## Articles

# Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement

*Tim Connor*[*]

**Abstract**

This Paper considers the jurisprudence of the Court of Justice in relation to the free movement provisions of European Community law in relation to goods, persons, services and capital within the European Union. It examines the bases used by the Court in its application of Community free movement provisions to national measures that may seek to hinder the exercise of such rights. From limited enquiry originally founded on considerations of non discrimination based on nationality, to one most recently focussed on the 'restriction' to the free movement right, the Paper examines the methods employed by the Court of Justice in its scrutiny of the national measure appearing to conflict with Treaty free movement rights.

The examination of the applicable free movement jurisprudence attempts to demonstrate the want of a thematically consistent underpinning within free movement case law. The Paper draws attention to the complexities and even the confusions that appear to be inherent within free movement jurisprudence and arguably evidenced within the Court's journey from 'discrimination' to 'restriction' as the basis of the enquiry with regard to the application of Treaty free movement rights. In its consideration of Case C-110/05 *Commission v Italy*, Case C-142/05 *Åklagaren v. Percy Mickelsson v. Joakim Roos*, recent jurisprudence with respect to the free movement of goods, the Paper notes that in the context of the 'measure having equivalent effect', the emphasis in the assessment of the national rule has shifted to an examination of the effect on market access, rather than a distinction based on the type of rule.

### A. Preface

This article examines the jurisprudence of the European Court of Justice in relation to the achievement of free movement Treaty rights in the context of *goods*,[1] *persons*,[2] *services*[3] and *capital*.[4]

[*] Lecturer in Law, Bradford University Law School, School of Management, University of Bradford. T.Connor@bradford.ac.uk

Founded upon the application of Treaty provisions, together with an assessment of the national measure by the benchmark of *justification*, the Court of Justice is the arbiter of the application of free movement rights with respect to the migrant, be it in the context of goods, persons, services or capital. It is an arbitration that fundamentally has been immersed in an assessment of the concept of non-discrimination on nationality grounds. It now appears, however, that the reliance on the application of that principle has been sublimated in a move by the Court to consider the *restriction* imposed on free movement rights by the national measure.

This paper examines the recent jurisprudence of the Court of Justice, attempting to explain the ramifications resulting from the change in the enquiry which has now embraced examination of the restriction to the free movement rights of goods, persons, services and capital. It offers some explanation of the change that consequently has been wrought upon the process of justification of the national measure deemed restrictive of free movement rights. It examines the application of the concept of discrimination in free movement jurisprudence in so far as that examination underpins an explanation of the recent developments. Finally, the article examines the continued maintenance of the ad hoc position respecting the jurisprudence of the free movement of goods in relation to the latent retention of the distinction between directly and indirectly discriminatory measures, and the recent developments in the jurisprudence with respect to the 'selling arrangement'.

**B. Discrimination**

'Discrimination' denotes less favorable treatment of the imported good and the migrant Community national by comparison to that given to the domestic good and to the host national. Article 12 EC renders "discrimination on grounds of nationality"[5] unlawful. It provides "Within the scope of application of this Treaty…any discrimination on grounds of nationality shall be prohibited." Article 12 EC is a general prohibition; it applies unless

[1] Art. 28 (ex 30) EC. Consolidated Version of the Treaty Establishing the European Community, Official Journal of the European Communities 2002, C 325,24/12/2004, p.47.

[2] Relating to the worker, Art 39 (ex 48) EC and to rights of establishment, Art. 43 (ex 52) EC. See *supra*, note 1 Art 39 (ex 48), p. 51; Art 43 (ex 52) EC, p. 52.

[3] Arts. 49 & 50 (ex 59 & 60) EC. See *supra*, note 1 Art 49 & 50 (ex 59 & 60) EC, pp. 54-55.

[4] Arts. 56 EC – 60 EC. See *supra*, note 1 Articles 56-60 (ex 73(b) – (g)), pp. 56-57.

[5] "Within the scope of application of this Treaty…any discrimination on grounds of nationality shall be prohibited." Art 12 (ex 6) EC. The Treaty provisions in relation to this prohibition with respect to free movement jurisprudence have direct effect. Case 13/76, *Gaetano Dona v. Mario Mantero,* 1976 E.C.R. 1333, para. 20.

discrimination is prohibited in specific circumstances by the Treaty.[6] Article 12 EC "requires perfect equality of treatment in Member States…in a situation governed by Community law and nationals of the Member State."[7]

The prohibition encompasses both direct and indirect discrimination.[8] In *Jean Reyners v. Belgian State*,[9] an example of the former, Belgian law permitted only the host national[10] to become lawyers.[11] Where the measure appears to be nationality-neutral, the discrimination is indirect[12] if the national measure is intrinsically liable to have a greater effect on the migrant national in comparison to the host national.[13]

*I. Goods*

Direct discrimination means the imported good has received different and usually less favorable treatment by comparison with the treatment which the domestic good has received. For example, in *R. v. Henn and Darby*[14] and *Conegate Limited v. HM Customs & Excise*[15] discriminatory national laws resulted directly in a total prohibition with respect to the imported good.

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[6] Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Federation royale belge des societies de basket-ball (FRBSB),* 2000 E.C.R. I-2681, para. 37.

[7] Case C-43/95, *Data Delecta Aktiebolag and Ronny Forsberg v. MSL Dynamics Ltd,* 1996 E.C.R. 1-4661, para. 16.

[8] "The rules regarding equality of treatment, … in the Treaty … forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result." Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost,* 1974 E.C.R. 153, para. 11.

[9] In the context of the right of establishment, Art 52 (now 43) EC. *Jean Reyners v. Belgian State* Case 2/74, 1974 E.C.R. 631.

[10] A Dutch national excluded from the profession of avocat on the ground of nationality, para 2.

[11] Note also the restrictions on the employability of migrants on fishing vessels, in the ratio of three French to one non French national. Case 167/73, *Commission of the European Communities v. French Republic,* 1974 E.C.R. 359, para. 46.

[12] "The application of other criteria of differentiation, lead[s] to the same result" as discrimination which is direct. Case C-175/88, *Klaus Biehl v. Administration des contributions du grand-duche de Luxembourg,* 1990 E.C.R. I-1779, para. 13.

[13] A greater burden in fact. In relation to the *worker*, for example Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost,* 1974 E.C.R. 153, para. 11; with respect to establishment and services Case C-3/88, *Commission of the European Communities v. Italian Republic,* 1989 E.C.R. 4035, para. 8.

[14] Case 34/79, *Regina v. Maurice Donald Henn and John Frederick Ernest Darby,* 1979 E.C.R. 3795, para. 22.

[15] Case 121/85, 1986 E.C.R. 1007.

The following instances of direct discrimination have, for example, resulted in the designation of "measures having equivalent effect to quantitative restrictions:"[16] phytosanitary inspections imposed by Germany only on imported apples,[17] a national measure relating to the purity of beer,[18] the imposition of a minimum price for fuel which resulted in the import being unable to benefit from lower cost prices in the country of origin,[19] an Irish law which required petrol importers to buy 35 per cent of their requirements from the state-owned old refinery at a centrally fixed price[20] and a Swedish law prohibiting private individuals from importing alcoholic beverages.[21]

The national measure will be held to be indirectly discriminatory where trade rules, not themselves discriminatory as to product origin, impose a greater impact on the imported good. The barrier to the free movement of goods is caught by Art 28 (ex 30) EC.[22] The *Dassonville* definition of the "measure having equivalent effect" clearly contemplates this.[23] Such was confirmed by *Rewe-Zentral A.G. v. Bundesmonopolverwaltung fur Branntwein* (*Cassis de Dijon*)[24] where German trade rules relating to minimum alcoholic content levels constituted an obstacle to the free movement of cassis between France and Germany.[25] The national rules were effective to bar French *cassis* from the German market.

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[16] Art. 28 (ex 30) EC.

[17] Case 4/75, *Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer,* 1975 E.C.R. 843. Other examples for example include Case 153/78, *Commission of the European Communities v. Federal Republic of Germany,* 1979 E.C.R. 2555, para. 15. concerning the prohibition by Germany of imports of meat products manufactured from meat not coming from the country of manufacture of the finished product and Case C-398/98, *Commission of the European Communities v. Hellenic Republic,* 2001 E.C.R. I-7915 where Greece required petroleum companies storing their products in Greek refineries to buy supplies from those refineries.

[18] Case 178/84, *Commission of the European Communities v. Federal Republic of Germany,* 1987 E.C.R. 1227, para. 40.

[19] Case 231/83, *Henri Cullet and Chambre syndicale des reparateurs automobiles et detaillants de produits petroliers v. Centre Leclerc a Toulouse and Centre Leclerc a Saint-Orens-de-Gameville,* 1985 E.C.R. 305, para. 34.

[20] Case 72/83, *Campus Oil Limited and others v. Minister for Industry and Energy and others,* 1984 E.C.R. 2727, para. 20.

[21] Case C-170/04, *Klas Rosengren and others v. Riksåklagaren,* 2007 E.C.R. I-4071, para. 36.

[22] Note also the possibility of Art. 30 (now 28) EC embracing the indistinctly applicable measure was broached by the Commission in 1970; Art. 3 Council Directive 70/50/EEC of 22 December 1969, Official Journal L 13, 19/01/1970 p. 29 [OJ Sp. Ed. 1970 L13/29]. See also Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik Jan-Erik Anders Ahokainen,* 2006 E.C.R. I-9171, para. 18.

[23] Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville,* 1974 E.C.R. 837, para. 5.

[24] Case 120/78, 1979 E.C.R. 649.

[25] *Id.,* para. 14.

Further examples of indirect discrimination include the *Commission of the European Communities v. Ireland*,[26] in which the Irish Goods Council promoted Irish goods to the detriment of the imported product, and *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*,[27] where national rules relating to designation of origins were held unlawful.[28]

*II. Persons and Services*

In relation to the worker, examples include the precondition of French nationality for permanent employment of public sector nurses,[29] based on the application of Art 48(2) (now 39) EC [30] wherein the conditions of work and employment favored Italian researchers,[31] and where the German foreign ministry distinguished between local staff having German nationality and those who did not.[32] In relation to rights of establishment for example, a French measure required doctors established in other Member States to cancel their registration in that state as a precondition to practicing in France.[33] In *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen*,[34] the host national was favored in respect of admission to national

[26] Case 249/81, 1982 E.C.R. 4005, para. 30.

[27] Case 207/83, 1985 E.C.R. 1201, para. 23.

[28] Other examples include Case 193/80, *Commission of the European Communities v. Italian Republic,* 1981 E.C.R. 3019, para. 12, a national measure, which determined that vinegar could only be used for products obtained from the acetic fermentation of wine, was held unlawful. The typically national product thereby favoured to the detriment of the various categories of natural vinegar produced in other Member States.

[29] Case 307/84, *Commission of the European Communities v. French Republic,* 1986 E.C.R. 1725, para. 17.

[30] Based on the application of Art 48(2) (now 39(2)) EC. The Article specifically implements the prohibition relating to discrimination. The provisions of Regulation (EEC) No 1612/68 of 15 October 1968, Official Journal L 257, 19/10/1968 p. 2. [OJ Sp.Ed. 1968, No. L257/2, p. 475] implement the principle of non-discrimination contained in Art 39(2) (ex 48(2) EC with respect to the *worker*, "but do[es] not extend its scope". Case C-90/96, *David Petrie and Others v. Universita degli studi di Verona and Camilla Bettoni,* 1997 E.C.R. I-6527, para. 25.

[31] Case 225/85, *Commission of the European Communities v. Italian Republic,* 1987 E.C.R. 2625, para. 14.

[32] Case C-214/94, *Ingrid Boukhalfa v. Bundesrepublic Deutschland,* 1996 E.C.R. I-2253, paras. 17 & 22.

[33] Case 96/85, *Commission of the European Communities v. French Republic,* 1986 E.C.R. 1475. Other examples in the context of establishment include Case 63/86, *Commission of the European Communities v. Italian Republic,* 1988 E.C.R. 29, para. 20 where an Italian measure permitted only host nationals to purchase socially built housing; a restriction in Case 147/86, *Commission of the European Communities v. Hellenic Republic,* 1988 E.C.R. 1637, para. 21 on the migrant setting up private music and dance schools and in Case C-311/97, *Royal Bank of Scotland Plc v. Greece,* 1999 E.C.R. I-2651, paras. 14 & 15, where higher tax rates were charged on foreign companies.

[34] Case 79/85, *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* 1986 E.C.R. 2375, para. 13.

sickness insurance benefits - the discrimination in the Dutch law based on the location of the registered office.[35]

Finally, in relation to the right to provide services, a residence requirement imposed by Holland in the context of undertaking a professional activity made it "impossible for persons residing in another member State to provide services."[36]

With respect to the free movement of persons, much jurisprudence exists which has been founded on the application of the principle of discrimination, which is indirect in nature. With regard to the worker, for example, the imposition of a time limit on the duration of the employment relationship between universities and foreign language assistants was held to be indirectly discriminatory.[37] An Italian law regarding employment of temporary teachers acted to the detriment of the migrant national.[38] In relation to the right of establishment, the United Kingdom stipulated the possession of UK nationality as precondition for ship ownership.[39] In relation to the right to provide services, a Belgian rule for example was held unlawful where it provided that fee charging employment agencies should be subject to the grant of a license.[40] Finally, in *Servizi Ausiliari Dottori*

[35] *Id.,* para. 19.

[36] Case 39/75, *Robert-Gerardus Coenen and others v. Sociaal-Economische Raad,* 1975 E.C.R. 1547, para. 12. See also Case C-294/89, *Commission of the European Communities v. French Republic,* 1991 E.C.R. I-3591, para. 37, where the national law required the migrant lawyer providing *services* to work with a French lawyer and in C-353/89, *Commission of the European Communities v. Kingdom of the Netherlands,* 1991 E.C.R. I-4069, paras. 16-17, an obligation imposed on national broadcasting bodies established in the Netherlands to have all or some of their programmes made by a Dutch undertaking was directly discriminatory.

[37] Case 33/88 *Pilar Allue and Carmel Mary Coonan v. Universita degli studi di Venezia,* 1989 E.C.R. 1591, para. 19. Other examples relate to Case C-272/92 *Maria Chiara Spotti v. Freistaat Bayern,* 1993 E.C.R. I-5185, para. 18, where the awarding of fixed term contracts in respect of language posts filled mainly by foreign-assistants and Case 16/78 *Criminal proceedings against Michel Choquet,* 1978 E.C.R. 2293, para. 8. where an insistence that the migrant worker obtain a fresh driving license, thereby duplicating one held in the home state, could have indirectly prejudiced exercise of free movement rights. The latter example represents an extension of the principle of non-discrimination through the conduit of Art 7(2) Regulation (EEC) No. 1612/68 of Council of 15 October 1968, of 15 October 1968, Official Journal L 257, 19/10/1968 p. 2. [OJ Sp. Ed. 1968, No. L257/2, pg 475].

[38] Case C-90/96, *David Petrie and Others v. Universita degli studi di Verona and Camilla Bettoni,* 1997 E.C.R. I-6527, para. 55.

[39] For example Case C-221/89, *The Queen v. Secretary of State for Transport ex parte Factortame and Others,* 1991 E.C.R.-3905; Case C-334/94, *Commission v. France,* 1996 E.C.R. I-1307. Further, in Case 154/87, *Rijksinstituut voor de sociale verzekering des zelfstandigen (RSVZ) v. Heinrich Wolf et NV Microtherm Europe and others,* 1988 E.C.R. 3897, para. 9., it was held that self employed migrants were to be exempted on an equal basis with host nationals from social security contributions.

[40] Joined cases 110 & 111/78, *Ministere public and 'Chambre syndicale des agents artistiques et impresarii de Belgique' ASBL v. Willy van Wesemael and others,* 1970 E.C.R., para. 39. Other examples include Case 205/84, *Commission v. Germany,* 1986 E.C.R. 3755, para. 57. in which legislation required insurance undertakings providing direct insurance services to have a permanent establishment in the state in which the service was provided . So too, in Case C-360/89, *Commission of the European Communities v. Italian Republic,* 1992 E.C.R. 1-

*Commercialisti Srl v. Calafiori*, an Italian law providing that tax assistance was to be exclusively given by authorized Italian tax advice centers financed by Italy was held indirectly discriminatory.[41]

The concept of 'indirect' discrimination has been deemed by the Court to embrace the imposition of dual burden rules on the migrant national. Examples of such rules include the requirement to hold particular qualifications[42] or licenses.[43] In such instances, the migrant satisfies two different sets of rules (those of the home and host states); the host national by comparison satisfies only one set of rules; those of the host state. The resultant 'dual burden' placed on the migrant has occasionally been referred to by the Court as an "indistinctly applicable measure."[44] Although it is a classification that may help to explain services jurisprudence; the application of the nomenclature of 'discrimination' is, however, less satisfactorily applied with respect to workers and to establishment. The performance of the latter activities is controlled only by one regulation regime; that of the host state. The classification by the Court of the double burden rule as 'indirectly discriminatory' raises conceptual difficulties; not all 'indirectly discriminatory' rules necessarily impose a dual burden.[45] The Court has skirted this issue by presenting a broad definition of the concept of 'indirect' discrimination. The concept embraces instances where the national measure "is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage."[46] The consequences of a focus on the potential effect on the free movement right has resulted in more national rules being cast within the ambit of the Treaty. One consequence of this has related to the need to justify national rules on grounds other than the narrow express derogations given in the Treaty.[47]

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3401, para. 23. Here an Italian measure was unlawful where it concerned the reservation of public works for companies having offices in the region of those works. Another example, in Case 59/82, *Schutzverband gegen Unwesen in der Wirtshaft v. Weinverttiebs-Gmbh,* 1983 E.C.R. 1217 related to the marketing of vermouth. The import contained a lower alcohol content than the minimum prescribed in the exporting Member State, para. 12.

[41] Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Calafiori* 2005 E.C.R. I-3875, para. 36.

[42] Case C-340/89, *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg,* 1991 E.C.R. 1-2357, para. 15.

[43] Case 292/86, *Claude Gullung v. Conseil de l"ordre des avocats du barreau de Colmar et de Saverne,* 1988 E.C.R. 111, para. 31.

[44] Case 143/87, *Christopher Stanton and SA belge d"assurances "L'Étoile 1905" v. Institut national d"assurances sociales pour travailleurs indépendants (Inasti),* 1988 E.C.R. 3877, para. 9.

[45] For example rules concerning qualifications and licences.

[46] Case C-237/94, *John O'Flynn v. Adjudication Officer,* 1996 E.C.R. I-2617, paras. 18-19.

[47] For a discussion of the consequence of this issue see CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 262 Oxford University Press 2nd ed., 2007).

*III. Capital*

Article 56(1) EC prohibits "all restrictions on the movement of capital between Member States." Direct and indirect discrimination have been prohibited. In *Klaus Konle v. Republik Österreich*, the Austrian law which exempted the host national from the requirements of authorization pre-land acquisition was held directly discriminatory to migrant nationals in respect of capital movements between Member States.[48] In *Alfredo Albore*, the requirement placed on solely the migrant national of prior authorization with respect to the purchase of property in areas of military importance was similarly held unlawful.[49] In *Blanckaert*, it was noted that "Less favorable tax treatment for non-residents only might deter the latter from investing in property in the Netherlands."[50]

*IV. Discrimination - Key issues*

It is clear from the forgoing analysis that the early jurisprudence of the Court of Justice relating to the achievement of free movement of goods, persons, services and capital was founded on the application of the principle of the abolition of "any discrimination on grounds of nationality."[51] The recent redirection of that enquiry to the examination of "restrictions/obstacles" raises a key issue for determination. Why was the concept of discrimination allowed to remain for so long in the vanguard of the attack on the national measure that hindered the exercise of the free movement right?

*1. Sole basis for justification?*

The principle of "non-discrimination on grounds of nationality" represents a general principle[52] of Community law that has been specifically applied by free movement jurisprudence. Without the application of that principle, for example, Ms. Coonan, as a UK national and worker in Italy, would have been excluded from that country's social security scheme,[53] Mr. Petrie, working as a foreign assistant in Verona, would not have been eligible for appointment to fill a temporary teaching vacancy, and the import of apples by

[48] Case C-302/97, *Klaus Konle v. Republik Österreich* 1999 E.C.R. I-3099, para. 23.

[49] Case C-423/98, *Alfredo Albore* 2000 E.C.R. I-05965, para. 17.

[50] C-512/03, *Blanckaert v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerle,* 2005 E.C.R. I-07685, para. 39.

[51] Art. 12 (ex 6) EC. Also for example, Art. 39(2) (ex 48(2)) EC in relation to the *worker.*

[52] Art. 12 EC.

[53] Case 33/88, *Pilar Allue and Carmel Mary Coonan v. Universita degli studi di Venezia,* 1989 E.C.R. 1591.

Rewe Zentralfinanz eGmbH[54] would have been hindered by phytosanitary inspections imposed by Germany. Despite the attainment of free movement rights in these instances, none of the Treaty provisions with respect to goods, persons, services and capital are specifically directed towards discrimination *per se* as the sole arbitrator of the application of free movement rights.[55]

It appears difficult to understand why the platform of restrictions/obstacle on which the enquiry is now based was not adopted from inception by the jurisprudence relating to the free movement of goods, persons, services and capital. With respect to *persons*, the reality would suggest otherwise. For example, the judgment of *Procureur du Roi v. Marc J.V.C. Debauve and others*,[56] with respect to the provision of *services* as late as 1980,[57] refused to recognize the non-discriminatory restriction as a conduit for achieving Treaty free movement rights.[58] This judgment may seem perplexing, given both the recent emphasis on the examination of the restriction/obstacle to the free movement right and also the language that has been adopted by the Treaty itself. With respect to the latter, it must be noted that the only Treaty free movement right to identify specifically the concept of discrimination is that accorded to the worker.[59] Not only is the concept notably absent from the other free movement Treaty provisions, but those provisions clearly embrace the language of restriction/obstacle. The prohibition contained in Art 43 (ex 52) EC relates to "restrictions on the freedom of establishment." Art 49 (ex 59) EC is similarly directed, "restrictions on freedom to provide services"[60] shall be prohibited. The prohibition contained in Article 56(1) EC, "all restrictions on the movement of capital" is expressed in the same terms. It is arguable that had free movement jurisprudence from inception

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[54] Case 4/75, *Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer,* 1975 E.C.R. 843, para. 3.

[55] Only Art. 39 (ex 48) EC relating to the worker specifically identifies the concept of discrimination. That Article provides "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of Member States."

[56] Case 52/79, *Procureur du Roi v. Marc J.V.C. Debauve and others* 1980 E.C.R. 833.

[57] Judgment delivered 18 March 1980.

[58] "The answer must therefore be that Articles 59 and 60 of the Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television - as they prohibit the broadcasting of advertisements by television - if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established" *supra*, note 56*,* para. 16.

[59] Art. 39(2) (ex 48(2)) EC. "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of Member States."

[60] Similarly, in relation to the free movement of goods, the language of Art. 28 EC is reflective of this sentiment. The Article, is expressed as the "measure having equivalent effect;" equivalent to the quantitative *restriction*. Note also the definition of Art 30 (now 28) EC provided by Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville,* 1974 E.C.R. 837, para. 5.

followed this gentle prod provided by the Treaty to examine the restriction to the free movement right, implementing such rights might have been less problematic. Judgments such as *Debauve*[61] might have quarried a different conclusion.[62] Further, it is a terminology reflective of the expression of the general principles of the Treaty, "the abolition…of obstacles to the free movement of…persons, services."[63] It is a conclusion given added force by the reference, for example, within the early judgment of *Lynne Watson and Alessandro Belmann* to the general principles of the Treaty in the context of the free movement of persons.[64] Further, judgments such as *Criminal Proceedings against Michel Choquet*[65] for example, acknowledge that conditions imposed relating to holders of driving licenses were an obstacle[66] to exercise of free movement rights of the worker,[67] establishment,[68] and the right to receive services.[69] Indeed, many of the judgments concerned with the issue of discrimination acknowledge the existence of a restriction/obstacle to the free movement right.[70] It is arguable that the terminology of *restriction* and *obstacle* in the context of asserting free movement rights bears a more honest reflection of the intent of Treaty free movement provisions. Both terms in this context are synonymous.[71] Their use would necessarily encompass the discriminatory

[61] Case 52/79, *Procureur du Roi v. Marc J.V.C. Debauve and others* 1980 E.C.R. 833.

[62] One possible argument standing in opposition to these sentiments would appear to be that had that approach been adopted, Member States would have been saddled with the grounds provided by the Treaty with respect to justification of the national measure. It would follow that the subsequent circumvention of those grounds in instances of indirect discrimination would have remained closed to the Court and may never have therefore occurred.

[63] Art. 3 (1)(c) EC.

[64] Case 118/75, *Lynne Watson and Alessandro Belmann* 1976 E.C.R. 1185, para. 23.

[65] Case 16/78, *Criminal Proceedings against Michel Choquet* 1978 E.C.R. 2293.

[66] *Id.,* para 8.

[67] Art. 48 (now 39) EC.

[68] Art. 52 (now 43) EC.

[69] Arts. 59 & 60 (now 49 & 50) EC.

[70] For example Case 2/74, *Jean Reyners v. Belgian State* ECR 631, para 49; Case 33/74 *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid,* 1974 E.C.R. 1299, para. 23, Case 107/83, *Ordre des avocats au Barreau de Paris v. Onno Klopp,* 1984 E.C.R. 2971, para. 8; Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649, para. 14; Case 71/76, *Jean Thieffry v. Conseil de l"ordre des avocats a la cour de Paris,* 1977 E.C.R. 765, para. 27.

[71] "In so far as such elements (in relation to health services of home respiratory treatments) are not obstacles to the establishment of the undertakings on Spanish territory it must be held, first of all, that no restriction on freedom of establishment exists in this case" (emphasises added). Also Case C-234/03, *Contse SA, Vivisol Srl and Oxigen Salud SA v. Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud),* 2005 E.C.R. 1-9315, para. 27.

measure, but the advantage of re-branding to the equation of restriction/obstacle is removing the need for identification of the presence of discrimination; whether direct or indirect. The jurisprudential consequences of that division[72] are thus easily removed. It is arguable that it would not have been an insurmountable hurdle for the Court in the first instance to envisage an equation encompassing obstacles rather than one routed in discrimination. It is ironic perhaps that *Procureur du Roi v. Marc J.V.C. Debauve and others*,[73] which, in judgment eschewing examination of the non-discriminatory measure, should have had recourse to the descriptive language of restriction in the context of measures concerning television advertising.[74] There may be some force in the suggestion that the maintenance of the concept of discrimination as the standard bearer of attaining free movement rights has effectively had a detrimental effect on the general development of free movement jurisprudence.

The success that the non-discriminatory requirement has achieved with respect to achieving the reality of free movement arguably explodes any residual notion that the concept of discrimination alone was ever the sole battle-ground with respect to the achievement of the right of free movement. The jurisprudence which extends the enquiry beyond the concept of discrimination is considered in the next section.

### C. Beyond Discrimination

This section of the paper is concerned with the methods adopted by the Court of Justice in the pursuit of free movement rights with respect to goods, persons, services and capital on bases other than discrimination in the national measure.

#### *I. Goods*

The nomenclature of recent judgments with respect to the application of Treaty provisions in relation to goods is directed at the assessment of the restriction to the right of free movement. It is a terminology that does not focus on an assessment of discrimination. For example, a Finnish requirement of prior authorization which applied in relation to products subject to excise duty was held to be "a restriction on trade between Member States."[75]

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[72] Particularly with respect to the difficulty in the use of the Treaty grounds with respect to issues of justification in the context of direct discrimination.

[73] Case 52/79, *Procureur du Roi v. Marc J.V.C. Debauve and others* 1980 E.C.R. 833.

[74] *Id.*, para. 15.

[75] Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik,* 2006 E.C.R. I-9171, para. 22.

Likewise, Greek provisions governing production conditions for bakery products restricted the free movement of goods,[76] and the failure by Austria to prevent the closure of the Brenner motorway resulting from demonstration for nearly 30 hours was held a "restriction which was capable of restricting intra-community trade in goods.".[77] The optional use of a quality label was held in *Commission of the European Communities v. Federal Republic of Germany*,[78] at least potentially to have "restrictive effects" on the free movement of goods.[79]

On the ground that it restricted access of the import of Italian and Spanish pipes to the Portuguese market, the national measure was held to be prohibited.[80] German measures relating to re-usable packaging were held a "barrier to trade,"[81] as were measures obliging producers to alter certain information on packaging.[82] On the same grounds, Italian measures which rendered the marketing of foods for sports persons more difficult and expensive fell within Art 28 (ex 30) EC scrutiny.[83] The restrictions imposed by Holland with respect to the marketing of foodstuffs fortified with vitamins and minerals were held to "hinder trade between Member States,"[84] as did the requirement of proof of nutritional need *Commission of the European Communities v. Kingdom of Denmark*.[85]

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[76] Joined cases C-158/04, & C-159/04, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v. Elliniko Dimosio and Nomarchiaki Aftodioikisi,* 2006 E.C.R. I-8135.

[77] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich,* 2003 E.C.R. I-5659, paras. 62 & 64.

[78] Case C-325/00, *Commission of the European Communities v. Federal Republic of Germany* 2002 E.C.R. I-9977, para. 23.

[79] *Id.,* para. 23.

[80] Case C-432/03, *Commission of the European Communities v. Portuguese Republic,* 2005 E.C.R. I-9665, para. 41.

[81] Case C-309/02, *Radlberger Getrankegesellschaft mbH & Co. and S. Spitz KG v. Land Baden-Wurttemberg,* 2004 E.C.R. I-11763, para. 60.

[82] Case C-463/01, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-11705, paras. 53, 68 & 69.

[83] Case C-270/02, *Commission of the European Communities v. Italian Republic,* 2004 E.C.R. I-1559, para. 19.

[84] Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375, para. 41. Similar Austrian measures were held to be "a barrier to trade" and French measures merely "measures having equivalent effect" in Case C-24/00, *Commission of the European Communities v. French Republic,* 2004 E.C.R. I-1277, para. 23; Case C-150/00, *Commission of the European Communities v. Republic of Austria,* 2004 E.C.R. I-3887, para. 82, as were German measures in Case C-387/99, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-3751, para. 65.

[85] Case C-192/01 *Commission of the European Communities v. Kingdom of Denmark,* 2003 E.C.R. I-9693, para. 41.

Spanish requirements relating to the labeling and packaging of cocoa and chocolate products containing vegetable fats other than cocoa butter were held to be an obstacle to the free movement of goods,[86] as was a dispute regarding the name given to a cleaning product.[87] The procedure requiring previously tested vehicles to be tested again as to general condition prior to registration in the Netherlands, constituted a restriction on the free movement of goods.[88]

*II. Persons and Services*

It is clear from judgments such as *Bosman*[89] and *Volker Graf v. Filzmoser Maschinenbau GmbH*[90] that "Article 48 [now 39] of the Treaty prohibits not only all discrimination, direct or indirect, based on nationality but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement."[91] *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* had made the same recognition of terminology with respect to the provision of services[92] by the migrant in the host state.[93]

Free movement jurisprudence has not been slow to explore application of the principle that the Treaty free movement provisions extend to the migrant a right of access to the marketplace in the host state. In seeking to achieve this objective, various adjectival terminologies have been used. The following jurisprudence examines more closely the

[86] Case C-12/00, *Commission of the European Communities v. Kingdom of Spain,* 2003 E.C.R. I-459, para. 73. This resulted in the need to alter the packaging or the labelling of imported products. See also Case C-14/00 *Commission of the European Communities v. Italian Republic,* 2003 E.C.R. I-513, para. 73.

[87] Case C-358/01, *Commission of the European Communities v. Kingdom of Spain,* 2003 E.C.R. I-13145, para. 44.

[88] C-297/05, *Commission of the European Communities v. Kingdom of the Netherlands,* 2007 E.C.R. I-7467, para. 74.

[89] C-415/93, *Union royale belge des societes de football association ASBL v. Jean-Marc Bosman, Royal club liegeois SA v. Jean-Marc Bosman and others and Union des associations europeennes de football (UEFA) v. Jean-Marc Bosman,* 1995 E.C.R, 1-4921, para. 96.

[90] Case C-190/98, *Volker Graf v. Filzmoser Maschinenbau GmbH* 2000 E.C.R. I-493.

[91] *Id.,* para 18.

[92] Art. 59 (now 49) EC. In the context of an habitual residence requirement imposed by the Dutch Bar on migrant nationals seeking to provide legal services in Holland. See also Case C-208/05, *ITC Innovative Technology Center GmbH v. Bundesagentur für Arbeit,* 2007 E.C.R. 00, para. 11; Case C-490/04 *Commission of the European Communities v. Federal Republic of Germany,* 2007 E.C.R. I-6095, para. 63.

[93] Case 33/74, 1974 E.C.R. 1299, para. 11.

approach taken by the Court in the application of free movement rights where the national measure in issue applies irrespective of the nationality of the migrant.

*1. "Liable to hamper or to render less attractive"*

Measures which governed the conditions under which an academic title obtained in another Member State could be used would be unlawful if "liable to hamper or to render less attractive…fundamental freedoms[94] guaranteed by the Treaty."[95] Spanish measures dictating a regional presence for undertakings tendering for services for home respiratory treatments were similarly held to render less attractive the exercise of free movement rights,[96] as was a registration requirement imposed on migrant patent agents as a precondition to providing services in Italy.[97]

*2. "Liable to prohibit or otherwise impede"*

In *Manfred Sager v. Dennemeyer & Co*,[98] national legislation prevented a patent renewal company from providing a monitoring service in Germany. The German legislation was held "liable to prohibit or otherwise impede"[99] the service activities of the UK company. United Kingdom measures affecting the importation of lottery tickets by the United Kingdom, were held "liable to prohibit or otherwise impede" the right to provide services,[100] as was the Greek licensing of self-employed migrant tourist guides who were prevented from supplying those services if they had not qualified in that state.[101]

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[94] In the context of Arts. 48 (now 39) EC and 52 (now 43) EC.

[95] Case C-19/92, *Dieter Kraus v. Land Baden-Wurttemberg,* 1993 E.C.R. I-1663, para. 32.

[96] Case C-234/03, *Contse SA and Others v. Instituto Nacional de Gestion Sanitaria,* 2005 E.C.R. 1-9315, para. 25.

[97] Case C-131/01, *Commission of the European Communities v. Italian Republic*, 2003 E.C.R. 1-1659, para. 26. The same language was used in Case C-58/98, *Josef Corsten,* 2000 E.C.R. I-7919, para. 33 with respect to pursuing a skilled trades activity in Germany.

[98] C-76/90, *Manfred Sager v. Dennemeyer & Co* 1991 E.C.R. 1-4221.

[99] *Id.,* para 12.

[100] Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jorg Schindler,* 1994 E.C.R. I-1039, para. 43. Also Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Calafiori*, 2005 E.C.R. I-3875, para. 31 with respect to the right of establishment and the provision of services.

[101] Case C-389/95, *Siegfried Klattner v. Elliniko Dimosio* (Greek State), 1997 E.C.R. I-2719, para. 16 & 19. In Case C-134/03, *Viacom Outdoor SrL v. Giotto Immobilier SARL* 2005 ECR I-1167. Article 49 EC was held not to preclude the levying of a municipal tax on advertising, para 39. In Case C-266/96, *Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl and Others,* 1998 E.C.R. I-3949, there was held no restriction on the freedom to provide maritime transport services when considering the fees imposed by Italy for mooring services.

*3. An impediment to free movement*

In *Cotswold Microsystems Ltd*, Finnish legislation reserving to a single body exclusive rights to operate slot machines, was described by the Court as "an impediment to freedom to provide services".[102] Likewise, the Dutch imposition relating to minimum capital in respect of company formation and directors' liability was held an impediment to freedom of establishment.[103] In *Dirk Rüffert v. Land Niedersachsen*, national rules relating to an obligation to comply with collective agreements with respect to public works contracts constituted "an impediment to market access" in respect of migrants wishing to provide services in Germany.[104]

*4. Impeding access/hindrance to trade*

A Dutch prohibition on cold calling deprived Dutch operators of a marketing technique and "therefore directly affects access to the market in services in the other Member States."[105] In *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori*[106] an Italian law[107] providing tax assistance to be given exclusively by authorized Italian tax advice centers "completely prevents access to the market."[108]

In *Graf*[109] an Austrian law, genuinely non-discriminatory, was held "too uncertain and indirect a possibility…to be…liable to hinder the free movement" of migrant workers in

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In Case C-544/03, *Mobistar SA v. Commune de Fleron* and *C-545/03 Belgacom Mobile SA v. Commune de Schaerbeek,* 2005 E.C.R. I-7723, Belgium taxes with respect to mobile phone operators were held not to be a restriction on the freedom to provide services, para. 32.

[102] The Finnish measure "directly or indirectly prevents operators in other Member States from…making slot machines available to the public." Case C-124/97, 1999 E.C.R. I-6067, para. 29.

[103] Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd,* 2003 E.C.R. I-10155, para. 107.

[104] Case 346/06, *Dirk Rüffert v. Land Niedersachsen* 2008 E.C.R.I-1989, para. 14.

[105] "And is thus capable in hindering intra-Community trade in services". Case C-384/93, *Alpine Investments BV v. Minister Van Financiën,* 1995 E.C.R. I-1141, para. 38.

[106] Case C-451/03, 2006 E.C.R. I-2941.

[107] In the context of a restriction on the right to provide *services* and the right of *establishment.*

[108] Case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl v. Giuseppe Calafiori* 2006 E.C.R. I-2941, para. 33. The Italian law "is liable to make more difficult, or even completely prevent, the exercise by economic operators from other Member States of their right to establish themselves in Italy with the aim of providing the services in question," para. 34.

[109] Case C-190/98, 2000 E.C.R. I-493.

Austria.[110] The denial of compensation on termination of employment was too remote in *Graf*[111] to affect the free movement right; the language driven by a concern for access to the Austrian labor market by the migrant national. Constraints imposed on the posting of workers to Luxembourg were held "likely to hinder the exercise of freedom to provide services."[112]

*5. Restrictions/obstacles*

Jurisprudence to reinforce the observation that the focus of the Treaty right of free movement is the restriction/obstacle to free movement rights is presented here. In *Questore di Verona v. Diego Zenatti*, for example, Italian legislation reserving to certain bodies the right to take bets on sporting events and preventing operators in other Member States from taking bets was held a *restriction* on the free movement of services,[113] as was Belgian legislation which required cable operators to broadcast programs transmitted by certain private broadcasters.[114] Likewise, the requirement of pre-conditional establishment in the host state was held an obstacle to the provision of services with respect to the contracting out of workers,[115] and rules imposed by Belgium preventing a professional footballer from playing with a new football club unless a transfer fee had been paid was held to be an obstacle to the freedom of movement for workers.[116] More recently, in *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, a difference in treatment of tax losses between resident and non-resident subsidiaries was held to

[110] "Such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers," para. 25.

[111] Case C-190/98, 2000 E.C.R. I-493.

[112] Case C-319/06 *Commission of the European Communities v. Grand Duchy of Luxemburg,* 2008 E.C.R. I-4323., para. 58.

[113] Case C-67/98, *Questore di Verona v. Diego Zenatti,* 1999 I-7289, para. 28. In Case 243/01 *Gambelli and others,* 2003 E.C.R. I-13031 para. 49, Italian betting legislation was held a restriction on the right of establishment and the right to provide services.

[114] Case C-250/06 *United Pan-Europe Communications Belgium SA and Others v. Belgian State,* 2007 E.C.R. I-11135, para. 38.

[115] Case C-493/99 *Commission of the European Communities v. Federal Republic of Germany,* 2001 E.C.R. I-8163, para. 18. In Joined Cases C-51/96 & C-191/97 *Christelle Deliege v. Ligue francophone de judo et disciplines associees ASBL, Ligue belge de judo ASBL, Union europeenne de judo and François Pacquee,* 2000 E.C.R. I-2549, a requirement of prior authorisation before participation in an international judo competition did "[not] constitute a restriction on the freedom to provide services" (emphasis added), para. 69.

[116] C-415/93 *Union royale belge des societes de football association ASBL v. Jean-Marc Bosman, Royal club liegeois SA v. Jean-Marc Bosman and others and Union des associations europeennes de football (UEFA) v. Jean-Marc Bosman,* 1995 E.C.R. 1-4921, paras, 100 & 104.

constitute a restriction on the freedom of establishment,[117] and in *Criminal proceedings against Claude Nadin, Nadin-Lux SA and Jean-Pascal Durre*, the obligation to register a company car in Denmark was held to "constitute a barrier … to freedom of movement"[118] of self-employed workers. Finally, in *Commission of the European Communities v. Kingdom of Belgium* the national measure imposing joint and several liability for the tax debts of contracting partners who were not registered in Belgium was held to "constitute a restriction on the freedom to provide services".[119] German taxation legislation which had the effect of deterring taxpayers resident in Germany from sending children to schools established in other Member States was held an obstacle to the free movement of services.[120] In *Commission of the European Communities v. Federal Republic of Germany* a national rule which required practice as a psychotherapist under a German sickness security scheme which included a German residence requirement was held a restriction on the freedom of establishment.[121] Recently, a French rule which allowed only persons holding an inseminator's license to provide the service of artificial insemination of bovine animals, was held an obstacle to the free movement of establishment and services.[122]

*III. Capital*

The jurisprudence with respect to the free movement of capital has embraced the *Sägar*[123] formulation developed with respect to services. In *Commission v. Portugal*,[124] for example, it was confirmed that the prohibition of Article 56 "goes beyond the mere elimination of unequal treatment, on grounds of nationality,"[125] the Court holding that rules relating to the acquisition by investors from other Member States "were liable to impede the acquisition of shares in the undertakings"[126] in the host state. The language of restriction[127]

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[117] Case C-446/03, 2005 E.C.R. I-10837, para. 34.

[118] Joined Cases C-151/04 & C-152/04, 2005 E.C.R. I-11203, para. 36.

[119] Arts. 49 & 50 EC.; Case C-433/04, 2006 E.C.R. I-10653, para. 32.

[120] Case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach,* 2007 E.C.R. I-06849, para. 67.

[121] Case C-456/05, 2007 E.C.R. I-10517, para. 57.

[122] Case C-389/05, *Commission of the European Communities v. French Republic,* 2008, E.C.R. I-5337 , para. 66.

[123] Case C-76/90, 1991 I-4221, para. 12.

[124] Case C-367/98, 2002 E.C.R. I -4731.

[125] See, *supra,* note 125, para. 44.

[126] See, *supra,* note 125, para. 45.

[127] See BARNARD (note 47), 528 (Oxford University Press 2nd ed., 2007).

is increasingly used. The Court has held unlawful a procedure of prior authorization which "entails, by its very purpose, a restriction on the free movement of capital."[128] So, too, a Belgian law concerning the deductibility of debts with respect to a deceased's estate was held a restriction on the free movement of capital.[129]

The language of restriction varies. The German law, effective so that resident companies holding depreciated shares in non-resident companies were in a less favorable situation than those holding such shares in resident companies was held "to have a restrictive effect in relation to companies established in other States, representing, as far as the latter are concerned, an obstacle to the raising of capital in Germany."[130] The difference in treatment with respect to apportionment of the tax burden, between the heirs residing in the host state and those who were not was held to be "a restriction on the free movement of capital."[131]A Dutch exclusion of a concession (relating to the taxation at source of dividends received abroad) in relation to dividends originating in certain Member States, was held "liable to deter investment in a Member States in which the taxation of dividends does not give rise to the concession, and accordingly constitutes a restriction on the free movement of capital."[132]

*IV. Beyond Discrimination – Key issues*

A number of key issues arise vis-à-vis the free movement provisions of the Treaty of Rome, with respect to persons and services, in the context of the non-discriminatory national measure. The first issue arises from the proposition that the cause of free movement rights may not have been furthered by the initial focus on the identification of discrimination in persons and services jurisprudence. The second issue addresses an apparent subsuming of the concept of discrimination within the umbrella of the non-discriminatory restriction. Finally, the *ad hoc* position in relation to the jurisprudence of the free movement of goods is addressed.

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[128] Case C-302/97, *Klaus Konle v. Republik Österreich,* 1999 E.C.R. I-3099, para. 39.

[129] Case C-11/07, *Hans Eckelkamp and Others v. Belgische Staat,* [2008] E.C.R. I-6845 , para. 54.

[130] Case C-377/07, *Finanzamt Speyer-Germersheim v. STEKO Industriemontage GmbH,* 2009 Judgment of the Court of Justice of the European Communities (First Chamber), 22 January 2009, para. 27.

[131] Case C-43/07, *D. M. M. A. Arens-Sikken v. Staatssecretaris van Financiën,* [2008] E.C.R. I-6887, para. 46.

[132] C-194/06 *Staatssecretaris van Financiën v. Orange European Smallcap Fund NV*, 2008 E.C.R . I-3747, para. 56.

*1. Discrimination – an improper focus?*

There is some argument for a proposition that an initial focus of non-discrimination on nationality grounds[133] as a tool for the attainment of EC Treaty free movement rights served only to obfuscate the attainment of those rights. The recent redirection of jurisprudence with respect to persons and services in favor of the examination of the non-discriminatory measure lends support for this view.

Whatever nomenclature used in that jurisprudence, be it manifested in impeding access/hindrance to trade or the terminology of "liable to hamper or to render less attractive," it is crucial to appreciate that the common objective in all such jurisprudence is the removal of the restriction to exercise the free movement right. In *Sager*[134]for example, the prohibited German legislation[135] was a restriction on the right of the UK company to provide patent renewal services,[136] the prohibition on cold calling in *Alpine Investments*,[137] similarly identified as a restriction to the right to provide services and the minimum capital requirement in respect of company formation, a restriction on the free movement of the worker and of establishment.[138] The removal at the national level of such restrictions[139] is clearly at the focus of recent free movement jurisprudence. Judgments such as *Zenatti*[140] and *Marks & Spencer*[141] are yet further evidence of this.

Recent free movement jurisprudence lifts the enquiry beyond the realm of the mere identification of discrimination. From the perspective of jurisprudence such as *Zenatti*[142] and *Marks & Spencer*,[143] it seems entirely logical that elimination of the restriction to the free movement right should form the central issue in such matters. Yet it is arguable, historically at least, that this has not always been reflected in free movement

[133] Art. 12 (ex 6) EC. Also for example, Art 39(2) EC in relation to the worker.

[134] C-76/90, 1991 E.C.R. 1-4221.

[135] See, *supra,* note 135, para. 21.

[136] See, *supra,* note 135, para. 14.

[137] Case C-384/93, *Alpine Investments BV v. Minister Van Financiën,* 1995 E.C.R. I-1141, para. 39.

[138] Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd,* 2003 E.C.R. I-10155, para. 104.

[139] Or obstacle.

[140] Case C-67/98, *Questore di Verona v. Diego Zenatti*, 1999 E.C.R. I-7289.

[141] Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes),* 2005 E.C.R. I-10837.

[142] Case C-67/98, *Questore di Verona v. Diego Zenatti,* 1999 E.C.R. I-7289.

[143] Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes),* 2005 E.C.R. I-10837.

jurisprudence. The focus on the prohibition of "any discrimination on grounds of nationality"[144] as the sole *modus operandi* which for some time had been effective to extinguish other forms of enquiry, may perversely have ill-served the cause of free movement attainment by presenting restricted grounds for attack on the national measure. It is evident that the modus operandi represents only a partial solution to achieving free movement. The initial focus on the concept of discrimination arguably served only to obfuscate and to frustrate, at least in part, the real purpose of the free movement provisions in relation to *persons* and *services*. It is puzzling why such an approach was adopted by the Court, particularly as some of the jurisprudence in question was clearly orchestrated to attack the restriction to such rights and the concentration solely on prohibition of discrimination is not fully transparent of Treaty objectives with respect to the free movement provisions.

*2. Discrimination subsumed?*

The displacement of the concept of discrimination from jurisprudence concerned with the attainment of free movement rights was noted by Advocate General Jacobs in *R v. Danner*.[145] In *Danner*,[146] Finish legislation relating to voluntary pension insurance scheme, itself overtly discriminatory[147] was described as a restriction on the right to supply services.[148] The same trait is displayed in other judgments. In *Erich Ciola v. Land Vorarlberg* for example, an Austrian law relating to boat owners resident in other Member States clearly was directly discriminatory; judgment on those grounds was avoided. It was held that the moorings quota was "contrary to the freedom to supply services."[149] In *Hanns-Martin Bachmann v. Belgian State*, directly discriminatory Belgian legislation relating to the deductibility of sickness contributions was held to constitute a restriction on the free movement for workers. Likewise, there were discriminatory issues surrounding the grant to a single body of the rights to operate slot machines in *Markku Juhani Laara, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen valtio (Finnish State)*.[150] However, in that instance, the national law was categorised as "an impediment to the freedom to provide services…directly or indirectly"

[144] Art. 12 (ex 6) EC.

[145] Case C-136/00, *R v. Danner* 2002 E.C.R. I-8147, para. 36.

[146] *Id*.

[147] Case 136/00 *R* v. *Danner,* 2002 E.C.R. I-8147, para. 34.A.G. (opinion ofAG Jacobs).

[148] *Id.,* para. 57.

[149] Within the meaning of Art 49 EC, para. 34.

[150] Case C-124/97, 1999 E.C.R. I-6067.

preventing migrant operators from making slot machines available to the public.[151] In *Commission of the European Communities v. Italian Republic,* the national measure which prohibited the undertaking of private security work by migrant firms, though clearly directly discriminatory was held a restriction on the right of free movement. In *Commission of the European Communities v. Kingdom of Belgium*,[152] the national measure concerning a withholding obligation and the imposition of joint liability in respect of contractors not registered in Belgium was clearly directly discriminatory of the migrant national supplying services in that state; the measure was identified not as discriminatory, but as constituting a restriction on the performance of that Treaty right.[153]

Similarly in relation to the free movement of goods, the recent spotlight on the restriction/obstacle has been at the expense of proceeding with an analysis focusing on discrimination. For example, in *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik Jan-Erik Anders Ahokainen*, the prior import authorization system was clearly directed at the imported product,[154] and in *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE*[155] specified the production conditions for all[156] bakery products. Recently, in the context of compliance of all automatic fire detection systems with Belgian law the Court analyzed the obstacle to the free movement of goods as being "applicable without distinction" to both imports and to the host product.[157] This, it seems, provides a clear recognition that whilst restriction/obstacle maybe the umbrella language with respect to Art 28 EC scrutiny, nonetheless the taint of discrimination in the national measure will trigger the application of the prohibition.

Whilst a number of judgments in relation to the free movement of persons and services shelve the categorization of discrimination, nonetheless it is clear that with respect to the application of those provisions, the use of the principle of discrimination on a "stand-alone basis" has not been abandoned.[158] On the contrary, the Court will refer to it and in some instances will apply it.[159] In relation to the free movement of the worker for example, the

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[151] *Id.*, para. 29.

[152] Case C-433/04, 2006 E.C.R. I-10653.

[153] *Id.,* para. 32.

[154] Case C-434/04, 2006 E.C.R. I-9171, para. 18.

[155] Joined cases C-158/04 & C-159/04, 2006 E.C.R. I-8135, para. 20.

[156] Both imported and exported product.

[157] C-254/05 *Commission of the European Communities v. Kingdom of Belgium,* 2007 E.C.R. I-4269, para. 32.

[158] Noted by Advocate-General Jacobs. Case 136/00, *R v. Danner,* 2002 E.C.R. I-8147, para. A.G. 35.

[159] An observation made by Advocate-General Jacobs. See, *supra,* note 159, para. 35.

court has recently confirmed that Article 39 EC and Article 3 of Regulation No 1612/68[160] "guarantee…fully…equal treatment."[161] For example, in *Commission of the European Communities v. Hellenic Republic*, a judgment handed down in 2001,[162] an obligation imposed by Greece relating to the compulsory maintenance of emergency stocks of petroleum products was held discriminatory of products from refineries situated in other Member States.[163] Likewise, in *Royal Bank of Scotland plc v. Elliniko Dimosio (Greek State)*,[164] national taxation legislation was held discriminatory,[165] and in *Commission of the European Communities v. Federal Republic of Germany*,[166] decided in January 2006,[167] a reference was made to the operation of the principle of discrimination.[168]

In a pertinent comment, Craig and de Búrca have expressed the view that "internal-market case law on what constitutes discrimination, whether direct or indirect…is highly confused."[169] Perhaps the approach taken by the Court in the recent judgment o*f Contse SA, Vivisol Srl and Oxigen Salud SA v. Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud)*[170] may go some way to address these concerns. In *Contse*,[171] admission conditions with respect to tenders for home respiratory treatment were held "applicable without distinction" to any person concerned in the tendering process.[172] It was for "the national court to determine whether that condition may in practice be met more easily by Spanish operators than by those established in

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[160] Regulation (EEC) No 1612 of 15 October 1968, Official Journal L 257, 19/10/1968 p. 2. OJ Sp.Ed. 1968, No. L257/2, p. 475.

[161] Case C-278/03, *Commission of the European Communities v. Italian Republic*, 2005 E.C.R. I-3747, para. 16, in respect of an Italian failure "to have regard to those rights in respect of access of Community nationals to recruitment competitions for teaching staff in the State schools of that Member State."

[162] 25 October 2001.

[163] Case C-398/98, 2001 E.C.R. 1-7915, para. 26.

[164] Case C-311/97, 1999 E.C.R. I-2651.

[165] *Id.,* para. 30.

[166] Case C-244/04, 2006 E.C.R. I-885.

[167] 12 January 2006.

[168] "Such restrictions, if discriminatory, are prohibited by Article 49 EC, unless they are justified by the combined provisions of Articles 46 EC and 55 EC," para. 12.

[169] *BARNARD* (note 47 ), *803* (Oxford University Press 4th ed., 2007).

[170] Case C-234/03, 2005 E.C.R. 1-9315.

[171] See, *supra*, note 171.

[172] See, *supra*, note 171, para. 37.

another Member State".[173] The former relates to the non-discriminatory restriction; the latter reference imports connotations of indirect discrimination.

It is arguable that *Contse*[174] goes some way to the adoption of a workable approach in free movement jurisprudence with respect to persons and services. It appears to affirm that the enquiry has been refocused on the obstacle/restriction to the exercise of the right. This presents a capacity for an acknowledgement of the presence of discrimination in the national measure where this is appropriate.[175] The judgment in *Contse*[176] may have signaled an attempt to weave a seamless strand of enquiry within the jurisprudence relating to persons and services; one capable of embracing recognition of the slivers of discrimination and the strands of the non-discriminatory requirement.

The terminology of *restriction* appears to be reflective of Treaty intent. The significance of the approach taken in *Contse*[177] is twofold. Not only is the language of jurisprudence aligned with that of the Treaty, but the pragmatic approach that *Contse*[178] evidences a conceptual honesty with respect the process of enquiry conducted into the legality of the national measure. In this respect, it is an approach to be welcomed. In addition, it is arguable that the adoption of the restriction terminology by jurisprudence relating to the free movement of capital gently reinforces a perceived convergence of the tests for the application of all Treaty free movement provision. The effect of this may be to render the practical importance of the interaction between those differing Treaty provisions rather less important than before.[179]

The focus on the obstacle/restriction to the exercise of the free movement right with respect to persons and services is important in one crucial respect; the issue relating to the justification of the national measure. The effect of the reclassification on rights justification is considered below.

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[173] See, *supra*, note 171, para. 37.

[174] Case C-234/03, 2005 E.C.R. 1-9315.

[175] This is to some extent confirmed by Case C-471/04 *Finanzamt Offenbach am Main-Land v. Keller Holding GmbH,* 2006 E.C.R. I-2107, para. 30. "The provisions concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation."

[176] Case C-234/03, 2005 E.C.R. 1-9315.

[177] See, *supra*, note 177.

[178] See, *Supra*, note 177.

[179] See *BARNARD* (note 47), *555* (Oxford University Press 2nd ed., 2007)

**D. Justification**

A national measure that is held unlawful, either on the grounds of discrimination,[180] on the grounds of nationality, or as a restriction on the free movement right, may be justified by the Member State.[181]

The concept of *justification* is an "assessment of balance;" the response by the Member State vis-à-vis the interest that it is purporting to protect must be proportionate. The test of proportionality was succinctly expressed in *Criminal proceedings against J.J.J. Van der Veldt* as "an obligation of that kind must be fulfilled by means which are *not out of proportion to the desired result and which hinder as little as possible* the importation of products which have been lawfully manufactured and marketed in other Member States" (emphasis added).[182]

The framework within which the process[183] of justification operates with respect to free movement provisions of Community law is distinguished by a division in treatment between the discriminatory and the non-discriminatory national measure. The former is further subdivided and is dependent upon whether the discrimination is *de facto* direct or indirect.

*I. Direct discrimination*

Where the national measure is directly discriminatory to the exercise of the free movement right, the framework with respect to justification is provided by reference to provisions of the Treaty of Rome.[184]

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[180] On the grounds of nationality. See for example Art. 12 (ex 6) EC.

[181] Consideration of the issue of *justification* is not however obligatory. In Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649, the issue of *justification* did not arise. The fixing of a minimum alcohol content for alcoholic beverages was considered contrary to Art 30 (now 28) EC, para. 15.

[182] Case C-17/93, 1994 E.C.R. I-3537, para. 30.

[183] The onus is on the Member State to provide *proof* of justification. For example, in Case C-283/99 *Commission of the European Communities v. Italian Republic*, 2001 E.C.R. I-4363, para. 26, it was held that Italy "had not shown the existence of any grounds of public policy or public security" which was capable of justifying the provision that private security work be carried out only by Italian security firms which employed Italian nationals. The same applies to the *justifications* in relation to the free movement of goods. For example in Case 121/85 *Conegate Limited v. HM Customs & Excise,* 1986 E.C.R. 1007, paras. 15 & 16 the United Kingdom failed in an attempted justification, national law permitted the host national to supply the same goods; they were freely available in that state.

[184] With respect to the fee movement of goods, Art 30 (ex 36) EC; to the *worker*, Art 39(3) (ex 48(3)) EC; the provision of services, Art 55 (ex 66) EC and the right of establishment, Art 46 (ex 56) EC.

*1. Goods*

The justification of the national rule which is directly discriminatory of the imported product is by reference to the provisions contained in Art 30 (ex 36) E.C.[185] The Treaty grounds for justification include inter alia "public policy, public security or public health."[186] It has been held that the grounds listed in Art 30 (ex 36) E.C. are exhaustive, they "constitute…a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly…The exceptions listed therein cannot be extended to cases other than those specifically laid down."[187] For example, "neither the protection of consumers nor the fairness of commercial transactions are included amongst the exceptions set out in Article 36, those grounds cannot be relied upon as such in connection with that Article."[188]

Underlying the process of justification of national measures relating to the free movement of goods is the principle of proportionality. In *R v. Henn and Darby*,[189] for example, a total ban on imports of pornographic materials was held proportionate. The prohibition on import of such materials genuinely applied for the protection of public morality. That ground, however, could not apply where similar goods to the prohibited imports were freely manufactured in the U.K.[190]

In *Commission of the European Communities v. Hellenic Republic*,[191] a measure requiring the maintenance of emergency stocks of petroleum products was held not proportionate; the stocks could have been equally obtained on the open market from other producers.[192] In *Klas Rosengren and others v. Riksåklagaren*, a Swedish prohibition on the import of

[185] See, *supra*, note 187.

[186] Art. 30 (ex 36) EC provides: "The provisions of Arts 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security the protection of health and life of humans, animals or plants the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

[187] Case 113/80, *Commission of the European Communities v. Ireland,* 1981 E.C.R. 1625, para. 7. Case 46/76 *W. J. G. Bauhuis v. The Netherlands State,* 1977 E.C.R. 5, para. 12.

[188] Case 113/80, *Commission of the European Communities v. Ireland,* 1981 E.C.R. 1625, para. 8.

[189] Case 34/79, *Regina v. Maurice Donald Henn and John Frederick Ernest Darby,* 1979 E.C.R. 3795, para. 22.

[190] Case 121/85, *Conegate Limited v. HM Customs and Exercise,* 1986 E.C.R. 1007.

[191] Case C-398/98, 2001 E.C.R. 1-7915.

[192] Case C-398/98 *Commission of the European Communities v. Hellenic Republic* 2001 E.C.R. 1-7915, para. 44 (opinion of AG Ruiz-Jarabo Colomer).

alcohol by private individuals to protect young people against the harmful effects of such consumption was held to be disproportionate.[193] This objective could have been achieved by requiring the purchaser to certify on import that he was more than 20 years of age.[194]

*2. Persons & Services*

Direct discrimination on account of the origin[195] of the migrant national is justifiable only[196] on Treaty grounds of "public policy, public security or public health."[197] Economic aims are not included,[198] nor are grounds of cultural policy.[199] In the context of persons and services, it has been held that Treaty derogations "must be interpreted strictly."[200] The loss of free movement rights, for example through deportation, representing "the most draconian steps a host state can take."[201]

As with the free movement of goods, with respect to persons and services, the operation of the principle of proportionality is the cornerstone of the justification process. The Treaty

[193] Case, *C-170/04 Klas Rosengren and others v. Riksåklagaren* 2007 E.C.R. I-4071, para. 58.

[194] Case, *C-170/04 Klas Rosengren and others v. Riksåklagaren* 2007 E.C.R. I-4071, para. 56.

[195] "And which are therefore discriminatory". Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, para. 32.

[196] Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, 1991 E.C.R. I-4007, para. 11. For example in Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, paras. 32 & 33 in relation to *services*, only the ground of "public policy" was available as justification.

[197] Provided by Art. 39(2) (ex 48(2)) EC; Art. 46 (ex Art 56) EC; Art. 55 (ex 66) EC.

[198] "Such as that of securing for a national public foundation all the revenue from advertising intended especially for the public of the Member State in question." Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, para. 34. See also Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media,* 1991 E.C.R. I-4007, para. 11; Case C-17/92, *Federacion de Distribuidores Cinematograficos v. Estado Español et Union de Productores de Cine y Television,* 1993 E.C.R. I-2239, para. 16.

[199] In the context of the provisions of *services*. Case C-17/92, *Federacion de Distribuidores Cinematograficos v. Estado Español et Union de Productores de Cine y Television,* 1993 E.C.R. I-2239, para. 20. The same observation is made in relation to the right of establishment and art 46 (ex 56) EC by Advocate General M. Jean Mischo. Case 3/88, *Re Data Processing Contracts: E.C. Commission v. Italy,* 1989 E.C.R. 4035, para. 33.

[200] "So that [the] scope of the free movement provisions cannot be determined unilaterally by each Member State". Case 41/74, *Yvonne van Duyn v. Home Office,* 1974 E.C.R. 1337, para. 18; Case 147/86, *Commission v. Greece,* 1998 E.C.R. 1637, para. 7; Case C-114/97, *Commission of the European Communities v. Kingdom of Spain,* 1998 E.C.R. 1-6717, para. 34.

[201] See CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU*: *THE FOUR FREEDOMS* BARNARD (note 47).253 (Oxford University Press 2nd ed., 2007).

justifications "must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard."[202] Dutch rules, such as those relating to the distribution of cable programs transmitted by migrant broadcasters[203] in *Bond van Adverteerders and others v. The Netherlands State*,[204] were held disproportionate to the intended objective, "that of maintaining the non-commercial and, thereby, pluralistic nature of the Netherlands broadcasting system."[205] In *Bond*,[206] it was admitted[207] "that there are less restrictive, non-discriminatory ways of achieving the intended objectives."[208] In *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen*,[209] the discriminatory treatment of migrant companies could not be justified on Treaty grounds, the Dutch response was disproportionate to the need to combat fraud. In *Segers*, it was held "Although [it] may therefore justify a difference of treatment in certain circumstances, the refusal to accord a sickness benefit to a director of a company formed in accordance with the law of another Member State cannot constitute an appropriate measure in that respect."[210]

### *II. Indirect discrimination*

#### *1. Goods*

National rules with respect to goods are not prohibited by art 28 EC[211] where they are necessary in order to satisfy "mandatory requirements."[212] The concept of the "mandatory

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[202] Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, para. 36.

[203] Making distribution of cable programmes transmitted by broadcasters established in other Member States conditional upon the absence of advertisements together with the prohibition of the subtitling of those programmes in Dutch. The Dutch rules were therefore discriminatory in relation to origin.

[204] Case 352/85, *Bond van Adverteerders and others v. The Netherlands State,* 1998 E.C.R. 2085, para. 37, in relation to Article 56 (now 46) EC.

[205] *Id.*, para. 35.

[206] See, *supra*, note 205.

[207] By the Dutch Government.

[208] "For instance, broadcasters of commercial programmes established in other Member States could be given a choice between complying with objective restrictions on the transmission of advertising, such as a prohibition on advertising certain products," *id.*, para. 37.

[209] Case 79/85, 1986 E.C.R. 2375, para. 13.

[210] *Id.*, para. 17.

[211] See *supra*, note 1 Art 28 (ex 30) EC. p.47.

requirement"[213] was introduced in *Rewe-Zentral A.G. v. Bundesmonopolverwaltung fur Branntwein*.[214] It is the benchmark of the justification of indistinctly discriminatory measures with respect to the free movement of goods. In *Rewe* the attempted justification of the mandatory fixing of minimum alcohol contents was on the grounds of the fairness of commercial transactions.[215] It was held, "Obstacles to movement within the Community 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…[relate] in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer."[216] However, the meaning of "mandatory requirement" is elastic in nature. The concept has since been extended, for example, to embrace the protection of the environment,[217] press diversity,[218] and the protection of the cinema in France.[219]

Related to the concept of the mandatory requirement is the application of the principle of proportionality. "If a Member State has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods."[220] It is a test importing considerations of legality and merit. In *Rewe*[221] for example,

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[212] Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649, para. 8. Increasingly, the terms of "imperative requirements" or "overriding reasons in the general interest" are used in the judgments.

[213] The fundamental assumption is that there should be "no valid reason why, provided that [goods] … have been lawfully produced and marketed in one of the Member States, [they] should not be introduced into any other Member State." Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649, para. 14. It is a presumption that can be rebutted when further measures are *necessary* to protect the interest concerned, the actions of the Member State must be *proportionate*. The burden of proving that a measure is *necessary* is onerous. See for example Case 16/83, *Criminal proceedings against Karl Prantl,* 1984 E.C.R. 1299; Case 182/84, *Criminal proceedings against Miro BV,* 1985 E.C.R. 3731; Case 286/86, *Ministere public v. Gerard Deserbais,* 1988 E.C.R. 4907. Note also Case C-317/91, *Deutsche Renault AG v. AUDI AG,* 1993 E.C.R. I-6227.

[214] Case 120/78, 1979 E.C.R. 649, para. 8.

[215] *Id.,* para. 12.

[216] *Id.*, para 8. The defences of consumer protection and fair trading are only available to the "mandatory requirement". Case 434/85, *Allen and Hanburys Ltd v. Generics (UK) Ltd,* 1988 E.C.R. 1245, para. 35; Case 113/80, *Commission of the European Communities v. Ireland,* 1981 E.C.R. 1625, para. 10.

[217] On the ground that protection of the environment is "one of the Community's essential objectives". Case 302/86, *Commission of the European Communities v. Kingdom of Denmark,* 1988 E.C.R. 4607, paras. 8- 9. In this judgment national rules establishing a deposit and return system for empty drinks containers were justified, para. 13.

[218] Case 368/95, *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v. Heinrich Bauer Verlag,* 1997 E.C.R. I-3689, para. 34.

[219] Case 60/84, *Cinetheque SA and others v. Federation nationale des cinemas français,* 1985 E.C.R. 2605, para. 23.

[220] Case 302/86, *Commission of the European Communities v. Kingdom of Denmark,* 1988 E.C.R. 4607, para. 6.

the national law could not be justified; the requirements relating to the minimum alcohol content were held not to serve a purpose which could be deemed to be in the general interest.[222] In *Cinetheque SA and others v. Federation nationale des cinemas français*, for example, a French measure, designed to encourage the creation of cinematographic works irrespective of origin, which gave for a limited period a priority of distribution through that medium, was held proportionate.[223] The system was designed to encourage the creation of cinematographic works irrespective of origin through that medium. In *Walter Rau Lebensmittelwerke v. De Smedt PVBA*, national law required margarine to be packed in cube shaped boxes so consumers could distinguish between margarine and butter. It was held that the same objective could have been achieved by other means (such as labeling) which would be less of a hindrance to trade.[224]

In *Ministere public v. Gerard Deserbais*, in relation to a French measure imposing a minimum fat content for Edam cheese, it was held that "The Member State into which they are imported cannot prevent the importation and marketing of such cheeses where adequate information for the consumer is ensured."[225] In *Commission of the European Communities v. Federal Republic of Germany*, a general ban on additives in beer was held not proportionate[226] to the stated aim of the protection of "public health."[227] The ban had applied to *all* additives,[228] not just those for which there was concrete scientific evidence of risk.[229] By contrast, in *Criminal proceedings against Ditlev Bluhme*,[230] national protection of the Danish bee was justified on the grounds of the protection of the "health and life of…animals".[231] The establishment of a protection area for the Lso brown bee aimed at the survival of that species was "an appropriate measure in relation to the aim pursued."[232]

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[221] Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein,* 1979 E.C.R. 649.

[222] *Id.*, para. 14.

[223] Case 60/84, 1985 E.C.R. 2605, para. 23.

[224] Case 261/81, 1982 E.C.R. 3961, para. 20.

[225] Case 286/86, 1988 E.C.R. 4907, para. 12.

[226] Case 178/84, 1987 E.C.R. 1227, para. 53.

[227] Art. 36 (now 30 EC). Case 178/84, 1987 E.C.R. 1227, para. 26.

[228] Lawfully in circulation in other Member States, *Id.*, para. 47.

[229] See, *supra*, note 227, para. 47.

[230] Case C-67/97, 1998 E.C.R. I-8033, para. 37.

[231] Art. 36 (now 30) EC.

[232] Case C-67/97, *Criminal proceedings against Ditlev Bluhme,* 1998 E.C.R. I-8033, para. 37.

*2. Persons & services*

Where the national measure is indirectly discriminatory of the exercise of the free movement right with respect to persons and services, it may be "objectively justified."[233] The grounds of justification are broad and not confined to the Treaty exceptions. In *Finanzamt Koln-Altstadt v. Roland Schumacker*[234] Belgian discrimination directed at a cross-border worker who could not benefit from tax allowances could in certain circumstances be justified where, for example, there was a difference in position between resident and non-resident worker. Likewise, it has been held that a national law which similarly discriminates against the migrant in the context of establishment[235] and services could be objective justified. For example, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* contains a reference to "professional rules justified by the general good."[236]

The process of justification in the theatre of free movement of persons is inextricably linked to the application of the concept of proportionality. In *John O'Flynn v. Adjudication Officer*,[237] in relation to the worker, for example, a United Kingdom measure relating to the payment of burial expenses was held not proportionate; entitlement to a lump sum payment, paid with reference to United Kingdom burial costs would have sufficed.[238] In the same way, an Italian measure placing a six year limit on the employment of foreign language assistants was held not necessary to enable universities to terminate the contracts of teaching staff that proved incompetent.[239] In *Clean Car Autoservice GesmbH v. Landeshauptmann von Wien*,[240] the requirement of residence in the host state so that managers could be served with notice of fines could have equally have been achieved by notification at the registered office.

In relation to rights of establishment, Dutch conditions imposed on the structure of foreign broadcasting bodies were disproportionate in the context of safeguarding the freedom of expression; that aim could have been achieved by the reformulating the composition of

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[233] For example Case C-237/94, *John O'Flynn v. Adjudication Officer,* 1996 E.C.R. I-2617, para. 23.

[234] 1995 E.C.R. I-225, para. 40. See also Case C-204/90, *Bachmann v. Belgium,* 1992 E.C.R. I-249, para. 28.

[235] Case 111/85, *Lynne Watson and Alessandro Belmann,* 1976 E.C.R. 1185, para. 22.

[236] Case 33/74, 1974 E.C.R. 1299, para. 12.

[237] See, *supra*, note 234. para. 23.

[238] *Id.*, para. 29.

[239] Case 33/88, *Pilar Allue and Carmel Mary Coonan v. Universita degli studi di Venezia,* 1989 E.C.R. 1591, para. 16.

[240] Case C-350/96, 1998 E.C.R. 1-2521.

national broadcasting bodies.[241] Similarly, the scale of restrictions, the requirement of a license and examination success as pre-conditions for tourist guides in Italy was held disproportionate in the context of achieving the purported objective of preserving cultural heritage.[242]

*III. The non-discriminatory requirement*

*1. Goods*

In recent jurisprudence where the national measure has been classified as a restriction on free movement rights relating to goods, justification has been measured either "by one of the public-interest grounds set out in Article 30 E.C. or by one of the overriding requirements laid down by the Court's case-law where the national rules are applicable without distinction."[243] Where the measure is tainted by direct discrimination, the grounds of Art 30 E.C. are available for justification. In other instances, recourse to "overriding requirements" will be appropriate.

a) Public interest grounds

Where there is *de facto* direct discrimination in the national measure held restrictive of the free movement of goods, the process of justification appears to be by reference to "public interest" grounds of Art 30 EC. In *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik*[244] for example, a Finish system relating to the commercial importation

[241] Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media,* 1991 E.C.R. I-4007 paras. 22 & 24.

[242] Case C-180/89, *Commission of the European Communities v. Italian Republic,* 1991 E.C.R. I-709, para. 24. See also Case C-154/89, *Commission of the European Communities v. French Republic,* 1991 E.C.R. I-659, para. 21. and Case C-198/89, *Commission of the European Communities v. Hellenic Republic,* 1991 E.C.R. I-727, para. 21.

[243] Joined cases C-158/04 & C-159/04, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v. Elliniko Dimosio and Nomarchiaki Aftodioikisi,* 2006 E.C.R. I-8135, para. 20; Case C-54/05, *Commission of the European Communities v. Republic of Finland,* 2007 E.C.R. I-2473, para. 38. The terminology used in the latter instance was that of "imperative requirements." See also Case 120/78, *Rewe-Zentral* (*Cassis de Dijon*), 1979 E.C.R. 649, para. 8. and C-297/05, *Commission of the European Communities v. Kingdom of the Netherlands,* 2007 E.C.R. I-7467, para. 74.

[244] Case C-434/04, 2006 E.C.R. I-9171.

alcoholic drinks[245] was considered by reference to the Art 30 EC ground of public policy and the protection of health.[246]

b) Overriding interests

Determination of "overriding requirements" is referenced to "the meaning of the case-law initiated by *Rewe-Zentral*[247] (*Cassis de Dijon*)."[248] In *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE,*[249] for example, it was held in relation to the baking of frozen bread without a license,[250] that the process of justification of the Greek measure could be by reference to one of the overriding requirements.[251]

In relation to various German measures relating to avoiding the environmental impact of packaging, the ground for justification[252] was based on the protection of the environment,[253] as were Dutch practices making the existence of an actual nutritional need a precondition for the granting of derogation from the application of national measures.[254]

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[245] Importing issues of direct discrimination. *Id.*, para. 6.

[246] *Id.*, para. 23.

[247] Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon),* 1979 E.C.R. 649, para. 8.

[248] Case C-441/04, *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt* para. 26. See also Joined cases C-158/04 & C-159/04, *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v. Elliniko Dimosio and Nomarchiaki Aftodioikisi,* 2006 E.C.R. I-8135, para. 20.

[249] Joined cases C-158/04 & C-159/04, 2006 E.C.R. I-8135, para. 20.

[250] The measure was clearly indirectly discriminatory. *Id.*, para. 10.

[251] In this instance, "consumer or health protection". See, *supra,* note 250, para. 23.

[252] In circumstance where the marketing of the national drinks and that of the import was not affected in the same manner. Case C-463/01, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-11705, para. 69.

[253] *Id.*, para. 75. On similar facts, see also Case C-309/02 *Radlberger Getrankegesellschaft mbH & Co. and S. Spitz KG v. Land Baden-Wurttemberg,* 2004 E.C.R. I-11763, para. 74. The German rules applied without distinction, para. 61.

[254] The measure was indirectly discriminatory; "the protection of human health is one of the objectives of the Community policy on the environment". Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375, paras. 23 & 45. See also Case C-150/00, *Commission of the European Communities v. Republic of Austria,* 2004 ECR I-3887, para 84; Case C-387/99 *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-3751, para. 67; Case C-24/00, *Commission of the European Communities v. French Republic,* 2004 E.C.R. I-1277, para. 53; Case C-270/02, *Commission of the European Communities v. Italian Republic,* 2004 E.C.R. I-1559, para. 23; Case C-95/01, *Criminal proceedings against John Greenham and Leonard Abel, 2004* E.C.R. I-1333, para. 34; Case C-192/01, *Commission of the European Communities v. Kingdom of Denmark,* 2003 E.C.R. I-9693, para. 42.

It has been held that a "legitimate aim of demonstration" may be an objective of general interest.[255] In *Commission of the European Communities v. Kingdom of Spain*[256] the issue of the justification of the prohibition on marketing of cocoa products containing fats other than cocoa butter was by reference to "consumer protection."

c) Determination at the national level

The availability of grounds for justification, the choice between the public interest grounds of Art 30 EC or the reference in the process to the use of "imperative requirements" has recently (in some instances) been dependent upon determination by the referring court of the nature of the national measure.[257] It is a determination pertaining to the issue of discrimination. The reference will be to imperative requirements if the "court finds that the prohibition…affects products originating from other Member States more than it affects domestic products as regards access to the domestic market."[258]

*II. Persons and services*

In the context of the justification of the non-discriminatory requirement, and in instances wherein the nomenclature of restriction has been used in relation to persons and services, it has been held that "It is for the national court to verify whether, having regard to the specific rules governing its application, the national legislation is genuinely directed to realizing the objectives which are capable of justifying it."[259]

The process of justification of the non-discriminatory requirement with respect to persons and services thus involves identification of an interest that is worthy of protection.[260] The

[255] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich,* 2003 E.C.R. I5659, para. 80.

[256] Case C-12/00, 2003 E.C.R. I-459, para. 83.

[257] Case C-441/04, *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt,* 2006 E.C.R. I-2093, para. 26.

[258] *Id.,* para. 26. in the context of national measures concerning promotional parties held in relation to the selling of jewelry.

[259] Case C-67/98, *Questore di Verona v. Diego Zenatti,* 1999 I-7289, para. 37. See also Case C-446/03 *Marks & Spencer plc v. David Halsey (Her Majesty"s Inspector of Taxes),* 2005 E.C.R. I-10837, para. 35; Case C-250/95, *Futura Participations and Singer,* 1997 E.C.R. I-2471, para. 26; Case C-9/02, *De Lasteyrie du Saillant,* 2004 E.C.R. I-2409, para. 49; Case C-19/92, *Dieter Kraus v. Land Baden-Wurttemberg,* E.C.R. I-1663, para. 32; Case C-124/97, *Markku Juhani Laara, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen valtio (Finnish State),* 1999 E.C.R. I-6067, para. 36.

[260] Together with an evaluation of the *proportionality* of the appropriateness of such response by the Member State in the circumstances.

grounds for justification are outlined in *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.[261] The measures "must be applied in a non-discriminatory manner[262] they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it."[263] It appears that the *Gebhard*[264] test applies universally across the free movement provisions relating to persons.[265] This has recently been confirmed in *Corporación Dermoestética SA v. To Me Group Advertising Media* which held that "the protection of public health is one of the overriding reasons based on the general interest."[266]

In the application of the *Gebhard* test with respect to the issue of justification, the Court has used an interchangeable nomenclature of public/general interest. The application of this standard is examined below.

a) Public interest

The 'public interest' is an eclectic and versatile concept.[267] With respect to the provision of services, for example, *Manfred Sager v. Dennemeyer & Co. Ltd* held that justification of patent monitoring legislation would be measured by reference to "imperative reasons relating to the public interest."[268]

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[261] Case C-55/94, 1995 E.C.R. I-4165, para. 37.

[262] *Gebhard*, arose from the suspension of a German national by the Milan bar for the use of the title of that bar.

[263] See*, supra,* note 262, para 37. See also C-19/92, *Kraus v. Land Baden-Wuerttemberg,* 1993 E.C.R. I-1663, para. 32.

[264] See, *supra,* note 262.

[265] Cross reference has for example been made with respect to the *worker* in C-415/93, *Union royale belge des societes de football association ASBL v. Jean-Marc Bosman, Royal club liegeois SA v. Jean-Marc Bosman and others and Union des associations europeennes de football (UEFA) v. Jean-Marc Bosman,* 1995 E.C.R. I-4921. See, inter alia, the judgment in Case C-19/92 *Kraus v Land Baden-Wuerttemberg,* 1993 E.C.R. I-1663, para. 32. and Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* 1995 E.C.R. I-04165, paras. 37 and 104.

[266] Case C-500/06, *Corporación Dermoestética SA v. To Me Group Advertising Media* 2008 E.C.R., para. 37.

[267] See for example the list given in Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media,* 1991 E.C.R. I-4007, para. 14.

[268] Case C-76/90, 1991 E.C.R. 1-4221, para. 15. The measure issue did not pass the test of *proportionality*, para. 20.

The concept has been applied to the award of academic titles,[269] the protection of workers,[270] the protection of consumers,[271] the maintenance of order in society,[272] and concerns relating to social policy and the prevention of fraud.[273] It has encompassed the objective of guaranteeing the quality of skilled work,[274] the protection of consumers and the maintenance of order in society in the context of the prevention of migrant operators from taking bets in Italy,[275] and the provision of legal advice by qualified persons.[276]

Into the public interest category has also fallen the protection of investor confidence, the prohibition of "cold calling" in the Dutch financial markets,[277] a "proper appreciation of the artistic and archaeological heritage of a country,"[278] the maintenance of a level of service and occupational skills in the skilled trade sector,[279] and the need to access the aptitude and ability of persons called to practice as advocates.[280] Further, in the differential tax treatment of company losses, economic objectives have been held to fall within the "public interest" criteria.[281]

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[269] Case C-19/92, *Dieter Kraus v. Land Baden-Wurttemberg,* 1993 E.C.R. I-1663, para. 33.

[270] Case C-79/01, *Payroll Data Services (Italy) Srl and Others,* 2002 E.C.R. 1-8923, para. 31.

[271] Consider for example, in relation to the remuneration of sight accounts in euros, the encouragement of medium and long term savings. Case C-442/02, *Caixa-Bank France v. Ministere de L"Economie, des Finances, De L"Industrie (Banque Fédérale des Banques Populaires and Others),* 2004 E.C.R. I-8961, para. 24.

[272] Case C-124/97, *Markku Juhani Laara, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen valtio (Finnish State),* 1999 E.C.R. I-6067, para. 33.

[273] Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jorg Schindler,* 1994 E.C.R. 1-1039, para. 63.

[274] Case C-215/01, *Bruno Schnitzer,* 2003 E.C.R. I-14847, para. 35.

[275] Case C-67/98, *Questore di Verona* v. *Diego Zenatti,* 1999 I-7289, para. 36.

[276] C-76/90, *Manfred Sager v. Dennemeyer & Co. Ltd,* 1991 1-4221, para. 16.

[277] Case C-384/93, *Alpine Investments BV v. Minister Van Financiën,* 1995 E.C.R. I-1141, para. 39.

[278] Case C-198/89, *Commission of the European Communities v. Hellenic Republic,* 1991 E.C.R. 1-727, para. 21. See also Case C-153/02, *Valentina Neri v. European School of Economics (ESE Insight World Education System Ltd),* 2003 E.C.R. 1-13555, para. 45 with respect to ensuring high standards in University education.

[279] Case C-58/98, *Josef Corsten,* 2000 E.C.R. I-7919, para. 33.

[280] Case C-250/03, *Mauri v. Ministero Della Giustizia and Commissione Per Gli Esami Di Avvocato Presso La Corte D'Appello Di Milano,* 2005 E.C.R. I-1267, para. 11.

[281] Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes),* 2005 E.C.R. I-10837, para. 51.

b) General interest

In *Gebhard*, in the context of the recognition of knowledge in a professional context, the language of "imperative requirements in the general interest"[282] has been used. In the relatively recent judgment of *Commission v. Greece,* the objective of protecting public health was described in the same manner[283] and in *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, conditions imposed by Holland which affected the structure of foreign broadcasting bodies were not regarded as being objectively necessary to safeguard the general interest in maintaining a national radio system which secured pluralism.[284]

In other instances, both the terms public and general interest have been used interchangeably. In *Commission of the European Communities v. Grand Duchy of Luxembourg*,[285] for example, in relation to the social protection of workers the national measure served "an objective of general interest,"[286] but could be justified by reference to "overriding requirement relating to the public interest."[287]

There appears also to be a flexible approach to the application of the public/general interest criterion. In *Schindler*,[288] the United Kingdom's justification relating to the social ills of gambling was accepted by the Court, despite the knowledge that the National Lotteries Act had been passed by Parliament. By contrast, in *Questore di Verona v. Diego Zenatti*,[289] an Italian law prohibiting the taking of bets on sporting competitions, except through specially appointed bodies was thoroughly investigated by the Court.

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[282] Case C-55/94, *Reinhard Gebhard v. Consiglio dell"Ordine degli Avvocati e Procuratori di Milano,* 1995 E.C.R. I-4165, para. 37.

[283] Case C-140/03, *Commission v. Greece,* 2005 E.C.R. I-3177, para. 34.

[284] Case C-288/89, 1991 E.C.R. I-4007, para. 25.

[285] Case C-445/03, 2004 E.C.R. 1-10191, para. 21.

[286] *Id.*, para. 14.

[287] See*, supra*, note 286, para. 21.

[288] Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jorg Schindler,* 1994 E.C.R. I-1039, para. 43.

[289] Case C-67/98, 1999 I-7289. These issues were sent to the national court for determination, para. 37.

*III. Capital*

The justification of national rules prohibited by the free movement provisions relating to capital have followed the approach taken in *Gebhard*.[290] The jurisprudence with respect to the free movement of capital is however less extensive than that relating to the other freedoms, primarily due to the breath of the express derogations listed in Article 58 EC. That Article provides that the member state shall:

"[T]ake all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security."

There are similarities and overlaps between the derogations here, and those found elsewhere in the Treaty. The Court draws on the jurisprudence relating to the other freedoms when interpreting the derogations relating to Article 58 EC.[291]

**E. Proportionality**

*I. Goods*

In the context of an assessment of proportionality of measures deemed 'restrictive' of the free movement of goods, where either a public interest ground or an imperative interest element has been identified, a twofold condition must be met. The measure must be both "appropriate to ensure the attainment of the objective pursued and does not go beyond what is necessary to attain that objective."[292] The Member State must show that the measure complies with these conditions. The assessment of compliance is for the national court after detailed guidance from the Court of Justice.[293]

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[290] Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* 1995 E.C.R. I-4165.

[291] See for example Case 203/80, *Casati,* 1981 E.C.R. 2595, para. 27.

[292] Case C-441/04, *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt,* 2006 E.C.R. I-2093, para. 27.

[293] Case C-434/04, *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik Jan-Erik Anders Ahokainen*, 2006 E.C.R. I-9171, paras. 31 & 38.

With respect to issues of justification on public interest[294] grounds, in *Criminal proceedings against Jan-Erik Anders Ahokainen, Mati Leppik,*[295] Finland had to show that the measures taken had been effective to combat abuse arising from the consumption of spirits.[296] Where the public health[297] ground is used in support of the national measure, a detailed assessment of the risk alleged by the Member State will be required.[298] In *Commission of the European Communities v. Kingdom of the Netherlands*[299] the Court asked for a detailed assessment of the risk to health on which the proof of the nutritional need in the Dutch population had been based.[300] In *Commission of the European Communities v. Federal Republic of Germany*,[301] it was held that the national measure which automatically classified vitamin preparations lawfully marketed in other Member States as medicines products was not proportionate; a less restrictive approach would have been to fix a threshold value for each group of vitamins.

An example of an assessment of justification by the standard of the imperative requirement is evident in *Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets AE*.[302] In *Alfa*, the Greek objective of removing confusion between traditional and 'bake off' bakery products was held not to have been satisfied by a requirement that the later product be subject to manufacturing and marketing requirements imposed on the baking of traditional bread. Objectives such as public health and consumer protection could have

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[294] Pertaining to Art. 30 (ex 36) EC.

[295] Case C-434/04, 2006 E.C.R. I-9171, para. 22.

[296] Could less restrictive means have been used to ensure a similar result? *Id.,* para. 38.

[297] Art. 30 (ex 36) EC.

[298] Case C-95/01, *Criminal proceedings against John Greenham and Leonard Abel,* 2004 E.C.R. I-1333, paras. 41 & 47. Case C-192/01, *Commission of the European Communities v. Kingdom of Denmark,* 2003 E.C.R. I-9693, para. 47.

[299] Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375, para. 41.

[300] Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375 para. 41. A similar request was made for example in Case C-150/00, *Commission of the European Communities v. Republic of Austria,* 2004 E.C.R. I-3887, para. 84. In Case C-24/00, *Commission of the European Communities v. French Republic,* 2004 E.C.R. I-1277, French measures were held disproportionate. It was noted that no detailed assessment as to the effects on public health resulting from the addition of vitamins and minerals to confectionary and drinks, para. 62. In Case C-270/02, *Commission of the European Communities v. Italian Republic,* 2004 E.C.R. I-1559, the national measure was held disproportionate, the Italian Government had not shown that the imposition of a prior authorisation procedure for the marking of sports food had was in response to a health risk, para. 24.

[301] Case C-387/99, 2004 E.C.R. I-3751, para. 67.

[302] Joined Cases C-158/04, and C-159/04, 2006 E.C.R.. 1-8135.

been achievable by less restrictive means, such as product labeling.[303] In other instances, the issue of proportionality has not been satisfied where, for example, only a six month implementation period for a deposit and return system had been imposed on the mineral water producers.[304] By contrast, in relation to the closure of the Brenner motorway, the authorities were reasonably entitled to consider the legitimate aim of demonstration; an aim which could not have been achieved by measures less restrictive of intra-Community trade.[305] A national measure prohibiting the use of fat other than cocoa butter in chocolate products was held disproportionate. "The inclusion in the label of a neutral and objective statement informing consumers of the presence in the product of vegetable fats other than cocoa butter would be sufficient to ensure that consumers are given correct information."[306]

*II. Persons & services*

With respect to persons and services it has been held that "Those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives."[307]

The referring national court *may* be given a detailed indication of the form of that enquiry.[308] Examples of the application of the proportionality principle include *Payroll Data Services (Italy) Srl and Others* where Italian restrictions on data processing activities concerning registration with certain professional organizations were held to be beyond what was necessary to attain the objective of the protection of workers.[309] Further, in

[303] *Id.,* para. 25.

[304] Case C-463/01, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-11705, para. 79. The same question with respect to proportionality, that of the imposition of a reasonable transitional period, arose in Case C-309/02, *Radlberger Getrankegesellschaft mbH & Co. and S. Spitz KG v. Land Baden-Wurttemberg,* 2004 E.C.R. I-11763, para. 81.

[305] Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich,* 2003 E.C.R. I-5659, para. 93.

[306] Case C-12/00, *Commission of the European Communities v. Kingdom of Spain,* 2003 E.C.R. I-459, para. 93.

[307] Case C-76/90, *Manfred Sager v. Dennemeyer & Co. Ltd,* 1991 E.C.R. 1-4221, para. 15; Case C-67/98, *Questore di Verona v. Diego Zenatti,* 1999 I-7289, para. 37.

[308] Case C-19/92, *Dieter Kraus v. Land Baden-Wurttemberg*, 1993 E.C.R. I-1663, para. 42. In the context of postgraduate titles and the facilitation of access to the host profession, was the verification procedure solely intended to verify that the award to the migrant was made properly? Was the authorisation procedure easily accessible, not for example dependent upon payment of excessive fees? Was the verification procedure carried out with respect for fundamental rights? Were any penalties imposed proportionate? paras. 37-41.

[309] Case C-79/01, *Payroll Data Services (Italy) Srl and Others,* 2002 E.C.R. 1-8923, para. 37.

*Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*,[310] a differential tax treatment of company losses went beyond what was necessary to attain the economic objective[311] of the United Kingdom measure.[312] In *Manfred Sager v. Dennemeyer*,[313] the possession of a qualification such as patent agent "goes beyond what is necessary"[314] in making the possession of a professional qualification "quite specific and disproportionate to the needs of the recipients."[315] A French measure, a prohibition of migrant companies remunerating sight accounts, was held disproportionate;[316] it prevented those companies from raising capital. Likewise, Greek legislation imposing a license requirement in respect of tourist guides was disproportionate to the held objective of a proper appreciation of places of historical interest.[317] So, too, an Italian practice relating to the non-recognition of certain degrees awarded to Italian nationals was held not proportionate.[318] On the other hand, in *Josef Corsten* it was held proportionate to maintain a trades register in the host state, provided that this did not involve additional administrative expense for the migrant.[319] In *Questore di Verona v. Diego Zenatti*, it was for the national court to determine the issue of proportionality in relation to social policy objectives behind the reservation to certain bodies of the right to take bets on certain sporting events.[320] In *Commission of the European Communities v. French Republic*, national legislation allowing only France to check to abilities of migrant inseminators "even if it is appropriate for ensuring the protection of animal health and the health of the operator carrying out the insemination, goes beyond what is necessary to attain the objective pursued."[321]

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[310] Case C-446/03, 2005 E.C.R. I-10837.

[311] Regarding competence in tax matters with respect to companies. *Id.,* para. 36.

[312] See, *supra*, note 311, para. 55.

[313] C-76/90, 1991 E.C.R. 1-4221, para. 17.

[314] *Id.*, para. 17.

[315] See, *supra*, note 314, para. 17.

[316] Case C-442/02, *Caixa-Bank France v. Ministere de L'Economie, des Finances, De L'Industrie (Banque Fédérale des Banques Populaires and Others),* 2004 E.C.R. I-8961, para. 21.

[317] Case C-198/89, *Commission of the European Communities v. Hellenic Republic,* 1991 E.C.R. 1-727, para. 25.

[318] Case C-153/02, *Valentina Neri v. European School of Economics (ESE) Insight World Education System Ltd,* 2003 E.C.R. 1-13555, para. 48.

[319] Case C-58/98, 2000 E.C.R. I-7919, para. 49.

[320] Case C-67/98, 1999 I-7289, para. 37.

[321] Case C-389/05, *Commission of the European Communities v. French Republic* 2008 E.C.R., I-5337, para. 97.

*III. Justification - key issues*

*1. Circumvention of the natural order*

That direct discrimination has been justified by reference to Treaty provisions, and indirect discrimination by reference to the concept of public/general interest, has traditionally represented the 'natural order' in persons and services jurisprudence. The refocus of the enquiry upon restriction/obstacle to the right of free movement rather than an assessment of the effect of discrimination appears to have been effective, partially, at least to displace that natural order. It has been effective to render redundant considerations of the Treaty grounds for justification in instances wherein previously the classification of directly discriminatory measures would have been used. The importation of the concepts relating to public and general interest has handed to the Member State the option of a wider range of grounds on which to justify the national measure in circumstances wherein the measure has been held restrictive of the free movement right. The public/general grounds relating to the protection of workers,[322] the protection of consumers,[323] the maintenance of order in society,[324] and to the recognition of knowledge in a professional context,[325] for example, stand in stark contrast to the limited grounds of justification provided by the Treaty.[326] The potential expansiveness of such grounds has been highlighted recently in *Commission of the European Communities v. Kingdom of Belgium*[327] in which the attempted justification of national fiscal measures was set in the context of compromising the objectives of the Treaty.[328] It is a timely reminder by the Court that the relevant context surrounding the justification of the restriction is expansive rather than limited. It should be remembered that in this instance, presumably the restriction in question would have formerly been designated as directly discriminatory, and the process of justification in turn restricted to the grounds provided in the Treaty.[329]

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[322] Case C-79/01, *Payroll Data Services (Italy) Srl and Others,* 2002 E.C.R. 1-8923, para. 31.

[323] See for example in relation to the remuneration of sight accounts in euros, the encouragement of medium and long term savings. Case C-442/02, *Caixa-Bank France v. Ministere de L'Economie, des Finances, De L'Industrie (Banque Fédérale des Banques Populaires and Others),* 2004 E.C.R. I-8961, para. 24.

[324] Case C-124/97, *Markku Juhani Laara, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen valtio (Finnish State),* 1999 E.C.R. I-6067, para. 33.

[325] Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* 1995 E.C.R. I-4165 para. 37.

[326] Art. 30 (ex 36) EC.

[327] Case C-433/04, 2006 E.C.R. I-10653.

[328] *Id.*, para. 35. The measure was not justified, paras. 37 & 42.

[329] Art. 55 (ex 66) EC.

The wider range of grounds[330] now available to justify directly discriminatory measures now classified as restrictions/obstacles to the exercise of the free movement right with respect to persons and services have, it seems, effectively placed the operation of proportionality into the forefront of preservation of free movement rights. Having placed that greater onus on the application of proportionality, it is arguably incumbent on the Court to provide guidelines as to the *de facto* implementation of that principle. It seems that, to date, it is an obligation given only *ad hoc* attention by the Court. In *Josef Corsten* for example, full guidance was supplied to the national court as to how it should apply the principle of proportionality.[331] By contrast, however, in *Questore di Verona v. Diego Zenatti*[332] it was left to the national court to determine the application of that principle. In the new era of examination of the restriction/obstacle in free movement jurisprudence with respect to persons and services with the increased emphasis on the principle of proportionality, it may be argued that as far as the preservation of Treaty free movement rights is concerned, the apparent lack of guidance in judgments such as *Zenatti*[333] represents an abdication of responsibility on the part of the Court.

*2. Justifications – fusion at source?*

a) Persons and Services

The focus on the obstacle/restriction on the free movement right in relation to persons and services has further effect. The repositioning of the enquiry, *i.e.* the withdrawal from identification of discrimination, causes a reconsideration of the distinction in use between Treaty grounds for justification and those attributable to the grounds of public/general interest. Has the maintenance of that distinction now become artificial and unnecessary?

The arguments relating to the inappropriateness of having different grounds for the justification of measures relating to persons and services dependent upon whether the measure is classified as discriminatory or as a non-discriminatory restriction[334] were put with some force by Advocate General Jacobs in *Rolf Dieter Danner*.[335] The Advocate General argued, "Once it is accepted that justifications other than those set out in the

[330] Public/general interest.

[331] Case C-58/98, 2000 E.C.R. I-7919, paras. 40 – 49.

[332] Case C-67/98, 1999 I-7289, para. 27.

[333] *Id.,* para. 37.

[334] In the context of the free movement of goods, these questions were regarded by Advocate General Jacobs as "preliminary one[s]." Case C-379/98, *Preussenelektra AG Schleswag AG,* 2001 E.C.R. 1-2099, para. 225.

[335] Case C-136/00, 2002 E.C.R. I-8147, para. 40.

Treaty may be invoked, there seems no reason to apply one category of justification to discriminatory measures and another category to non-discriminatory restrictions."[336] His rationale was based on the premise that Treaty free movement provisions with respect to the provision of services "does not refer to discrimination but speaks generally of restrictions on freedom to provide services."[337] There appears to be much merit in this argument. The use of the language of restriction in recent jurisprudence is much more transparent and reflective of Treaty objectives.[338] The analysis rightly places the onus on an assessment of "whether the ground invoked is a legitimate aim of general interest"[339] and a proper application of the principle of proportionality.[340] The Advocate General underpins this argument by proposing that grounds for justification are "no less legitimate and no less powerful"[341] because they do not appear in the Treaty. It seems illogical, for example, that Belgium could not prevent the storage and dumping of hazardous waste in Wallonia which had originated from other Member States simply because there were no Treaty grounds available and upon which the national measure could have been justified.[342]

Given that in practice it is difficult to apply the distinctions between direct and indirect discrimination and the non-discriminatory measure, it would seem that the amalgam proposed by Advocate General Jacobs is a propitious one. It may be that maintaining rigid distinctions between direct and indirect justification are superficial. Arguably, the ramifications of such distinctions are covered elsewhere within in the equation of justification. It is much more likely, for example, that the more the measure is *de facto* tainted with discrimination, the less likely it will satisfy the principle of proportionality.[343]

b) Goods

Similar, persuasive arguments for an analogous treatment of the grounds of justification exist with respect to jurisprudence relating to the free movement of goods. An indication that "the Court is reconsidering its earlier case law" in favor of the same fusion of grounds

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[336] *Id.*, para. 40.

[337] *See, supra*, note 336, para. 40.

[338] The activities of the Community include "an internal market characterised by the abolition of … obstacles to then free movement of goods, persons and services" (emphasis added). Art. 3(c) EC.

[339] See, *supra*, note 336, para. 40.

[340] Id.

[341] Id.

[342] Case C-2/90, *Commission of the European Communities v. Kingdom of Belgium,* 1992 E.C.R. I-4431, para. 34.

[343] As noted by Advocate General Jacobs, Case C-136/00, *Rolf Dieter Danner,* 2002 E.C.R. I-8147, para. 40.

for justification as that which it has applied to persons and services was noted by Advocate General Jacobs in *Preussenelektra A.G. Schleswag A.G.*.[344] Aside subsequent jurisprudence concerning the assessment of issues relating to public health,[345] it is noticeable however that the "reconsideration of earlier case law" noted by the Advocate General may prove to be a premature observation.[346] In circumstances of justification other than recourse to public health, the Court appears to have maintained the distinction between the application of Article 30 EC and the justifications whose grounds arise from within free movement jurisprudence. This places the jurisprudence of the free movement of goods in a unique position in relation to the issue of justification by comparison to that of persons and services. The language of restriction in the latter has fermented a fusion with respect to the traditional bases of justification; with respect to the former, it appears to have failed to remove the traditional distinctions of the justification of the directly discriminatory measure and that of the measure that has applied without distinction. It is disappointing to contemplate, for example, that had the measure in *Schmidberger* been directly discriminatory, the legitimate aims of demonstration, recognized as a fundamental right by the Court,[347] would then have had to be ignored as a ground for justification.

Not only is the development of a symbiosis,[348] which reflects that of free movement of persons and services desirable with respect to the justification of measures relating to goods, it may in certain circumstances prove crucial. There may be instances which highlight the desirability of permitting the justification of directly discriminatory measures on environmental grounds.[349] For example, in *Commission of the European Communities v. Kingdom of Belgium*,[350] the grounds of imperative requirements were not available in

[344] Case C-379/98, 2001 E.C.R. 1-2099, paras. 225-228. In respect of the judgment in Case 389/96, *Aher-Waggon GmbH v. Bundesrepublik Deutschland,* 1998 E.C.R. I-4473. In that case, the German measure appeared to discriminate directly against the import; the issue of justification was by reference to considerations of 'public health' and 'environmental protection.' In judgment the Court did not consider the issue of direct discrimination.

[345] Case C-41/02, *Commission of the European Communities v. Kingdom of the Netherlands,* 2004 E.C.R. I-11375, para. 41; Case C-387/99, *Commission of the European Communities v. Federal Republic of Germany,* 2004 E.C.R. I-3751, para. 81.

[346] See, *supra*, note 345, paras. 225-228.

[347] "Expressly recognised by the ECHR". Case C-112/00, 2003 E.C.R. I-5659, para. 79.

[348] This does not extend to the justification of the national provision relating to *capital*. Here there is a more extensive range of express derogations available to the Member State than in comparison to those available in relation to measures concerning the free movement of *goods*, *persons* and *services*.

[349] Noted by Advocate General Jacobs. Case C-379/98, *Preussenelektra AG Schleswag AG,* 2001 E.C.R. 1-2099, AG, para. 226.

[350] Case C-2/90, 1992 E.C.R. I-4431.

circumstances relating to an absolute prohibition on the dumping of imported hazardous waste.[351]

### F. The Selling Arrangement

The cases of *Commission v. Italian Republic*[352] and *Åklagaren v. Percy Mickelsson and Joakim Roos*[353] currently before the Court have provided renewed focus on the boundaries that lie between Article 28 EC and the "selling arrangement." A judicial creation, the "selling arrangement" relates to non-discriminatory[354] national rules concerning "the sale of products from another Member State meeting the requirements laid down by that State."[355] The imposition of such requirements on the import "is not by nature such as to prevent…access to the market or to impede access any more than it impedes access of the domestic product."[356] In concept, the "selling arrangement" has remained undefined within free movement of goods jurisprudence; only a "non-exhaustive inventory" has been provided on a case by case basis.[357] The invitation to the Court presented by both *Commission v. Italy*[358] and by *Roos*[359] is to extend the concept of the selling arrangement to rules beyond those relating to the sale of the product, to embrace arrangements for the use of goods.[360]

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[351] The rigidity of the Treaty justifications was thereby respected, Advocate General Jacobs. See, *supra*, note 350, para. 34.

[352] Case C-110/05, *Commission of the European Communities v. Italian Republic*, Judgment of the Court of Justice of the European Communities (Grand Chamber),10 February 2009.

[353] Case C-142/05, *Åklagaren v. Percy Mickelsson and Joakim Roos*, Judgment of the Court of Justice of the European Communities (Second Chamber) 4 June 2009.

[354] "So long as those provisions apply to all relevant traders operating within the 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". Joined cases C-267/91 & C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard,* 1993 1 E.C.R. 6097, para. 16.

[355] *Id.*, para. 17.

[356] See, *supra*, note 355, para. 17.

[357] Case C-110/05, *Commission of the European Communities v. Italian Republic*, Judgment of the Court of Justice of the European Communities (Grand Chamber),10 February 2009, para. 77 (opinion of AG Bot).

[358] *Id.*

[359] See, *supra,* note 354.

[360] See, *supra*, note 358, Advocate General Bot, para. 1.

In *Commission v. Italy*,[361] there was a total prohibition of the use of trailers towed by motor cycles, in *Roos*,[362] a partial prohibition had been imposed on the use of jet skis in Sweden. In the former case, Advocate General Bot was of the opinion that the Italian rule should fall within the application of Article 28 EC.[363] By contrast, Advocate General Kokott in *Roos*, had argued that it "appears logical to extend the Court's Keck case-law to arrangements for use" of the product.[364]

Advocate General Bot's argument that national measures concerning the *use* of products should be scrutinized by Article 28 EC was founded on the claim that "a distinction between different categories of measures is not appropriate,"[365] and may "be artificial."[366] In demarcation, the division between "selling arrangement, "or "requirements to be met,"[367] "may be uncertain."[368] In reality, the restriction in issue argued Advocate General Bot might have arisen from other factors, not attributable to that demarcation, for example the application of the rules in question or their specific effects on trade.[369] As the examination of restrictions to free movement is "based on a single criterion, that of access to the market,"[370] Advocate General Bot was of the opinion that the adoption of a *Keck* based criteria in the circumstances of measures concerning the use of goods, would create differences by comparison with the rules applicable to the other freedoms.[371] It "would result in the introduction of a new category of exemption from the application of Article 28 EC."[372] According to Advocate General Bot, such would be contrary to the objectives of the Treaty;[373] the handing to the Member States of an ability to legislate would undermine the "usefulness" of Article 28 EC.[374]

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[361] See, *supra*, note 358.

[362] See, *supra*, note 354.

[363] See, *supra,* note 358, para. 159.

[364] See, *supra*, note 354, para. 55.

[365] See, *supra*, note 358, paras. 79 & 81.

[366] See, *supra*, note 358, para. 81.

[367] See, *supra*, note 355.

[368] See, *supra*, note 358, para. 81.

[369] See*, supra*, note 358, para. 80.

[370] See, *supra*, note 358, para. 83.

[371] See, *supra*, note 358, para. 82.

[372] See, *supra*, note 358, para. 88.

[373] The creation of a single and integrated market. See, *supra*, note 358, para. 91.

[374] See, *supra*, note 358, para. 91.

By contrast, the rationale behind the argument of Advocate General Kokott that rules as to use of the product be treated as selling arrangements was that such restrictions are not product related, and do "not therefore require any modifications to the personal watercraft themselves."[375] The Swedish rules in *Roos* "also apply to all relevant traders operating within the national territory, since they do not discriminate according to the origin of the products in question."[376]

The respective opinions of the Advocates General delivered in *Commission v. Italian Republic* and *Roos* focus sharply on the opposing ends of the conceptual spectrum of arguments relating to the rightful place of the selling arrangement within Community free movement of goods jurisprudence. Advocate General Kokott's claim "that it appears logical to extend the Court's Keck case law to arrangements for use"[377] has much merit. The Swedish rules appear to fall within the *Keck*[378] criteria, as was implicitly acknowledged by Advocate General Bot in his opinion in *Commission v. Italy*.[379] Though technically correct, the position taken by Advocate General Kokott's arguments, however, present some difficulties. Reflecting perhaps some of the problems experienced by the Court to interpretation of *Keck*, the jurisprudence of the selling arrangement has been "Resolve[d] only on a case-by-case basis."[380] As a result, the *Keck* criteria has neither clarified the scope of Article 28 EC nor facilitated its use.[381] Against this background, the argument presented by Advocate General Bot that *Keck* served to introduce an inappropriate distinction between different categories of measures appears persuasive.[382] It is a distinction that would be prolonged if rules governing arrangements for the use of the product[383] were to be classified as selling arrangements. It has been noted that other free movement jurisprudence by comparison is based on the single criterion of access to the market.[384]

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[375] See, *supra*, note 354, Advocate General Kokott, para. 57.

[376] *Id.*, para. 58.

[377] Opinion delivered 14 December 2006, *Id.*, para. 55.

[378] See, *supra,* note 355, para. 16.

[379] See, *supra*, note 358, para. 86.

[380] See, *supra*, note 358, para. 75.

[381] Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos,* 2006 E.C.R. I-8135. See, *supra,* note 358, para. 84.

[382] See, *supra*, note 358, para. 79.

[383] See, *supra*, note 358, para. 86.

[384] See, *supra*, note 358, para. 77.

The subjection of national rules governing arrangements for the use of the product to the same criterion would represent a move in the direction of building a cohesive approach within the jurisprudence to the attainment of the right of free movement, whatever Treaty right is claimed. This latter option clearly exists in part at least, after the invitation to the Court from Advocate General Bot to impose the judicial review of the Court in accordance with the "traditional analytical pattern"[385] in the circumstances of product use. The advantage of the application of Article 28 EC would be twofold: it "makes it possible for the Court to monitor Member States" compliance with Treaty provisions" whilst allowing "necessary room for maneuver to defend their legitimate interests."[386]

It may be that now is an opportune moment for the Court to re-examine the nature of the selling arrangement, and to establish a uniformity in its approach to the attainment of all Treaty free movement rights. That such reassessment should occur is not only preferable, but has been clearly contemplated by Advocate Generals Maduro[387] and more recently Bot in *Commission v. Italy*,[388] as well as a host of academic writers.[389] Whether or not the opportunity is seized by the Court in *Roos* to fully reassess the role of the selling arrangement within free movement of goods jurisprudence at this juncture can only be the subject of conjecture. Even the Advocate General in *Commission v. Italy* was of the opinion that "at the present time it is (not) appropriate to depart from"[390] the jurisprudence established by *Keck and Mithouard*.[391]

It is noted, however, that in the judgment of *Commission v. Italy*, the Court has chosen to follow the line of reasoning proposed by the Opinion of Advocate General Bot. In that judgment, the Italian arrangements for the use of motorcycles towing a trailer were

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[385] See s*upra*, note 358, para. 93.

[386] See, *supra*, note 358, para. 94.

[387] Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos,* 2006 E.C.R. I-8135, para. 25.

[388] See, *supra,* note 358, para 85. A *de minimis* approach was recommended by Advocate General Jacobs in his Opinion in Case C-412/93, *Leclerc-Siplec,* 1995 E.C.R. I-179, para. 42.

[389] See, in particular, Picod, F., "*La nouvelle approche de la Cour de justice en matière d"entraves aux échanges*", Vol 34 No 2, Revue trimestrielle de droit européen, p. 169, (1998); Mattera, A., "*De l'arrêt Dassonville à l'arrêt Keck: l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions*", Revue du Marché Unique Européen, No 1, 1994, p. 117; Weatherill, S., "*After Keck: some thoughts on how to clarify the clarification*", 33 C.M.L. Rev, p. 885, (1996); Kovar, R., "*Dassonville, Keck et les autres: de la mesure avant toute chose*", Vol 42 No 2, Revue trimestrielle de droit européen, p. 213, (2006); Poiares Maduro, M., "*Keck: The End? The Beginning of the End? Or just the End of the Beginning?*", I.J.E.L. Vol 3 No 1, p. 30, (1994).

[390] See, *supra*, note 358, para. 85.

[391] See, *supra*, note 355.

brought within Article 28 EC scrutiny.[392] What is somewhat disappointing, however, is that although an assessment of the hindrance to the access to the Italian market for trailers was pivotal to this judgment and consequently to the applicability of Article 28 EC, there was no proper evaluation by the Court of the role of the selling arrangement within the jurisprudence relating to the free movement of goods. It is an evaluation that might have conceivably occurred on delivery of the judgment in *Åklagaren v. Percy Mickelsson and Joakim Roos*.[393] However, whilst it was to be hoped that the Court would have seized that opportunity to make a full assessment of the place of the selling arrangement, the judgment was delivered without a mention of the *Keck* ruling. It reaffirmed the use of the market access test, finding that rules restricting the use of personal watercraft were a barrier to market access. The effect of the use of the market access test has been to restrict *Keck* to situations which concern arrangements for sale and which will now be construed in the narrowest possible sense. It is a judgment in which the Court has taken for itself an ability to scrutinize an even wider category of measures for Article 28 EC compatibility.

### G. Conclusions

The jurisprudence of recent years with respect to the free movement of *goods*, *persons, services* and *capital* has been one that has been characterized by a process of revaluation and reassessment by the Court of Justice. The procedure of translating Treaty rights into free movement reality has been refocused; it now involves an assessment of the *restriction* to the free movement right. It is a process in which the shackles of slavish adherence to Treaty strictures with respect to the justification have been removed, and an increased reliance has been placed upon the operation of the principle of *proportionalit*y. It therefore appears that a uniformity of approach by the Court extending to all free movement jurisprudence now exists.

The concentration on the identification of the restriction to Treaty free movement rights is to be welcomed. It is a terminology representative of Treaty exhortations prohibiting restrictions to free movement rights.[394] It encompasses, but is broader than, the discriminatory measure. No longer does discrimination *per se* have to be identified, nor instances of direct discrimination justified, by recourse to the grounds provided by the Treaty.

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[392] Judgment 10 February 2009, para. 58.

[393] Case C-142/05, , 2006. *Åklagaren v. Percy Mickelsson and Joakim Roos*, Judgment of the Court of Justice of the European Communities (Second Chamber) 4 June 2009.

[394] With respect for example to rights of establishment, Art. 43 EC and *services*, Art. 49 EC.

There now appears an apparent uniformity in the approach taken by the Court within free movement jurisprudence to attack national measures restrictive of free movement rights. The identification of the restriction, the availability of grounds of justification *(*which are themselves broad in concept),[395] are integral elements presenting an aura of uniformity in the current approach. Any such move by the Court of Justice is to be welcomed as a move towards clarity and transparency. Nevertheless, any pretensions that a procedural uniformity has been adopted by the Court may be misguided. With respect to the free movement of goods, for example, it is evident that despite the uniformity of language, there remains an adherence to the identification of discrimination.[396] The old nuances associated with this division remain in the context justification. Arguably, this could be regarded as a sleight of hand; the language is modern, that of the examination of the *restriction* to the free movement of the imported good. The reality, however, appears to be the maintenance of the strict adherence to Treaty grounds for justification in instances wherein there has been *de facto* discrimination.

It is evident that the jurisprudence relating to the free movement of goods, persons, services and capital exhibits a common purpose; the removal at the national level of restrictions on the exercise of those free movement rights. Whether the unity of that purpose is served by the latent maintenance of the arbitrary distinction of discrimination within the field of the free movement of goods with respect to the issues of justification remain another matter. On the other hand, there is evidence that the latent acknowledgment of this distinction may become superfluous. There is increasingly a cross-fertilization of the grounds of justification in free movement of goods jurisprudence.[397]

There is at present a methodology in free movement jurisprudence separating the attainment of the free movement right in relation to goods as separate and distinct from that relating to persons and services. Whether the jurisprudence pertinent to the implementation of all Treaty free movement rights is aligned in the future by the Court must remain a moot point. At present, the jurisprudence of the free movement of goods occupies a rather *ad hoc* position, with an eye to the future, a foot in the past. The inherent reliance on academic distinctions relating to discrimination, insofar as the issue of justification is concerned, to some extent sits uneasily with the adoption of the universal approach of addressing the restriction presented by the national measure to the exercise of the right of free movement. In the cause of greater transparency with respect to free movement of goods, it is a reliance that ought not to continue. So too within free

[395] The Treaty grounds are to be strictly interpreted.

[396] So too with respect to the jurisprudence in matters related to taxation. See BARNARD (note 47), 319.

[397] Note the observation of the observation of Advocate General Jacobs in Case C-136/00, *Rolf Dieter Danner,* 2002 E.C.R. I-8147, para. 40.

movement of goods jurisprudence, the cases of *Commission* v. *Italian Republic*[398] and *Åklagaren v. Percy Mickelsson and Joakim Roos*[399] present a timely reminder to the Court that the contradictions and uncertainties imposed by the introduction of the concept of the selling arrangement must at some stage be adequately dealt with. It is arguable that whilst the refusal to extend the concept of the selling arrangement to yet another category of goods in *Commission v. Italy*[400] is to be welcomed, it was also an opportunity missed by the Court to explain fully its reasoning. The argument presented in the opinion of A.G. Bot in *Commission v. Italy* that the "selling arrangement" effectively be brought within the umbrella of the traditional structure imposed by Article 28 EC has much merit.[401] The ensuing introduction by the judgment in that case of the market access test signifies the embracing of wider powers by the Court with respect to the scrutiny of the national measure. Such introduction is at the expense of a restriction on the future application of *Keck*. It is arguable however, that the subsequent opportunity presented by *Åklagaren v. Percy Mickelsson and Joakim Roos*[402] both to clarify and to re-impose uniformity within the jurisprudence relating to goods was avoided. In result, the tensions and contortions inherent within the jurisprudence relating to the free movement of goods appear to be set to continue. Such tensions and contortions arguably remain to be addressed by the Court at some future time. In the cause of reinforcing the move towards transparency, certainty, and uniformity across all free movement jurisprudence resulting from the focus on the restriction to free movement presented by the national measure, arguably it is a pity that the opportunity for the establishment of clarity in this context was overlooked by Court in *Roos*.[403]

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[398] Case C-110/05, *Commission of the European Communities v. Italian Republic*, Judgment of the Court of Justice of the European Communities (Grand Chamber), 10 February 2009.

[399] Case C-142/05. *Åklagaren v. Percy Mickelsson and Joakim Roos*, Judgment of the Court of Justice of the European Communities (Second Chamber) 4 June 2009

[400] See, *supra*, note 400.

[401] See, *supra*, note 400. paras. 91-93.

[402] See, *supra*, note 400.

[403] See, *supra*, note 400.