Common Market Law Review **41:** 743–773, 2004.

FROM *GEBHARD* TO *CARPENTER*: TOWARDS A (NON-)ECONOMIC EUROPEAN CONSTITUTION

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1. Introduction

The free movement provisions have always been generously construed by the European Court of Justice. Through a teleological rather than a literal interpretation, the Court ensured that individuals would enjoy tangible benefits from their State's membership of the Community. Further, the Court has adopted a dynamic interpretation, reflecting both the evolving nature of the Community integration process, and changes in society.

If, following *Keck*, the scope of the free movement of goods has been (at least partially) curtailed, the scope of the free movement of persons provisions has been considerably broadened. The step towards a non-discriminatory assessment of the workers and establishment provisions, together with some developments which have occurred in the field of services, have made it considerably easier for individuals (and companies) to bring themselves within the scope *ratione materiae* of the Treaty. Consequently, an increasing number of rules are subject to the necessity and proportionality assessment demanded by the imperative requirements doctrine. This creates three main problems. First of all, it is debated whether such intrusion into the regulatory autonomy of the Member States is justified by the Treaty. Secondly, it is increasingly difficult to assess the boundaries of the free movement provisions. Thirdly, the practical difficulty in drawing a demarcation line between rules which can be construed as obstacles to the exercise of the movement rights, and rules which should fall altogether outside the scope of the Treaty, is reflected in the difficulty of providing a satisfactory conceptual framework capable of defining the scope of the Treaty rights whilst also accommodating the developments of the often confused case law.

* This is an elaborated version of a paper presented in November 2002 at a lunch-time seminar organized by the Cambridge Centre for European Legal Studies. I am grateful to Michael Dougan, Professor Derrick Wyatt, and Catherine Barnard for their comments. The usual disclaimer applies.

This article aims at exploring these problems by focusing on the case law on non-discriminatory restrictions in the field of free movement of persons. It will be argued that whilst the discrimination/double burden approach does not reflect the State of the law, the market access theory either cannot explain the post-*Gebhard* case law, or, if it can, it does not provide us with any indication as to the content of the free movement provisions. It will then be suggested that the internal market rationale does not provide a valid explanation for some of the Court's case law. Rather, the rulings in *Gebhard*, *Gourmet* and *Carpenter* are part of a broader phenomenon, where the Court is protecting the citizen *qua citizen*, rather than simply *qua mover*, thereby assuming a role which traditionally pertained to national constitutional courts. Thus, it will be argued, these cases should be seen in the context of the introduction, and development, of Union citizenship.

We will start by outlining the different conceptual frameworks elaborated in relation to the free movement provisions, to then turn our attention to the case law to assess how the theory relates to the practice, and to suggest a new framework of analysis.

2. Different conceptual frameworks: An outline

Three main theories have been put forward in relation to the scope of the free movement provisions: the discrimination theory, the double burden theory and the market access theory.

Those who support the discrimination theory argue that the Treaty is concerned only with the elimination of protectionism and with ensuring that foreign goods and persons be treated, substantially and formally, in the same way as domestic goods and nationals.[1] Provided there is no discrimination, there is no infringement of Community rights, and the courts should refrain from judicial scrutiny under Community law. The scrutiny of non-discriminatory rules under the Treaty free movement provisions implies a choice about the appropriate level of regulation which, it is argued, is not justified by the Treaty. In the absence of harmonization such choices are reserved to the Member States, since the Treaty does not provide any indication as to a preferred type of market economy. Those who support a discriminatory approach to the Treaty free movement provisions usually accept that their view is prescriptive rather than descriptive. In other words, they accept that a discriminatory approach does not explain all of the case law of the Court.

1. See e.g. Snell, *Goods and Services in EC Law* (OUP, 2002).

Rather, they argue that a discriminatory approach is the only approach which is consistent with the Treaty, and that those cases which cannot be so explained were wrongly decided.

The double burden theory might be seen as a more refined version of the discrimination theory. According to this theory, the internal market requires not only the abolition of discrimination but also that, even lacking harmonization, only one set of rules should apply to those covered by the free movement provisions. This theory was first elaborated to conceptualize the mutual recognition principle established in *Cassis*,[2] and provides us with a satisfactory explanation of the rationale behind it. The idea is that any given product should be regulated only once, since to do otherwise would mean to impose a double burden on imported products which would have to satisfy both the regulatory standards of the Member State of origin and those of the Member State of destination. The double burden is borne *only* by those products which move, and in this way the imposition of additional regulatory standards directly impacts on the freedom granted by the Treaty. The mutual recognition principle therefore ensures a *substantial* rather than just a formal notion of free movement. Bernard has argued that this theory provides a suitable explanation for the *Keck* case law.[3] In his view, the selling arrangements/product requirements dichotomy is entirely consistent with the double burden theory: the way the product is sold is regulated *only* by the place of sale, whilst the way the product is produced is regulated *only* by the Member State of origin. Should a Member State wish to impose additional rules, thus creating a double burden, it has to justify them according to the mandatory requirements doctrine.[4]

The double burden theory is entirely consistent with the internal market rationale. Once a product has been lawfully produced it should be able to *move* freely around the Community: a market without frontiers so requires. The deregulatory effect that might result from negative integration is then

2. Case 120/78, *Rewe-Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein* ("Cassis de Dijon"), [1979] ECR 649.

3. Joined Cases C-267/91 & C-268/91, *Keck and Mithouard*, [1993] ECR I-6097. Bernard, "La libre circulation des marchandises, des personnes et des services dans le Traité CE sous l'angle de la compétence", 33 CDE (1998), 11; and id., *Multilevel Governance in the European Union* (Kluwer Law International, 2002), esp. ch. 2.

4. However, it should be borne in mind that the dichotomy selling arrangements/product requirements does not exhaust the type of rules which might be caught by Art. 28. If it is true that in most of the cases which concern rules different from product requirements/selling arrangements the rule under scrutiny either imposed a barrier to movement or it was discriminatory, that was not true in Case C-189/95, *H Franzén*, [1997] ECR I-5909, where a licence requirement was held to be caught by Art. 28 regardless of whether discrimination was involved.

purely incidental, and judicial scrutiny is not concerned with the appropriate level of regulation, but with ensuring that no product should be asked to satisfy more than one set of rules. Thus the internal market, as far as negative integration is concerned, requires that there should be no discrimination, no frontier obstacle and no double regulatory burden.

The double burden theory also provides a suitable explanation for the Court's case law on free movement of persons before 1991,[5] i.e. before the step towards a non-discriminatory assessment of those provisions. Thus in the case of services, the Member States must take into account the checks performed by the Member State of establishment.[6] In the case of workers and establishment, however, there is usually no issue of double burden because the person, by establishing herself in another Member State, ceases (for most purposes) to be regulated by the Member State of origin. Consistently, the Court's interpretation was limited to an assessment of whether the rules were indirectly discriminatory. In the case of qualification requirements – which have always been considered as barriers falling within the scope of application of Article 43[7] – the case law might be seen both as a consistent application of the principle of non-discrimination, and as a consistent application of the double burden theory, in that to ask a person who already satisfied one set of rules to satisfy another set of rules in order to take advantage of the Treaty freedom, is tantamount to imposing a double burden on the migrant. Thus, in this case as well, negative integration might be seen as concerned only with ensuring the free *movement* of persons and as not interfering with the appropriate level of regulation. The internal market then requires that there should be no discriminatory rules, and that economic actors be able to move around without being penalized for so doing.

The double burden theory overlaps significantly with the discrimination theory, in that a rule which imposes a double burden is almost inevitably also indirectly discriminatory since it affects migrants or imported products more than it affects non-migrants or domestic products. However, the double bur-

5. In Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and Others* v. *Comissariaat voor de Media*, [1991] ECR I-4007, and Case C-76/90, *M Säger* v. *Dennemeyer & Co. Ltd*, [1991] ECR I-4221, the Court explicitly departed from a discriminatory assessment of Art. 49. It can be argued that, already in Case 205/84, *Commission* v. *Germany* (Insurance), [1986] ECR 3755, the Court had used a non-discriminatory approach to the restrictions under scrutiny. However, even though the language used in the ruling is consistent with this interpretation, the case concerned a residence and registration requirement, which can be seen (and are usually seen) as indirectly discriminatory.

6. Consistent case law, e.g. Joined Cases 110 & 111/78, *ASBL* v. *W Van Wesemael and others*, [1979] ECR 35; Case 279/80, *Criminal proceedings against A J Webb*, [1981] ECR 3305.

7. Consistent case law, e.g. Case 11/77, *Patrick* v. *Minister of Cultural Affairs*, [1977] ECR 1199.

den theory is conceptually more satisfactory than a mere discriminatory theory since it focuses on the specific effect of the rule on products and migrants, rather than on a comparative assessment between national products/persons, and foreign products/persons. Thus, for instance, the double burden theory can be easily applied even when there is no national comparator, i.e. when there is no domestic production of the goods in question or no national service provider.[8] The two theories are in any event closely linked and indeed their supporters share the same concern over the fact that the Treaty should not be construed as a weapon to challenge Member States' regulatory policies which do not *specifically* affect *movement*.

Lastly, several authors believe the key concept in free movement law to be market access.[9] Thus the internal market requires not only the elimination of directly and indirectly discriminatory barriers, but also the elimination of those rules which affect the economic actors' ability to access the market, since the reason why we have the free movement provisions in the first place is that economic operators should be given the opportunity to exercise their economic activity. We shall analyse the market access theory in detail in the course of this article, since this is the only theory which might be able also to accommodate the developments which have occurred in the case law.

3. Climbing the ladder: Towards a new layer of fundamental rights protection

3.1. *The first step: The Gebhard (r)evolution*

In the previous section, I pointed out that the double burden theory provides a suitable explanation for the Court's case law on the free movement of persons before 1991. In the 1990s, the Court progressively expands its interpre-

8. In its assessment of the discriminatory effect of internal taxation under Art. 90, the Court has expressly held that the lack of domestic production of the same or similar goods excludes the possibility of discrimination, Case 47/88, *Commission* v. *Denmark* (Registration duty for cars), [1990] ECR I-4509; upheld in Case C-383/01, *De Danske Bilimportører* v. *Skatteministeriet, Told- og Skattestyrelsen*, [2003] ECR I-6065; for a requirement that the situation be comparable before a finding of discrimination can be made, see Joined Cases C-430 & 431/99, *Inspecteur van de Belastingdienst Douane, Rotterdam district* v. *Sea-Land Service Inc and Nedlloyd Lijnen BV*, [2002] ECR I-5235, para 36.

9. See e.g. A.G. Jacobs' Opinion in Case C-412/93, *Société d'importation Éduard Leclerc-Siplec* v. *TF1 Publicité SA*, [1995] ECR I-179; Weatherill, "After *Keck*: some thoughts on how to clarify the clarification" 33 CML Rev. (1996), 885; Barnard, "Fitting the remaining pieces into the goods and persons jigsaw?" 26 EL Rev. (2001), 35; Poiares Maduro, "Harmony and Dissonance in Free Movement" in Andenas and Roth (Eds.), *Services and Free Movement in EU Law* (OUP, 2002), p. 41.

tation of the persons provisions by explicitly including non-discriminatory restrictions first within the scope of Article 49,[10] and then within the scope of Articles 39 and 43.[11] The expansion of the scope of Article 49 is not in itself particularly problematic. The provision of cross-border services bears, in fact, considerable resemblance to the free movement of goods. The service provider moves, if at all, to the host Member State only *temporarily*; in so doing, she does not cease to be regulated by the Member State of establishment. Thus, the imposition of the rules of the host State means that the provider might be subject to a double regulatory burden, having to satisfy both the rules imposed by the Member State of establishment and those of the State of destination.[12] The situation is however different in relation to Articles 39 and 43.[13] This is because in the case of workers/establishment the migrant usually establishes herself in the host country.[14] By so doing, the person ceases, for most purposes, to be regulated by her country of origin. Thus, there is usually no issue of a double regulatory burden. When people establishing themselves in another country could question only directly and indirectly discriminatory rules, the double burden theory, with its stress on the inherent division of regulatory competences, provided an accurate explanation of the rationale behind the Court's interpretation. As a matter of principle, an established person would be subject to all (non-discriminatory) rules of the host-State, since those would be the *only* rules to which she would be subject and would therefore not impose any double regulatory burden on the migrant. In *Gebhard*,[15] however, the Court departed from its previous case law and accepted that non-discriminatory rules could also be construed as obstacles to the freedom of establishment.[16]

Mr Gebhard was a German lawyer working in Italy; he used the title *avvocato* without having previously enrolled at the local bar as required by Italian law. When other lawyers complained about the improper use of the

10. *Gouda* and *Säger*, both cited *supra* note 5.

11. Cf. Case C-19/92, *D Kraus* v. *Land Baden-Württemberg*, [1993] ECR I-1663; Case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165; Case C-415/93, *Union Royal Belge des Sociétés de Football Association ASBL* v. *Jean-Marc Bosman*, [1995] ECR I-4921.

12. Cf. Case C-379/92, *Peralta*, [1994] ECR I-3453 in which the Court relied on a double burden type of reasoning to exclude the applicability of Art. 49 to the rules imposed by the Member State of establishment to its providers.

13. Cf. also Daniele, "Non-discriminatory restrictions to the free movement of persons", 22 EL Rev. (1997), 191.

14. Of course with the exception of frontier workers.

15. Cited *supra* note 11.

16. The Court had already indicated its willingness to do so in *Kraus*, cited *supra* note 11; however, in that case the rules did put those who took advantage of their free movement rights at a disadvantage.

title, Mr Gebhard argued that the Italian rule was incompatible with Article 43 and/or 49. Having instructed the national court as to the criteria to assess whether a person is established in a Member State, or rather just providing services there, the Court went on to analyse the compatibility of the enrolment requirement with Community law. It is important to stress that, for the purposes of the case, there was no issue of mutual recognition of qualifications. The issue was not whether Italy had a duty to recognize experience and qualifications acquired elsewhere. Rather, it was whether Italy could impose a formal requirement for the exercise of a profession (registration at the local bar in order to use the title *avvocato*) on a foreigner who was taking advantage of his freedom of establishment under Article 43. The rule was non-discriminatory since it applied in exactly the same way to Italian citizens wishing to use the title *avvocato*, and did not impose any *specific* burden on foreigners willing to exercise their profession in Italy. Indeed, if Germany had had identical rules (which was in fact the case), Mr Gebhard's situation would have been exactly the same. In the words of Advocate General Tesauro, the alleged barrier in this case arose not from different regulatory standards, but from the very *existence* of regulatory standards.[17] This notwithstanding, the Court found that the rules at issue fell within the scope of the Treaty, since the free movement provisions encompass any "rule liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty".[18]

The broad and unqualified *Gebhard* formula leaves us in the dark as to the reason why rules which do not have an impact on the economic actors' ability to move should fall within the scope of the Treaty. By allowing Mr Gebhard to question those rules, thereby requiring that a necessity and proportionality assessment be carried out, the Court severs the link between the need to achieve an internal market, a market without "frontiers" in which persons and goods can *move* freely, and the rules at issue. The lack of specificity of the intra-Community situation, together with the lack of any qualification to the test, suggest that almost any rule could be construed as falling within the scope of the Treaty.

17. Cf. Opinion in Case C-292/92, *Hünermund and Others* v. *Landesapothekerkammer Baden-Württemberg*, [1993] ECR I-6787; also White, "In Search of the Limits to Article 30 of the EEC Treaty", 26 CML Rev. (1989), 235.

18. Operative part of the ruling. The fact that the Court accepts that *in principle* non-discriminatory rules regulating an economic activity can be imposed on persons established within the territory, together with the fact that those rules are generally found to be justified being subject to a "light" proportionality assessment, does not make this step any less significant. What is determinant for our purposes, is that the Court brings these rules within the ambit of application of the Treaty thus accepting to scrutinize their aim and proportionality.

The *Gebhard* interpretation has been confirmed in later cases, and given that the ruling therein was delivered by the full Court, this is hardly surprising. In *Mac Quen*,[19] a rule which reserved eye examinations to qualified ophthalmologists was found to fall within the scope of application of Article 43. As in *Gebhard*, the issue was not one of mutual recognition of qualifications, but rather whether a Member State could subject the exercise of a profession to a qualification requirement. Consistently with *Gebhard*, the Court found that such a requirement had to be justified. In *Gräbner*,[20] the same reasoning applied to an Austrian rule which prevented people not holding a degree in medicine from practicing as *Heilpraktikers* (lay health practitioners). In *Payroll*,[21] the claimants attacked Italian legislation reserving the calculation and printing of payslips for undertakings with less than 250 employees to centres for data elaboration constituted and composed exclusively by people registered as labour consultants, lawyers, professional accountants, and other regulated professions. Once again, the Court confirmed the *Gebhard* ruling and found that, even though aimed at the protection of employees, the Italian legislation was not necessary and thus it was inconsistent with the freedom of establishment.

It is clear that the rules at issue in those cases would have been considered as restricting the freedom to provide services if applied to a service provider established in another Member State. However, what was at issue in these cases was the States' power to impose such rules on established persons, i.e. persons over which the State, being the main if not only regulator, should have had full regulatory competence. For these reasons, the developments in *Gebhard* represent not only a step towards a considerable expansion of the scope of the free movement provisions, but also a *qualitative* leap in the content of the free movement rights. Thus, if previously the Court's interpretation of the persons provisions was instrumental – or could be so explained and justified – to the achievement of the internal market, the move towards a non-discriminatory assessment adds a new dimension to the rights conferred upon individuals by the Community. After the developments in *Gebhard* it is possible – at least to a certain extent – to attack rules which merely regulate

19. Case C-108/96, *D Mac Quen et al* v. *Grandivision Belgium SA*, [2001] ECR I-837.

20. Case C-294/00, *Deutsche Paracelsus Schulen für Naturheilverfaharen GmbH* v. *K Gräbner*, [2002] ECR I-6515.

21. Case C-79/01, *Payroll Data Services (Italy) et al*, [2002] ECR I-8923. I am not including Case C-255/97, *Pfeiffer Großhandel GmbH* v. *Löwa Warenhandel GmbH*, [1999] ECR I-2835 in the cases decided according to the *Gebhard* rationale, since the Court, in its rather confused reasoning, relies on the fact that the rule at issue – an order restraining an undertaking from using a given name already used by another trader – operated to the detriment of companies having their seats in other Member States thus suggesting some discriminatory effect.

an economic activity, even when there seems to be no *intra-Community* specificity. Furthermore the same approach has been adopted in the case of free movement of capital.[22] Thus, for instance, rules concerning "golden shares", shares held by the Government which carry special powers (usually in privatized industries), have been held to infringe the freedom of movement of capital.[23] Some of the rules struck down by the Court, such as the limit to ownership in the *BAA* case, did not have a *specific* effect on intra-Community movement of capital. And indeed the reasoning of the Court suggests that the *mere existence* of special rules might discourage investors from investing in a company, and thus restrict market access.[24]

This development begs then the question as to which rules, if any, are excluded from judicial scrutiny. Attempts to curtail the breadth of the *Gebhard* formula have so far failed,[25] and, as we shall see below, it is questionable whether the market access test can provide any coherent framework for this case law.

The developments which have occurred in the field of Article 43, have been mirrored in the case law relating to Article 49, where the Court has allowed service providers to challenge rules imposed by their State of establishment even in cases in which that State is the only regulator, and there is no *specificity* of the intra-Community situation. We shall first consider this case law to then turn to assess whether the market access test is capable of accommodating these new developments.

3.2. *The second step: The Sodemare/Gourmet case law*

In *Alpine*,[26] the Court accepted to scrutinize a non-discriminatory rule imposed by the Member State of establishment on the grounds that it constituted a restriction on the provider's ability to supply its services abroad. The provisions at stake forbade financial service providers from approaching prospective clients by phone or in person, when they had not previously

22. Cf. also Commission's Communication on certain aspects concerning intra-EU investments, O.J. 1997, C 220/15, esp. point 9.

23. Case C-367/98 *Commission* v. *Portugal* (Golden shares) [2002] ECR I-4732; Case C-483/99 *Commission* v. *France* (Golden shares) [2002] ECR I-4781; Case C-503/99 *Commission* v. *Belgium* (Golden shares) [2002] ECR I-4809; Case C-98/01 *Commission* v. *UK* (BAA golden share) [2003] ECR I-4641.

24. C-98/01, *Commission* v. *UK* (BAA), cited *supra* note 23, esp. para 47.

25. This subject to the doctrine of effect too uncertain and indirect; see Joined Cases C-418/93 to C-421/93, *Semeraro Casa Uno et al.* v. *Sindaco del Comune di Erbusco et al*, [1996] ECR I-2975.

26. Case C-384/93, *Alpine Investments BV* v. *Minister van Financiën*, [1995] ECR I-1141.

agreed in writing to be contacted (so called "cold-calling"). The prohibition applied regardless of the domicile of the potential client, i.e. regardless of whether the potential client was established in the Netherlands or abroad. Alpine, a financial service provider established in the Netherlands, attacked the rules on the ground that they restricted its ability to contact clients in other Member States. The Court found such rules to constitute a barrier to the intra-Community provision of services, since they directly affected access to the market in services in other Member States. The rules at stake therefore needed to be justified in relation to the imperative requirements doctrine. By doing so, the Court at least partially departed from the home-country principle, i.e. the principle according to which the Member State of establishment is at freedom to regulate persons established in its territory as it deems appropriate, provided of course the rules are non-discriminatory.[27]

Nonetheless, Bernard has argued that the ruling is consistent with the reallocation of regulatory competences endorsed by the double burden theory.[28] Thus, the rules in *Alpine* concerned the way the service was to be provided in another Member State and that is allegedly a matter for the recipient Member State. For this reason, the Netherlands, as the provider's State of establishment, had to justify its rules. Attractive as it is, this interpretation might not be consistent with the approach so far followed by the Court, since in the case of services there seems to be a presumption that the host-State is always required to justify the imposition of its own rules on a foreign service provider. However, if, as argued by Bernard, the guiding principle underlying *Alpine* is a reallocation of regulatory competences/double burden rationale according to which the State of origin cannot impose rules concerning the *way* the service is to be provided in another Member State, then – consistently with the *Keck* approach – the State where the service is provided should be in no need to justify rules relating to the *way* the service is provided. Thus, for instance, a Member State would not have to justify the imposition on foreign providers of non-discriminatory rules on how clients can be contacted by providers of financial services. Whilst there is no case law on this specific aspect, it can be doubted that, given the Court's broad ap-

27. The home-country principle has never been explicitly endorsed by the Court, rather being a doctrinal rationalization of the case law, stemming from both the case law on Art. 29, where the Court, by limiting its scrutiny to discriminatory restrictions, has left it to the Member States to decide the level of regulation to which home-producers are subject, and from the Court's references to the fact that goods and services need to be lawfully produced before a right to free movement can be enjoyed.

28. Bernard, op. cit. *supra* note 3 (1998), 11, 34–35; and later Snell, op. cit. *supra* note 1, pp. 93–94.

proach, such rules would fall automatically outside the scope of Article 49. And indeed, the earlier decision in *Gouda* seems to point to the opposite result.[29] In that case, the Court accepted to scrutinize a rule which imposed a Sunday ban on the provision of a service (television advertisement), i.e. a rule which was akin to a Sunday trading ban.

If it can be questioned that the repartition of regulatory competences endorsed by the double burden theory can provide a satisfactory descriptive framework for the *Alpine* approach, the ruling can still be explained with a movement rationale. The rule was extra-territorial in nature, and thus undeniably imposed a direct hindrance to the provider's ability to supply services abroad, a hindrance which was not faced by providers established in the host Member State. *Alpine* was in fact unable to advertise its financial products abroad, even though that would have been possible under the rules of the Member State where the service was to be provided. It can then be argued that the rules in *Alpine* still bore an intra-Community specificity capable of justifying the Court's scrutiny.

However, subsequent cases relating to home-country rules seem to indicate a much broader construction of the services provisions. In *Sodemare*,[30] the claimant, an Italian subsidiary of a Luxembourg company, attempted to rely on Article 49 against Italy, the State of secondary establishment, on the sole ground that it provided services to, *inter alia*, foreign recipients. The disputed rule provided that only non-profit making bodies could conclude contracts with the local health authority in order to obtain repayment for social insurance services of a health care nature. The company challenged the rule on the grounds that about 2% of its residents were foreigners, and that about 10% of the enquiries were received every year from persons resident in other Member States.[31] The Court, having referred to the general principle according to which a provider might rely on Article 49 when providing a service for persons established in another Member State,[32] found that in this case Article 49 could not be relied upon, since the recipients would establish

29. *Gouda*, cited *supra* note 5.

30. Case C-70/95, *Sodemare SA* v. *Regione Lombardia*, [1997] ECR I-3395.

31. The company challenged the rules also under freedom of establishment; it could be questioned whether the fact that *Sodemare* was in principle allowed to rely both on Art. 43 and on Art. 49 in order to challenge the *same* rule, is not inconsistent with the residual nature of the provisions on services provided by Art. 50 EC.

32. Also cases C-18/93, *Corsica Ferries Italia Srl* v. *Corpo dei Piloti del Porto di Genova*, [1994] ECR I-1783; C-379/92, *Peralta*, [1994] ECR I-3453; C-224/97, *Erich Ciola* v. *Land Vorarlberg*, [1999] ECR 2517; in *Alpine Investments*, cited *supra* note 26, the Court stated that in order to be able to rely on Art. 49 there is no need of "the prior existence of an identifiable recipient" (para 19).

their residence in Italy. Thus the situation, from a services viewpoint, was wholly internal. However, the Court failed to curtail or specify the extent to which an established provider may rely on the Treaty just because its recipient *might be* foreign.[33] In other words, is the potentiality of a foreign recipient enough to bring the situation within the scope of the Treaty and challenge the rules of the Member State which might well be the *only* regulator? Following *Gourmet*, the answer to this question seems to be positive.

In *Gourmet*, the Court scrutinized a total ban on the advertisement of alcoholic beverages on the grounds that it restricted "the right of press undertakings established in the territory of that Member State to offer advertising space in their publications to potential advertisers established in other Member States."[34] The approach in *Gourmet* signals a considerable expansion in the scope of Article 49 because, in this case, *Gourmet* was challenging the very *illegality* of the provision of services in its Member State of establishment. The fact that *Gourmet* could not provide its services to foreign recipients was a purely incidental factor and the specificity of the intra-Community situation was lacking. The situation was then different both from that at issue in *Schindler*, and from that at issue in *Alpine*.

In *Schindler*[35] the claimants, established in Germany, attacked the British ban on the provision of lotteries on the grounds that it constituted a restriction on their freedom to provide services. In other words, the foreign providers sought to provide a service in a Member State in which that service was unlawful. The restriction amounted thus to a ban on service provision, and the Court found it to be a restriction justified according to imperative requirements of public interest. In *Schindler*, the provider sought to extend its market to another Member State. However, it did *lawfully* provide the service in its Member State of establishment (where it was regulated). In *Gourmet*, the provider could not – in its Member State of establishment – *lawfully* provide the service.

The situation in *Gourmet* also differed markedly from that in *Alpine*. In *Alpine*, the rules at issue directly restricted the possibility of advertisement *in another* Member State. The situation was thus dynamic in nature, the rule

33. In the other cases in which Art. 49 was relied upon against the Member State of establishment the rules were either indirectly (*Corsica Ferries*, cited *supra* note 32) or directly discriminatory (*Erich Ciola,* cited *supra* note 32) and directly affected the providers' freedom to provide the service. On the other hand in *Peralta*, cited *supra* note 32, the claimant could not rely on Art. 49 against the Member State of establishment since the rule was neither discriminatory nor protectionist.

34. Case C-405/98, *Konsumentombudsmannen (KO)* v. *Gourmet International Products AB (GIP)*, [2001] ECR I-1795, para 38.

35. Case C-275/92, *HM Customs Excise* v. *Schindler*, [1994] ECR I-1039.

was extra-territorial and the barrier to the possibility of "exporting" services was direct. If *Alpine* was challenging a rule imposed by its Member State of establishment, the rule prohibited something which, although unlawful in the Member State of establishment, was *lawful* in the recipient's Member State *where* the service would be provided. On the other hand, in *Gourmet*, the Swedish rule did not impede domestic producers or service providers from advertising their goods/services *abroad*; nor did it affect the provider's ability to provide a service in another Member State where the service was lawful.[36] It merely affected the provider's ability to provide the service in the Member State of establishment.

The significance of the *Sodemare/Gourmet* approach is of practical as well as theoretical importance. To allow a provider to challenge the rules imposed by its Member State of establishment on the sole ground that its recipients *might* be foreign, means to dispose, not only of the home-State control principle, but also of the requirement that the service be *lawfully* supplied before the provider is allowed to rely on the Treaty. In both *Sodemare* and *Gourmet*, the service was to be provided in the Member State of establishment, and the rules did not have an extra-territorial effect. Furthermore, in *Gourmet*, the service to be provided in the State of establishment was a service which was there unlawful, and indeed it was the very illegality of the service which was under attack. *Gourmet* was allowed to challenge rules which did not have a *specific* cross border effect: those rules did not prevent *access* to a foreign market, rather they prevented the very *existence* of a domestic market. Taken at face value, the *Gourmet* approach would for instance allow a challenge of the unlawfulness of prostitution services on the grounds that some of the clients might be foreign.[37]

The end result of the *Gourmet* approach (especially if seen together with the *Gebhard* case law) is to subject the Member States' ability to regulate operators established in their territory to a general proportionality requirement.

The question is then whether the *Gebhard/Gourmet* developments, which cannot be explained having regard to the double burden theory, can be accommodated in the framework provided by those who support the market ac-

36. The situation was also different from that in Case C-362/88, *GB-INNO-BM* v. *Confédération du Commerce Luxembourgeois Asbl*, [1991] I-667, where the restriction on advertisement was imposed by the recipients' Member State and directly affected the undertaking's ability to attract clients from that country.

37. The fact that rules prohibiting soliciting would probably be found to be justified on public morality grounds does not affect this assessment: it is the subjection of the rules to a proportionality assessment to be problematic in constitutional terms, i.e. the extent of application of the free movement provisions and consequently of judicial review of national legislation under Community law.

cess approach. And in any case, it should be queried whether this case law can find sufficient normative basis in the Treaty free movement provisions. We shall first analyse the market access test, to then turn our attention to the questions of legitimacy.

4. Market access: A concept in search of a definition?

Several authors have argued that the free movement provisions should be construed with reference to the market access test.[38] And indeed there is increasing case law to suggest that market access is central not only to the scope of Article 49,[39] but also to the workers (and probably the establishment) provisions. Thus, the Court referred to market access in *Bosman*,[40] and in *Graf* excluded the applicability of Article 39 because the rules at issue did not affect access to the labour market.[41] It is then undeniable that the Court considers a hindrance to market access as falling within the scope of the Treaty free movement of persons provisions. As for goods, the reference to market access in paragraph 17 of the *Keck* ruling,[42] together with recent developments,[43] seem to suggest that market access is also relevant to Article

38. See e.g. A.G. Jacobs in *Leclerc-Siplec*, cited *supra* note 9. Cf. Weatherill, op. cit.; Barnard, op. cit.; Poiares Maduro, op. cit.; all *supra* note 9.

39. This was openly stated in *Alpine Investments*, cited *supra* note 26.

40. Cited *supra* note 11, para 103.

41. Case C-190/98, *V Graf* v. *Filzmoser Maschinenbau GmbH*, [2000] ECR I-437, esp. para 23. In Joined Cases C-51/96 & C-191/97, *C Deliège* v. *Ligue Francophone de Judo et Disciplines Associées ASBL et al.*, [2000] ECR I-2549 the Court relied on the fact that the rule was neither discriminatory nor regulating the conditions to access to the market, to exclude the applicability of Art. 49 to selection rules for participation in sporting competitions, subject to the *caveat* that the rules be inherently necessary for the organization of such competitions.

42. Case C-267 & 268/91, *Keck and Mithouard*, [1993] ECR I-6097, para 17 "Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 [now 28] of the Treaty." The Court's reference to market access seems indicative that it considers market access relevant. Thus, what the supporters of the market access test question is the absolute presumption that non-discriminatory selling arrangements do not affect market access. Arguing the *Keck* test might be more flexible than it seems at first sight, Koutrakos, "On groceries, alcohol and olive oil: More on the free movement of goods after *Keck*", 26 EL Rev. (2001), 391.

43. The ruling in *Gourmet*, cited *supra* note 34, seemed to indicate that the Court's readiness to scrutinize barriers preventing market access even when non-discriminatory. However, in Case C-322/01, *Deutscher Apothekerverband eV* v. *0800 DocMorris NV*, judgment of 11 Dec. 2003, nyr, the Court retreats to a purely discriminatory assessment of the selling arrange-

28. Before starting our discussion on market access, however, we should attempt to look at the different meanings which might be given to the notion of a "barrier to market access".

4.1. *The economic view*

In economics, there are, broadly speaking, two views of what constitutes a barrier to market access.

At one extreme, a barrier to market access is understood as being a barrier to entry, whether created by circumstances or by legislation.[44] Barriers to entry are "barriers that make it more costly for new firms to enter an industry".[45] In economic terms, therefore, a barrier to market access is defined through a comparative assessment.[46] Market access is thus construed as the ability for an economic actor to gain access to a market on an *equal footing* with other economic operators. This definition seems entirely consistent with the Court's view in *Keck*, but for the fact that the Court makes it clear that a rule preventing market access (i.e. a total barrier) falls within the definition, regardless of discrimination.[47]

At the other extreme, *any* regulation can be seen as a potential barrier to access, since *any* regulation imposes and implies compliance costs. In order to distinguish acceptable from unacceptable barriers to market access, regard is paid to whether the measure is arbitrary or not, rather than on its disparate effect. So, for instance, a ban on Sunday trading might not be considered arbitrary, since it can be justified by the protection of workers or of cultural and social traditions. On the other hand, a rule which restricted the sale of newspapers to two hours a day could be seen as an arbitrary restriction on market access. This approach is more similar to that followed by the Court in the free movement of persons cases, and indeed the imperative requirements

ment at issue (a ban on internet sale of medicinal products). In Case C-337/95, *Dior* v. *Evora*, [1997] ECR I-6013, the Court explicitely referred to market access (para 51).

44. Of course we are concerned only with obstacles to access raised by regulations, or individual behaviour, not with "natural" obstacles (such as geographical conditions).

45. Foldovary, *Dictionary of free market economics* (Edward Elgar Publishing Inc, 1998), 48. See also Black, *Oxford Dictionary of Economics*, 2nd ed. (OUP, 2002) entry "market access" which defines market access as the "freedom to sell in a market", and identifies as institutional obstacles restrictions on entry, tariffs and quotas.

46. A ban on advertisement is then considered a barrier to entry if, for instance, the products aims to compete with national established products since it would make it more difficult for the imported product to penetrate the new market. On similar lines see the Court's reasoning in *Gourmet,* cited *supra* note 34.

47. From an economic viewpoint, it is a matter of discussion whether a non-discriminatory barrier which prevents market access is to be considered a barrier to entry.

doctrine can be seen as a refined version of the "arbitrariness" test. The rule is not arbitrary *only* if it pursues an interest consistent with Community law, and if the restriction it imposes is necessary and proportionate.

The tension between these two meanings which can be given to the concept of market access is reflected both in the case law of the Court (*Keck vis-à-vis* the case law on persons), and in the scholarly debates, to which we shall now turn our attention.

4.2. *Market access and free movement: An intuitive approach?*

In the context of Community law, those who support the market access test seem to place themselves in between the extremes outlined above, adopting an *intuitive* rather than an economic approach to market access. Thus, whilst a purely discriminatory assessment is rejected, there is an attempt to provide a test which would allow us to distinguish between rules which should be subjected to judicial scrutiny, and rules considered neutral as regard intra-Community trade which should fall altogether outside the scope of the Treaty free movement provisions. However, there is no indication of precisely which rules should be considered as *not* constituting a barrier to market access. Reliance on notions such as direct or substantial hindrance to market access,[48] do very little to provide a clear indication of what would fall outside the scope of the free movement provisions.[49] Further, this "intuitive" approach, also fails to identify *why* given rules do not affect market access whilst others do.[50]

48. Weatherill, op. cit. *supra* note 9, esp. 896, proposes a test of direct or substantial hindrance to market access. A.G. Jacobs in *Leclerc-Siplec*, cited *supra* note 9, suggested a test of substantial hindrance to market access. A similar test has been suggested by Barnard, op. cit. *supra* note; A.G. Lenz in Bosman, cited *supra* note 11, para 205, proposed a distinction between rules which regulate *access* to an occupational activity (which should be scrutinized), and rules which regulate the *exercise* of that activity (which should not be scrutinized).

49. It is interesting to note that bans on advertisement and television sales, the two examples relied upon by A.G. Jacobs in *Leclerc-Siplec*, cited *supra* note 9, to argue against the *Keck* test and in favour of the market access test, would not necessarily fall without the scope of Art. 28 even after *Keck*. A total ban on advertising might very well have a discriminatory impact because, as the Court held in *Gourmet*, it might act to the detriment of imports, and A.G. Jacobs himself concedes that this would be a likely result even in the post-*Keck* era. On the other hand, the ban of television sales might be seen as a rule imposing a double burden, in that imposing the rule of the country of destination in that case would mean that the person would have to comply with two set of rules in relation to the same event.

50. On the lack of a precise definition of the notion of market access see also Craig and De Burca, *EU Law* (OUP, 2002), p. 656. They suggest market access to be a means to an end, the end being "to maximize sales/profits for the individual producer, and to enhance optimal allocation of resources for the Community as a whole".

If, admittedly, this "intuitive" approach might still be useful in the case of goods and services, where the situation is dynamic in nature and thus a barrier to market access might very well result also in a barrier to movement,[51] it clearly shows its definitional deficiency when used in the context of non-discriminatory barriers to establishment and workers, where there might not be any cross-border specificity to help us distinguish rules which should be scrutinized from rules which should fall outside the scope of the Court's scrutiny. Thus if "in *Keck* and *Leclerc-Siplec* ... the limit of commercial freedom could not be directly connected to any cross-border aspect of the activity",[52] and thus the rules at issue did not directly or substantially hinder market access, why was that not also the case in *Gebhard*?[53] In *Gebhard*, the rule under scrutiny was a rule which merely regulated the exercise of an economic activity, providing that established lawyers should register at the local bar in order to use the title *avvocato*. There was no limit to the exercise of the economic activity which could be *specifically* connected to a cross-border aspect. For the purpose of the ruling, Mr Gebhard was not providing cross-border services; he was providing services in Italy where he was established. But in doing so, he was no different from any other person established in Italy: there was no intra-Community specificity to his situation. If the barrier could not be connected to any cross-border aspect of the activity, then why was the rule scrutinized in the first place? Similarly, in *Gourmet* the limit to commercial freedom was not directly connected to the cross-border aspect of the activity. Rather it was a natural consequence of the mere *existence* of the domestic rules.

4.3. *Advocate General Fennelly's test: Formal restrictions to market access*

In order to provide a definition of market access capable of explaining also the scrutiny of non-discriminatory restrictions in the field of establishment, whilst still allowing for some differentiation between non-discriminatory rules which should or should not be caught by the Treaty, Advocate General Fennelly has suggested the notion of formal restrictions on access to economic activity in another Member State. These would be "(c)onditions ... prescribed by law or regulation non-compliance with which constitutes an absolute bar to taking up the activity in question".[54] The rules at issue in

51. On static and dynamic rules see Mortelmans, "Article 30 of the EEC Treaty and legislation relating to market circumstances: time to consider a new definition?" 28 CML Rev. (1991), 115.

52. Weatherill, op. cit. *supra* note 9, at 905.

53. Cited *supra* note 11.

54. *Graf*, cited *supra* note 41, Opinion para 28.

Gebhard undeniably had this effect since they constituted a necessary condition to lawfully exercise the legal profession. However, when an alleged obstacle does not arise from a *formal* restriction to market access, but rather "from some neutral material barrier or disincentive deriving from national regulations, the prejudice to the exercise of Community-law rights must be established",[55] i.e. some sort of disadvantage arising from the fact that a free movement right has been exercised. In this way, the effect of the *Gebhard* ruling could be curtailed so as to exclude some rules from the reach of the Treaty.

However, the test proposed by Advocate General Fennelly, whilst providing an accurate description of the state of the law, does not provide us with any explanation as to the reason why different types of rules are to be treated in different ways. In other words: why does a prejudice to the right of free movement need to be established only in some cases but not in others? One possible explanation for this distinction is that Advocate General Fennelly considers *formal* barriers to market access as inherently prejudicial to free movement, and thus as being caught by Articles 43/39 and in need of justification. However, neither the wording nor a purposive interpretation of the Treaty seem to support this claim. Article 43 provides that freedom of establishment shall be exercised under the conditions laid down in the host State, whilst Article 39 provides for the abolition of any discrimination based on nationality. Whilst the wording of both articles suggests that the right to equal treatment is not the only right that employed and self-employed people derive from the Treaty,[56] it does suggest that, once in the territory of the host State, individuals should abide by the laws of that State. The Treaty wording seems thus not to support the notion of a formal barrier to market access. The question is then whether a purposive interpretation of the Treaty justifies such an approach; i.e. whether an internal market/movement rationale provides an explanation for the formal barrier approach. There are three arguments which could be put forward in order to defend the view that the inclusion of formal barriers to market access in the scope of Article 43 is justified by a teleological reading of the Treaty.

First, the formal barrier test is reminiscent of the case law on absolute bans on imports and provision of services. Thus, one could argue that since absolute barriers to the import of goods and the provision of services are caught by the Treaty even when non-discriminatory, that should be the case also for the other free movement provisions. Analogical reasoning would

55. *Graf*, cited *supra* note 41, Opinion para 31.

56. Arts. 39 and 43 state that the freedoms shall include (or entail) the right to equal treatment.

then lead to request Member States to justify rules such as those identified by Advocate General Fennelly, since they also "bar" an economic activity. However, the analogy would be misplaced. There are in fact two ways, by no means mutually exclusive, to explain the case law on goods and services. A total barrier to imports runs against the very prohibition on quantitative restrictions contained in the Treaty. This was the argument used by the Court in *Henn and Darby*.[57] Similarly, a prohibition on the provision of services might be seen as an absolute restriction which, according to the wording of the Treaty, would have to be justified.[58] But also, and more importantly, both a ban on imports and a ban on the provision of services run against the mutual recognition principle.[59] Once a product/service has been lawfully produced, i.e. has been *regulated somewhere* in the Community, it should be able to freely move unless there is a good reason to stop it.[60] However, if the product has not been lawfully produced (such as heroin), then there is no issue of free movement.[61]

In the case of established persons, the migrant is subject (for most purposes) to just one set of regulations. Similarly, in cases where a service provider can rely on Article 49 only on the grounds that it provides a service for recipients established abroad, even though there is no barrier to cross-border activities, the economic actor is allowed to question its main (and maybe

57. Case 34/79, *R* v. *Henn and Darby*, [1979] ECR 3795. It is not clear whether the Court still considers ban on imports as quantitative restrictions or rather as measures having equivalent effect that can be justified also according to the mandatory requirements. See e.g. Case 216/84, *Commission* v. *France* (Milk substitutes), [1988] ECR 793; Case 76/86, *Commission* v. *Germany* (Milk Substitutes), [1989] ECR 1021; Case 52/88, *Commission* v. *Belgium* (Gelatine), [1989] ECR 1137; and Case C-67/97, *Bluhme*, [1998] ECR I-8033, esp. para 19.

58. *Schindler*, cited *supra* note 35; the Court allows absolute bans to the provision of a service to be justified also by the imperative requirements doctrine.

59. On mutual recognition see Armstrong, "Mutual Recognition" in Barnard and Scott (Eds.), *The Law of the Single European Market. Unpacking the premises* (Hart, 2002), ch. 9.

60. This case law is entirely consistent with the internal market and the attempt to eradicate any protectionist measures. Take the case of a Member State which produces only beer, and bans marketing and imports of wine; judicial scrutiny of such measure would be entirely consistent and necessary for the establishment of a true internal market.

61. To the author's knowledge no case has arisen so far in relation to "illegal goods", i.e. goods which are illegal throughout the Community. The legal situation of drugs was considered in relation to taxation in Case 240/81, *Senta Einberger* v. *Hauptzollamt Freiburg*, [1982] ECR 3699 and in Case 294/82, *Senta Einberger* v. *Hauptzollamt Freiburg*, [1984] ECR 1177. The issue of whether a product not produced according to the rules of the country of origin could nonetheless benefit from Art. 28 was left unanswered in Case 94/83, *Criminal Proceedings against A Heijn BV*, [1984] ECR 3263. In this case A.G. Lenz submitted that the condition that a product be lawfully produced in order to benefit of Art. 28 was not an essential requirement.

only) regulator.[62] It is then difficult to understand how the imposition of one regulatory standard can automatically be considered as a hindrance to movement without there being the need to prove a prejudice to the exercise of the free movement rights. The idea that a formal bar to activities of established persons should be subject to judicial scrutiny is, in this case, not justified by a regulatory repartition/mutual recognition approach, or by a movement rationale.

Secondly, it might be that the relevant factor which brought about the Court's scrutiny in the cases on establishment, as examined above, is the underpinning internal market assumption that, once a person is exercising a profession somewhere in the Community, she should be allowed to exercise that profession in other Member States unless there is a good reason to prevent her.[63] This could be the rationale behind *Mac Quen* and *Payroll*:[64] in both cases, the parent companies were lawfully providing the service in their State of primary establishment, and wanted to extend their market to other Member States. One could argue that the fact that they were doing so through the establishment of subsidiaries should not affect their freedom to elaborate a pan-European strategy and gain access to other markets. Thus, there might have been an intra-Community specificity which justified the Court's scrutiny.

However, this was not the case in *Gebhard* and *Gräbner*.[65] In those cases, there was no attempt to elaborate a pan-European strategy; and indeed those cases – surely the latter, probably the former – related to primary, rather than secondary, establishment. Furthermore, in all four cases, the Court's reasoning does not suggest that there is any assessment of the existence a *specific* barrier to intra-Community movement. In order to fall within the scope of the Treaty, a rule needs to satisfy a two-limb test: it has to *hinder* or *discourage* movement, and it has to be not justified. As in the case of goods in the 1980s, the Court is now focusing primarily on the second limb of the test, i.e. on an assessment of the proportionality of the measures at stake. It is only in a few cases that the first limb of the test is deemed not to have been satisfied and thus there is no need to address the proportionality of the measures at stake.[66] It is this focus on the proportionality assessment, rather than

62. See the discussion on *Sodemare* and *Gourmet* above.

63. I am particularly grateful to Michael Dougan for raising this objection.

64. *Mac Quen*, cited *supra* note 19; and *Payroll*, cited *supra* note 21.

65. Case C-294/00, *Deutsche Paracelsus Schulen für Naturheilverfaharen GmbH* v. *K Gräbner*, [2002] I-6515.

66. E.g. in those in which the alleged limitation imposed has very little connection to the exercise of the economic activity, such as *Graf*, cited *supra* note 41, or is inherent in the very existence of the economic activity such as in *Deliège*, cited *supra* note 41.

on the existence of a barrier to intra-Community movement, that makes it more difficult to find an intra-Community specificity of the rules under scrutiny so as to provide some guidance as to the rationale behind their inclusion within the scope of Article 43. Similarly, in *Gourmet* – as said before – the issue was not one of attempting to penetrate new markets, but rather to "create" a domestic market.

Thirdly, it could be argued that the formal barrier to market access test is justified by a "movement rationale". The Treaty grants a right to move to exercise an economic activity. If the Member States impose conditions on the exercise of economic activities, they are indirectly imposing a restriction on the individual's right to move, in that, given the hindrance to the exercise of the economic activity (the very reason why the migrant would migrate), the individual might be discouraged from moving and thus discouraged from exercising her right. This approach reflects very much the reasoning of the Court in *Bosman* and *Gebhard*, and it might (in a rather artificial way) accommodate the ruling in *Gourmet*. But if that is so, if rules regulating the exercise of economic activities constitute indirect hindrances to movement, then why (or on which basis) is there a distinction between those imposing a *formal* barrier to access and those imposing just a *material* barrier to access? After all, high levels of social contributions or of direct or corporate taxation[67] might have a much more discouraging effect on individuals' or companies' desire to move between Member States. If the rules in *Gebhard* were caught because they indirectly discouraged the exercise of an economic activity in Italy, so too should tax and social security rules. If that is so, however, the market access test loses any ability to distinguish between rules which should be scrutinized and rules which should be not. It would be just as well to say that, as construed by the Court, the free movement of persons provisions are capable of encompassing virtually any rule. To interpret such regulations as a barrier (formal or substantive) to market access means that we are embracing a broad notion of market access, whereby potentially *any* rule relating to the exercise of an economic activity can be construed as a barrier to market access.[68] This is not to say, however, that *all* rules will be so

67. In Case C-451/99, *Cura Anlagen GmbH*, [2002] ECR I-3193, the Court found that an indirect tax on vehicles was in breach of Art. 49 because not proportionate. A.G. Jacobs, on the other hand, found a breach because the tax had a more burdensome effect on foreign car leasers. This case however does not seem to signal the Court's willingness to scrutinize the *level* of taxation, but rather the *way* such taxation is calculated.

68. Barnard and Deakin, "Market Access and Regulatory Competition" in Barnard and Scott, op. cit. *supra* note 59, ch. 8, have elaborated on A.G. Fennelly's test proposing a distinction between formal and substantial barriers to market access. The former would catch only quantitative restrictions type of rules, whilst the latter would catch almost any rule.

construed. In its erratic way of proceeding, the Court does adopt different tests in relation to different rules, not least for social security and tax rules, and might well exclude some rules because of an a priori assessment of their legitimacy.

The ambiguity surrounding the market access test does little to help the quest for clarity which characterizes the debate over the free movement provisions: the problem is that either a discriminatory approach is accepted, similar to the Court's approach in *Keck*; or potentially almost any regulation might be seen as a restriction to market access. If the latter view is accepted, the test loses the ability to distinguish coherently between rules which are subject to a proportionality assessment and rules which need not be so assessed. Even were we to accept this as an inevitable result, we should still query whether the notion of market access is the test which is better apt to unveil the consequences of the Court's interpretation, or rather whether it is an "internal market blanket" covering a state of affairs which is perceived as deeply uncomfortable. The market access test might indeed attempt to conceal the fact that the Court's interpretation of the free movement provisions might no longer be justified with regard to the internal market rationale alone.

5. A right to exercise an economic activity free of disproportionate regulations: Towards a liberal European Constitution

In the previous section, I attempted to show how the market access test is either unable to provide an explanation for the *Gebhard/Gourmet* case law; or is so broadly construed as to fail to provide us with any demarcation line in relation to the scope of the free movement provisions. The developments in *Gebhard/Gourmet* represent not only a step towards a considerable expansion of the scope of the free movement provisions, but also a *qualitative* leap in the content of the free movement rights. Thus, if the Court's interpretation of the persons provisions beforehand was instrumental – or could be so explained and justified – to the achievement of the internal market, the move towards a non-discriminatory assessment of the rules imposed by the main (if not only) regulator adds a new dimension to the rights conferred upon the individuals by the Community. It is now possible to attack rules – at least to a certain extent – which merely regulate an economic activity, even though there is no double burden nor cross-border issue.

It is the very lack of *specificity* of the intra-Community situation, specificity which exists when there is a double burden or a cross-border issue, which brings about the qualitative change. In other words, the internal market ratio-

nale provides no justification by itself for allowing a challenge to rules which bear no relation to the individual's ability to move around the Community.[69] The "free movement" right is not construed anymore as a mere right to move, but rather as a right to pursue an economic activity in another country or even, in the *Gourmet* type of situations, in one's own country. The Community right then becomes akin to the claim that, in national contemporary liberal democracies, citizens have against their own State not to be *unjustly* limited in their freedom, be this freedom economic or of another kind. A new layer of protection to personal freedom is added, and the very claim which traditionally pertains to the realm of national constitutional law, the right not to be restrained without good reason, becomes a Community right, albeit restricted mainly to the economic dimension.

To hide this behind the notion of market access therefore seems an attempt to seek a consistency between the internal market rationale and the interpretation given by the Court, which does not in fact exist. In other words, to speak about barriers to market access in these cases might be misleading, in that it covers the real significance of the *Gebhard* development. In *Gebhard*, the Court leaves economic agnosticism to espouse a notion of liberal market economy.[70] However, this does not mean that the Court is embracing a *neo-liberal* approach, i.e. hostile to *any* regulation, in the belief that it is for the market to regulate itself. Rather, it is embracing a *liberal* approach, in the sense of protecting the individual from *unnecessary* regulation.[71] It is exactly this preference towards the individual rather than the "market" that explains the case law where there is no issue of any barrier to movement, or where the economic-right dimension is minimal if not altogether inexistent. The fact that the Court's interpretation is not endorsing a neo-liberal approach to regulation is demonstrated by the fact that it uses a "light touch" on proportionality when dealing with this type of restrictions,[72]

69. Cf. also Case C-376/98, *Germany* v. *Parliament and Council* (Tobacco advertising), [2000] ECR I-8419, in which the Court refused to accept that a mere difference in regulatory standards between different Member States automatically constitutes a barrier to movement or a distortion of competition capable of justifying the exercise of Community regulatory competence under Arts. 94 and 95 EC.

70. The expression is borrowed from Bernard, "Discrimination and Free Movement in EC Law", 45 ICLQ (1996), 81.

71. See Bernard, op. cit. *supra* note 3 (2002) esp. ch. 2 and his point that, were the Court to have embraced a neo-liberal view of the Economic Constitution, it would have to be much more heavy-handed in its review of Community legislation.

72. In all cases but *Payroll* (*supra* note 21), the Court found the measures to be justified. On the different intensity of proportionality review in Community law cf. de Búrca, "The principle of proportionality and its application in EC Law" 13 YEL (1993), 105.

thus ensuring that the Member States retain some power to decide the regulatory threshold and to balance competing values.

5.1. *The Court as a guarantor of the individual*

I have argued that the *Gebhard* developments suggest that the Court is ready to scrutinize national rules in terms of proportionality even in cases in which there seems not to be any hindrance to movement. By so doing, the Court is acting as a constitutional court willing to protect the individual from unnecessary or unjust regulation. If it is true that the Court has always been sensitive to the needs of those who exercise their Treaty rights, in the last decade we have also witnessed a more interventionist approach, together with a use of the free movement provisions which is sometimes purely instrumental to the achievement of the intended result. This is particularly visible in the case law relating to immigration rules, and especially in *Carpenter*.[73]

Mrs Carpenter was a Philippine national who, having overstayed her entry permit to the UK, married a British national. She then sought leave to remain in the UK, which was denied. The UK authorities then threatened to make a deportation order if she did not voluntarily leave the country. According to UK immigration rules, she was to leave the UK and then seek, from abroad, permission to enter as a spouse of a UK citizen. Her husband had an advertising business and a "significant proportion" of his trade was with advertisers established elsewhere in the Community. He thus travelled to other Member States in order to pursue his business. Mrs Carpenter claimed that her deportation would affect Mr Carpenter's right to carry on his activity, since he would have either to go and live with her in the Philippines or be separated from his family. The UK Government and the Commission considered the situation to be purely internal, since Mr Carpenter had not exercised his right of movement, and was thus covered neither by secondary legislation,[74] nor by the *Singh* ruling.[75] The Court found that Mr Carpenter was a

73. Case C-60/00, *M Carpenter* v. *Secretary of State for the Home Department*, [2002] ECR I-6279; cf. also A.G. Ruiz-Jarabo Colomer in Case C-386/02, *J Baldinger* v. *Pensionsversicherungsanstalt der Arbeiter*, Opinion delivered 11 Dec. 2003, nyr, case still pending. The A.G. seems much more interested in avoiding a "clear injustice", than in establishing a link between the rule at issue and Community law.

74. Council Directive 73/148, O.J. 1973, L 172/14, on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, did not apply since it does not discipline the right of residence of family members of a service provider established in her State of origin.

75. Case C-370/90, *The Queen* v. *Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department*, [1992] ECR I-4265 in which the Court held that the situation of a national returning to her Member State of origin after having exercised her right

service provider within the meaning of Community law, since he provided services for recipients in other Member States. It then found that his separation from his wife would be "detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be *deterred* from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse".[76]

The ruling is puzzling and difficult to explain in relation to the free movement provisions. Both statements, that Mr Carpenter was a service provider, and that deportation is a disruption to family life, are indeed true. However it is the link between the two which is missing. In other words, whilst it is obvious that emotional distress affects one's working abilities, it is not clear how such distress can be construed as a barrier to one's ability to provide services across the Community. By reading the rest of the ruling, it is clear that the Court's worry lies not with Mr Carpenter's ability to provide services, but rather with the fact that the deportation order affected his right to respect for family life as guaranteed by the European Convention of Fundamental Rights. The fact that the Treaty was triggered allowed the Court to assess the compatibility of the UK rules with the Convention. By severing the link between service provision and obstacle, the Court *de facto* ensures that the individual's fundamental rights are protected in the case at issue. These rights, however, had nothing to do with a right to free movement. Rather, the case underlines the Court's self-perception as a guarantor that the individual is protected from executive/legislative misbehaviour.

The same is true, at least to a certain extent, of the decision in *Akrich*.[77] In this case, a Moroccan national married a UK national when he was unlawfully present in the UK. The couple then moved to Ireland, where Mr Akrich had asked to be deported, with the *sole* intention of triggering the Treaty (Mrs Akrich worked there). Upon returning to the UK, Mr Akrich argued that he was covered by the *Singh* ruling and that thus he derived a right of residence from his wife's Community rights.[78] The Court, in contrast with what decided in *MRAX*,[79] stated that the rights to residence that third country

to free movement is covered by Community law and therefore her spouse derives a right of residence from Community law.

76. *Carpenter*, *supra* note 73, para 39, emphasis added.

77. Case C-109/01, *Secretary of State for the Home Department* v. *H Akrich*, judgment of 23 Sept. 2003, nyr.

78. *Singh, supra* note 75.

79. Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)* v. *Belgium*, [2002] ECR I-6591, in which the Court accepted that Community law could be use to rectify the illegal status of a third country national spouse of Community mi-

nationals derive from their Community spouses are conditional upon the third country national being *lawfully* resident in a Member State at the time when he moves to another Member State where his spouse is migrating or has migrated. This notwithstanding, the Court imposed an obligation upon the Member States to respect the right to family life as guaranteed by Article 8 of the European Convention on Human Rights even in situations in which the third country national, being unlawfully present in the Community territory, is not otherwise protected by Community law.[80]

As a result of the rulings in *Carpenter* and *Akrich*, the Member States see significantly reduced the possibility to control illegal immigration through "exemplary" and perhaps draconian measures. Rather, Member States have to take into account – whenever there is a Community element, but even where such link is less evident – the personal situation of the persons concerned, both in assessing the applicability of the public policy derogation and in balancing immigration policies with the individual's fundamental rights. Again, the feeling one gets in reading those rulings is that of a Court which is willing to interfere in Member States regulatory policies in order to protect fundamental (this time non-economic) rights.

6. Free movement and citizenship: Two sides of the same coin?

So far I have argued that the recent case law on free movement of services and establishment is difficult to explain having sole regard to the internal market objective. Thus, the scrutiny of rules which do not bear any intra-Community specificity, such as the rules in *Gebhard*, *Gourmet* and *Carpenter*, is difficult to explain having regard to a movement rationale. Rather, this case law seems directed at protecting the *individual* from disproportionate regulations imposed by Member States regardless of an effect, even only potential, on the exercise of intra-Community economic activities. But if, as argued in the course of this article, the internal market objective does not lend sufficient legitimacy for such steps, where is legitimacy to be found? The answer, in the writer's opinion, might lie with the notion of Union citizenship.[81]

grant and even in the case where the marriage was subsequent to the migrant's exercise of the free movement right.

80. Cf. also Case C-71/02, *H Karner Industrie-Auktionen GmbH* v. *Troostwijk*, judgment of 25 March 2004, nyr, where the Court proceeded to the assessment of the compatibility of the rules at issue with fundamental rights despite having found that they constituted selling arrangements falling outside the scope of Art. 28.

81. Starting with Case C-85/96, *M Martinez Sala* v. *Freistaat Bayern*, [1998] ECR I-2691, the Court progressively fleshed out the rights deriving from Article 18. See especially Case C-

In *Baumbast*, the Court has made clear that the right to move and reside for economically inactive people (i.e. those who are not covered by the economic free movement provisions) is bestowed directly by Article 18 EC.[82] Whilst the Court has recognized that those rights are subject to limitations and conditions, not least those contained in the three residence directives,[83] it has also made clear that the Member States are bound by the general principles of Community law (and especially by the principle of proportionality) when limiting the Union citizen's right to reside in their country.

The developments which have occurred in relation to Article 18 might help providing a stronger normative basis for the expansion of the scope of the free movement of persons provisions. Thus, if the rulings in *Gebhard* and *Gourmet* suggest that the Treaty is now interpreted as granting a right to pursue an economic activity unhindered by disproportionate rules, and if those developments can hardly be conceptualized as being justified by a *movement* rationale, then they might be seen in the context of the *Baumbast* ruling. The (economic) mover is surely to be considered as falling within the scope of the Treaty, and a Union citizen is to be protected as a *citizen* by the principle of proportionality (and fundamental rights) at *least* for anything concerning the limitations and conditions imposed by the Member States on the exercise of her Community rights. It is possible that, the free movement of persons provisions read *together* with the Union citizenship provisions, provide sufficient normative basis to allow a challenge of the rules which merely regulate the *exercise* of an economic activity in the territory of another Member State. In other words, if the free movement provisions grant a right to exercise an economic activity in another Member State, albeit subject to the same rules to which nationals are subject, and citizenship grants a right to be treated proportionally whenever the State is limiting the right to move granted by Article 18, then it could be argued that the State has also to respect the principle of proportionality when limiting the right, granted by the Treaty, to exercise an economic activity in its territory. The provisions on free movement of persons can then be read together with those on Union

184/99, *R Grzelczyk* v. *Centre public d'aide social d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193; Case C-224/98, *D'Hoop* v. *Office national d'emploi*, [2002] ECR I-6191; Case C-413/99, *Baumbast and R* v. *Secretary of State for Home Department*, [2002] ECR I-7091.

82. Case *Baumbast*, cited *supra* note 80; and see Dougan and Spaventa, "Educating Rudy and the (non-)English Patient: A Double-Bill on Residency Rights under Article 18 EC" 28 EL Rev. (2003), 699.

83. Council Directive 90/364, O.J. 1990, L 180/26, on the right of residence; Council Directive 90/365, O.J. 1990, L 180/28, on the right of residence for employees and self-employed persons who have ceased their occupational activity; Council Directive 93/96, O.J. 1993, L 317/59, on the right of residence for students.

citizenship, to provide a more convincing explanation of the Court's case law.

As for the ruling in *Carpenter*, the case law on Union citizenship might also in this case provide some basis to explain the Court's approach. As said above, the Court held in *Baumbast* that the limitations to which the right to reside and move under Article 18 are subject, must be interpreted according to the general principles of Community law. This suggests that the conditions imposed on movement and residence are also subject to fundamental rights as general principles of Community law. One of the issues which might soon face the Court is the extent to which Union citizens are protected by the general principles of Community law when moving.

If, on the one hand, the Court's ruling in *Carpenter* suggests that the possibility of invoking fundamental rights as general principles of Community law against national rules is still limited to situations in which the rule either limits,[84] or derogates from,[85] the Treaty free movement rights, on the other hand, the normative justification adopted in that case is highly unsatisfactory – since it was achieved by the creation of an imaginary link between the disputed national rule and a barrier to the intra-Community provision of services. There are two possible ways in which the ruling could be accommodated in a more coherent way in the current Treaty framework. It could be argued that the general principles of Community law always apply, regardless of whether the situation is purely internal or not, i.e. not only regardless of a connection between the rule and a barrier to movement, but even regardless of a connection with the exercise of a right to *movement*.[86] The creation of Union citizenship (in this case of Art. 17 rather than 18) would then have the effect of establishing a general competence of fundamental rights review for national and European courts. This would be a revolutionary route, and one of debatable legitimacy. Furthermore, it would be inconsistent with Opinion 2/94,[87] where the Court excluded that the Community had competence to accede to the European Convention on Human Rights. And it would be inconsistent with the ruling in *Konstantinidis* where the Court refused to follow Advocate General Jacobs' suggestion that migrants should always be protected by fundamental rights as general principles of Community law,[88]

84. Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH* v. *Heinrich Bauer Verlag*, [1997] ECR I-3689.

85. Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT)* v. *Dimotiki Étairia Pliroforissis (DEP)*, [1991] ECR I-2925; *Carpenter*, cited *supra* note 73.

86. See also N. Nic Shuibhne, "Free movement of persons and the wholly internal rule: Time to move on?", 39 CML Rev.,731–771.

87. Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759.

88. Case C-168/91, *Konstantinidis* v. *Stadt Altensteig, Standesamt und Landratsamt Calw,*

regardless of whether the rule which might interfere with the citizen's right directly relates to the exercise of her free movement rights.[89] Such a route would also be at odds with the horizontal provisions of the Charter which make clear that the Charter – when and if it acquires a clear legal status – is binding on the Member States only when they implement Union law.[90] For the time-being, it is unlikely that the Court would be prepared to interfere to such an extent, and so intrusively, with choices which are under constant debate at institutional level.

Otherwise, it could be argued that the combined effect of Article 17 and 12 is to grant protection, as a matter of Community rather than national law,[91] to citizens who have not exercised their free movement rights, and who, by virtue of Article 12, cannot be discriminated against on grounds of nationality.[92] Thus, citizens in purely internal situations would be able through the combined effect of Article 17 and 12 to enjoy rights equivalent to those enjoyed by citizens who have exercised their Treaty rights, or who come within the scope of secondary legislation. This interpretation would also significantly expand the current scope of the Treaty, but less so than a free-standing fundamental rights protection. It would, in any case, provide a more convincing framework to accommodate the *Carpenter* ruling (and maybe also the *Gourmet* approach).

7. Concluding remarks

I have attempted to demonstrate that the *Gebhard/Gourmet* case law constituted a qualitative leap in the interpretation of the free movement provisions.

Ordnungsamt, [1993] ECR I-1191; but then see Jacobs, "Human Rights in the European Union: The Role of the Court of Justice", 26 EL Rev. (2001), 331.

89. See generally Demetriou "Using Human Rights through European Community Law", 5 EHLRR (1999), 484.

90. Charter of Fundamental Rights of the European Union, O.J. 2000, C 364/1, Art. 51. The rights in the Charter will thus apply in a narrower way than fundamental rights as general principles of Community law, since, as currently interpreted, general principles apply whenever a Member State is acting within the *scope* of Community law, rather than just when implementing Union law.

91. Several national constitutions (e.g. Italian, Austrian, French, Belgian) provide for a general right of equality which has been used to rectify the problem of reverse discrimination arising in purely internal situations. Thus, through the medium of national constitutional law some citizens already enjoy a protection equivalent to that afforded to those who are protected by the Treaty free movement provisions.

92. Johnson and O'Keeffe, "From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989–1994", 31 CML Rev. (1994), 1313, have advocated the introduction of a general principle of equality in Community law, which would apply to Community and third country nationals alike.

By allowing judicial scrutiny of non-discriminatory rules against the State of establishment, the Court stepped beyond a movement rationale. Whilst the discrimination/double burden approach cannot accommodate these developments, to rely on the notion of market access to justify such case law might be misleading, since in order to do so a very wide interpretation of market access has to be given, which consequently allows scrutiny of almost any regulation. Thus, I preferred to describe the step taken by the Court as granting an individual right to exercise an economic activity free of disproportionate regulation. I will accept the criticism that this definition is by no means more precise than a broad market access test, in that it tells us very little about which rules, if any, can be left outside the Court's scrutiny. However, the reason why I prefer to use the notion of a right to exercise an economic activity is because it better describes what is going on, having regard to two factors.

First of all, it draws attention to the fact that it is difficult to justify the Court's interpretation only having regard to the internal market rationale and negative integration. Secondly, I want to underline the fact that this case law is part of a broader phenomenon, which sees the Court expressing a strong preference for protecting the individual from rules it perceives as unjust. Thus, it is submitted that the two phenomena are linked and that we are witnessing a change in the conception of the Community, which goes far beyond a system aimed at guaranteeing free movement of factors of production and undistorted competition. In this regard, I have linked those developments to the ruling in *Carpenter*, where the Court's role as a protector of rights is even more evident.[93] In *Carpenter*, the link with the economic dimension is minimal, if at all existent; thus neither the broad notion of market access nor the notion of unhindered exercise of an economic activity provide any guidance as to the rationale behind the case.

If the internal market rationale cannot by itself provide a satisfactory answer for cases such as *Gebhard*, *Gourmet* and *Carpenter*, legitimacy for the Court's interpretation has to be sought somewhere else in the Treaty. Thus, the effect of the free movement provisions is to impose a duty to refrain from disproportionate interference with fundamental, economic and non-economic, rights. In expanding the boundaries of the Treaty free movement of persons provisions, so as to subject an increasing number of national rules to the proportionality assessment demanded by the imperative requirements doctrine, the Court is acting as a guarantor of individual rights *vis-à-vis* na-

93. Of course there are many areas of Community law where the Court seems less eager to perform a role as a guarantor of individual rights; e.g. the Court's refusal to relax the rules on standing in Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, [2002] ECR I-6677.

tional regulators. Taken together, those cases point at the emergence of a new constitutional dimension whereby the Member States bear considerable duties towards Union citizens *qua* citizens rather than just *qua* economic actors – a duty not to *interfere* with individual rights (*Gebhard*) and a duty to *respect* individual rights (*Carpenter*).[94] It is for this reason that both the *Gebhard/Gourmet* case law and *Carpenter* should be read in the context of Union citizenship.

94. And, following the developments in the health cases, one could argue that the Member States also have a duty to *protect* fundamental rights (on this issue see Spaventa "Public Services and European Law: Looking for Boundaries" 5 CYELS (2002), 271). In the health cases the Court relaxed its previous interpretation of the "remuneration" element necessary to trigger Art. 49, to include within the scope of that provision also rules which impose conditions on patients' ability to seek health care abroad at the expenses of the competent (public or semi-public) institution; see especially Case C-157/99, *B S M Geraets-Smits v Stichting Ziekenfonds VGZ* and *Peerbooms* v. *Stichting CZ Groep Zorgverzekeringen*, [2001] ECR I-5473; and Case C-368/98, *A Vanbraekel et al.* v. *Alliance nationale des mutualités chrétiennes*, [2001] ECR I-5363; C-385/99, *V G Müller-Fauré* v. *Waarborgmaatschappij OZ Zorgverzekeringen U A* and *E E M van Riet* v. *Onderlinge Waarborgmaatschappij Z A O Zorgverzekeringen*, [2003] ECR I-4509. These cases have been extensively analysed by the scholarship; e.g. Davies, "Welfare as a Service", 29 LIEI (2002), 27; Hatzopoulos, "Killing the national health systems but healing the patients? The European market for health care after the judgment of the ECJ in *Vanbraekel* and *Peerbooms*", 39 CML Rev. (2002), 683.