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**Free movement of persons: granting  
individual rights or regulating business?**

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# Free movement of persons: granting individual rights or regulating business

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## Introduction

It is now accepted that there has been convergence in the interpretation by the Court of Justice of the rules applicable to the free movement of goods, to the free movement of persons, and to the free movement of services.<sup>1</sup> The same trend can be seen in the less voluminous case law on the free movement of capital. The convergence of principles is generally, though not universally, seen as a good thing, despite earlier views that the law on the four freedoms might follow different routes. If the perspective from which the area is viewed is the dismantling of protectionist barriers, or the prohibition of discrimination in all its forms, or securing the completion of an internal market, then the logic of convergence is compelling. Jukka Snell has commented,

The building of a coherent and transparent European legal system demands a common approach that is based on generally accepted principles, not on dubious distinctions.<sup>2</sup>

However, there are practical and legal distinctions between the Treaty rules on the four freedoms which demand more than a monochrome view of the landscape. Let us look at a number of those distinctions.

The rules in the EC Treaty on goods prohibit State measures which favour the domestic market. As Wouter Wils has noted, Article 28 (ex 30) EC is about 'policing the borderline between legitimate and illegitimate national regulation'.<sup>3</sup> The emphasis is on State measures. By contrast, the benefits granted by Article 39 EC are given to individuals and may be asserted against both State actors and private parties. So the prohibition on discrimination based on nationality applies to a private sector employer as well as to State entities; by contrast a private seller of goods may urge consumers to buy national by singing the praises of British cheese or fruit, but the State may not do so.<sup>4</sup>

The Treaty provisions on the right of establishment and on services use the language of prohibiting restrictions, before moving on to specify certain

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<sup>1</sup> See, for example, Jarass, 'A unified approach to the fundamental freedoms' in M Andenas and W-H Roth, *Services and Free Movement in EU Law*, Oxford University Press, 2002, at 141.

<sup>2</sup> J Snell, *Goods and Services in EC Law. A Study of the Relationship between the Freedoms*, Oxford University Press, 2002, at 15.

<sup>3</sup> Wils, 'The search for the rule in Article 30 EEC: much ado about nothing?', (1993) 18 *ELRev* 475, at 477.

<sup>4</sup> See Case 249/81 *Commission v Ireland*, [1982] ECR 4005, and Case 222/82 *Apple and Pear Development Council v K J Lewis Ltd*, [1983] ECR 4083.

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individual or business rights. The Treaty provisions are silent on the source of those restrictions, but we now know from the case law that these Treaty articles are not just about State measures but are about professional and business regulation more generally.<sup>5</sup>

A further difference between the rules on goods and workers is that once goods are lawfully introduced into one Member State from outside the territory of the Member States, they are in free circulation in all Member States. There is as yet no corresponding rule in relation to workers or self-employed persons. Admission of a national of a non-Member State as a worker or self-employed person in one Member State does not grant any rights to enter and work in any other Member State.

There are practical differences too. The tendency in regulating the market in goods is to regulate the product; examples are requirements that the goods meet certain standards if they are to be sold on a particular market. By contrast, the tendency in regulating services is to regulate the provider of the service rather than the service itself. The consumer is protected by the integrity and standing of the service provider.<sup>6</sup> Yet in many respects services share a key characteristic with goods; they are a commodity to be sold in the market place.<sup>7</sup> Such an analysis might take an undergraduate by surprise since services are seen—and are so located in the EC Treaty—as the residual category of the free movement of persons once workers and establishment have been considered. There is justification for that since there is a closer link between service provision and the need for the service provider (or service recipient) to move across Member State borders than in the case of the supply of goods. There are also practical links between goods and services exemplified by the advertising industry. Advertising is a service, but much advertising is carried out through the medium of goods. In some cases, a magazine is wholly advertising material; in other cases, advertising is a feature of a magazine with a broader function.

Finally, there is the truism that people are not goods. Since the very early case law, the Court has recognised that there is a social as well as an economic dimension to the movement of people. As early as 1975 Advocate General Trabucchi said,

The migrant worker is not regarded by Community law—nor is he by the internal legal systems—as a mere source of labour but is viewed as a human being. In this context the Community legislature is not concerned solely to guarantee him the right to equal pay and social benefits in connection with the employer-employee relationship, it also emphasises the need to eliminate

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<sup>5</sup> See, for example, Case 107/83 *Ordre des Avocats v Klopp*, [1984] ECR 2971; Case C-415/93, *Union Royale Belge des Sociétés de Football Association, ASBL and others v Jean-Marc Bosman and others*, [1995] ECR I-4921; and Case C-309/99 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577.

<sup>6</sup> This has given rise to arguments as to which State should regulate the service provider: the State from which the service provider comes (the home State), the State in which the service is provided (the host State), or both.

<sup>7</sup> See, for a compelling argument that the economics of trade in goods and services are the same, J Snell, *Goods and Services in EC Law. A Study of the Relationship between the Freedoms*, Oxford University Press, 2002.

obstacles to the mobility of the worker, inter alia, with regard to the 'conditions for the integration of his family into the host country.'<sup>8</sup>

Since 1 November 1993,<sup>9</sup> the EC Treaty has contained a set of provisions now contained in Articles 17-22 EC on citizenship of the Union. The most important of the rights accorded to citizens is the right 'to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'<sup>10</sup> There is now a voluminous secondary literature on citizenship of the Union,<sup>11</sup> and a burgeoning case law which shows the Court of Justice giving real substance to what some initially argued were purely symbolic provisions.

I argue in this paper that the result is that there are distinct lines of case law concerned with (a) prohibiting discrimination on grounds of nationality or residence, (b) in the words of Wouter Wils cited earlier in this paper, 'policing the borderline between legitimate and illegitimate national regulation', and (c) granting rights for individuals and businesses. Following the introduction of citizenship of the Union, this third group needs to be sub-divided into rights for individuals and for business organisations<sup>12</sup> since no *de iure* corporate citizenship of the Union has yet been established.

### **From *Cassis de Dijon* to *Bosman***

In its seminal judgment in *Dassonville*,<sup>13</sup> the Court expanded the scope of what is now Article 28 EC by giving a very broad definition indeed to the term 'measures having equivalent effect to quantitative restrictions',

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having effect equivalent to quantitative restrictions.<sup>14</sup>

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<sup>8</sup> Case 7/75, *Mr and Mrs F v Belgium*, [1975] ECR 679. See, for an analysis of the distinction between the social citizen and the market citizen, Everson, M, 'The legacy of the market citizen' in J Shaw and G More (eds), *New Legal Dynamics of the European Union*, Oxford University Press, 1995, at 73.

<sup>9</sup> Following amendments made by the Treaty on European Union.

<sup>10</sup> Article 18(1) EC.

<sup>11</sup> Examples are S O'Leary, *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, Kluwer, 1996; Weiler, 'Citizenship and Human Rights' in J Winter and others, *Reforming the TEU: the Legal Debate*, Kluwer, 1996, at 57; Shaw, 'The many pasts and futures of Citizenship of the European Union' (1997) 22 ELRev 554; and Davis, 'Citizenship of the European Union ... rights for all?' (2002) 28 ELRev 121.

<sup>12</sup> The term 'business organisations' encompasses sole traders, partnerships, companies and other forms of enterprise through which business is conducted.

<sup>13</sup> Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837.

<sup>14</sup> At para. 5 of the judgment.

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However, the essence of the prohibition in Article 30 (now 28) EC remained less favourable treatment of imported when compared with domestic products. It was not long before it became apparent that national measures which appeared at face value to apply equally to imported and domestic products in fact treated domestic products more favourably. This led to one of the most famous and integrationist judgments ever handed down by the Court of Justice: the *Cassis de Dijon* case.<sup>15</sup> The first limb of the judgment took outside the scope of the prohibition in what was then Article 30 those measures of national regulation which applied equally to domestic and imported products, which served a legitimate purpose, and which were the least restrictive interference with the free movement of goods to meet that legitimate aim.<sup>16</sup> The second limb raised a presumption that goods which have been lawfully produced and marketed in one Member State may be lawfully marketed in other Member States.<sup>17</sup> Regulation which could not be justified under the exceptions in Article 36 (now 30) EC or the *Cassis de Dijon* 'mandatory requirements' doctrine would contravene the prohibition on measures having effect equivalent to quantitative restrictions in Article 30 (now 28) EC.

The early cases in the field of establishment and services<sup>18</sup> can be analysed either as legitimate measures of national regulation or in terms of having *in fact* a discriminatory effect.

However, the *Insurance Cases*<sup>19</sup> put forward a test for the compatibility of professional rules which bears similarities with the doctrine contained in the *Cassis de Dijon* line of authority. The litigation arose in the context of enforcement proceedings brought by the Commission alleging that the defendant Member States were infringing Articles 59 and 60 (now 49 and 50) EC and a directive on the provision of insurance services by maintaining in effect rules regulating the provision of insurance services which were incompatible with Community law. For example, one of the rules called into question was a requirement that a business providing direct insurance must be established and authorised to practice in the Member State in which the service was provided.

The Court's judgments contain a reminder of the distinction between establishment and services, and take a broad view of the concept of establishment.<sup>20</sup> The Court suggested that an undertaking would fall within

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<sup>15</sup> Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

<sup>16</sup> At para. 8 of the judgment.

<sup>17</sup> At para. 14 of the judgment.

<sup>18</sup> For example, Case 118/75 *Watson and Bellman*, [1976] ECR 1185 (administrative arrangements for recording the presence of nationals of other Member States in Italy); Case 16/78 *Choquet*, [1978] ECR 2293 (requirement to hold a national driving licence); and Case 107/83 *Klopp*, [1984] ECR 2971 (requirement to have only one office from which law is practised).

<sup>19</sup> Case 220/83, *Commission v France*, [1986] ECR 3663; Case 252/83, *Commission v Denmark*, [1986] ECR 3713; Case 205/84, *Commission v Germany*, [1986] ECR 3755; and Case 206/84, *Commission v Ireland*, [1986] ECR 3817.

<sup>20</sup> Significant because regulation by the host State is likely to flow from establishment there, but see the *Gebhard* case considered later in this paper, which adopts a rather more generous view of the level of infrastructure a business may have and still remain a service provider.

the concept of establishment even if its presence was not in the form of a branch or agency but merely consisted of an office managed by the undertaking's own staff or by a person who was not an employee of the undertaking but was authorised to act on a permanent basis for the undertaking. The Court also suggested that an undertaking established in another Member State whose activity is entirely or mainly directed towards the territory in which it is providing services and which is intending to avoid rules of professional conduct in that State would be properly treated as established there for public policy reasons.

The Court's ruling on the provision of services was that Articles 59 and 60 EC require the removal of all discrimination based on nationality and all restrictions on freedom to provide services imposed by reason of the fact that the undertaking is established in a Member State other than that in which the services are provided. The Court ruled that national rules could only be applied to undertakings established in another Member State and delivering services in the host Member State where:

- those rules can be justified by imperative reasons relating to the public interest, and
- the public interest is not already protected by the rules of the Member State in which the business is established, and
- the same result cannot be achieved by less restrictive rules.

So it would follow that a requirement of establishment in a Member State, as a condition of providing services there, would be a complete denial of the freedom to provide services, and so constitute a breach of the EC Treaty. Authorisation could, however, be justified if, for example, its purpose was to ensure that appropriate reserves were held in order to protect policyholders and insured persons.

In 1991 the Court, in its decision in *Säger*,<sup>21</sup> handed down the decision which is often regarded as the first in the modern line of cases on obstacles to the free movement of services. Weatherill calls it 'one of the clearest expressions of the use of the deregulatory influence of the *Cassis de Dijon* principle in the services sector.'<sup>22</sup> Dennemeyer, a United Kingdom company, found its business of providing patent renewal services hindered in Germany by German licensing requirements which applied equally to German and non-national enterprises. In practice, those licences were only available to those offering German professional qualifications. The Court concluded that such requirements could only be applied to Dennemeyer where it could be shown that they were justified by 'imperative reasons relating to the public interest' and where the restrictive effect was no more severe than necessary to achieve the object pursued. This involved a demonstration that the concern underlying the rules was not adequately addressed by the regulatory system of the home State (in this case, the United Kingdom). The objective of the German system of regulation was the protection of the consumer from harm that could be caused by inadequately

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<sup>21</sup> Case C-76/90, *Säger*, [1991] ECR I-4221; [1993] 3 CMLR 639.

<sup>22</sup> S Weatherill & P Beaumont, *EU Law*, 3rd ed. 1999, at 686.

qualified advisers. The requirements of the German licensing were not the least restrictive to achieve this objective.

The *Säger* principle was applied in the *Schindler* case,<sup>23</sup> which concerned restrictions placed at the material time in the United Kingdom on the sale of lottery tickets. Agents of a German lottery placed advertisements in English magazines and sold lottery tickets for the German lottery. A mail shot about the lottery was sent to certain people in the United Kingdom from the Netherlands. The mail shot was intercepted and confiscated by customs officers at Dover. This action pre-dated the amendments to the lotteries legislation to allow for the United Kingdom's lottery. The Schindler brothers contested the confiscation order arguing that the United Kingdom legislation was in breach of Article 30 (now 28) EC on the free movement of goods and Article 59 (now 49) EC on the freedom to provide services.

The Court ruled that lottery activities were not activities relating to goods, but were to be regarded as services under Article 59 EC. The price of the lottery ticket constituted remuneration for the services provided by the operator of the lottery to enable purchasers of tickets to participate in a game of chance with the hope of winning the draws for prizes. Lotteries are not governed by any other provisions in the Treaty. So was the United Kingdom legislation an obstacle to the free movement of services? In the United Kingdom, activities similar to lotteries were permitted: bingo and the football pools, and small lotteries were permitted. Despite this the Court concluded that the United Kingdom legislation was non-discriminatory. The United Kingdom's aims in banning lotteries were to prevent crime, to ensure the honest treatment of gamblers, to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess, and to ensure that lotteries could not be operated for personal and commercial profit, but only for charitable purposes. Ultimately the Court found that the prohibition in United Kingdom law was not inconsistent with Article 59 EC in view of the concerns about social policy and the prevention of fraud.<sup>24</sup>

One of the most important developments in the services sector is the judgment of 10 May 1995 in the *Alpine Investments* case.<sup>25</sup> Alpine Investments was a company established in The Netherlands. The case concerned the practice of telephoning members of the public to try to sell them securities investments. Dutch law prohibited this, in response to complaints from investors who had made unfortunate investments in the financial sector as a result of being telephoned.

In response to a reference from the Dutch Courts, the Court of Justice ruled that an offer to provide services came within Article 59. Community law was

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<sup>23</sup> Case C-275/92, *Schindler*, [1994] ECR I-1039, noted at (1994) 19 ELRev 642.

<sup>24</sup> See also Case C-124/97 *Läärä*, [1999] ECR I-6067, and Case C-67-98 *Zenatti*, [1999] ECR I-7289, where the Court accepted as permissible certain systems in place in Finland and Italy respectively designed to control gambling. The social policy objectives were recognised as compelling reasons in the public interest.

<sup>25</sup> Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, noted at (1995) 20 ELRev 507, and (1995) 32 CMLRev 1427. The case is also notable for the rejection of the application in the field of services of the *Keck* doctrine of selling arrangements as falling outside the ambit of Article 28 EC.



engaged, even though the prohibition and the company were in The Netherlands; they could well be involved in selling across national boundaries by cold calling potential customers in other Member States. The key question was whether the ban was a restriction on services. Whereas a restriction did not exist solely by reason of disparities in the regulatory regime operating in different Member States, the ban did operate to deny the company an opportunity for marketing across national boundaries. Despite its non-discriminatory operation (it applied to all Dutch and foreign enterprises alike), the ban could amount to a restriction.

The next question was whether the restriction was justified, which involved two questions:

- was the ban serving a legitimate purpose?
- did the ban meet the test of proportionality?

The Court allowed a considerable margin of appreciation in home State control in concluding that the prohibition was justified. It could be argued that an outright ban was not necessary, since a cooling off period within which any commitment could be cancelled might have met the concerns of the Dutch Government.

That this line of reasoning is not yet fully developed is clear from the decision in the *Kraus* case<sup>26</sup> in which the Court and its Advocate General disagreed. Dieter Kraus is a German national who successfully completed a one year taught master's degree in law at the University of Edinburgh. German law makes the use of any foreign qualification in a title (putting LLM (Edinburgh) after your name) subject to prior authorisation by the Ministry of Education and Science of each *Land*. The penalty for failure to comply was up to one year in prison or, alternatively, a fine. The application for authorisation had to be accompanied by a fee of 130DM. The requirements applied in a non-discriminatory manner. Master of Laws qualifications have a particular attraction in the German legal environment, since they are general evidence of a further qualification and evidence an interest in comparative, Anglo-American or European Law. The German legal profession encourages academic qualifications. Academic titles are a frequent feature of note paper and business cards. The Court's opinion on the reference is excessively cautious, though it might well have had the effect of limiting the application of the German rules.

The Court ruled that, in the absence of harmonised rules relating to the conditions attached to the use of university titles, each Member State is entitled to prescribe the conditions for their use on its territory. But in regulating their use, the Member State must not deprive its citizens of any useful benefit to be derived from the guaranteed freedoms in Articles 39 and 43 EC. There is a public interest in regulating the use of titles from educational establishments from outside Germany; but the system of regulation must be proportional to that objective. There is also an obligation to give reasons and to have a system of challenge of any refusal to grant authorisation.

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<sup>26</sup> Case C-19/92, *Kraus*, [1993] ECR I-1663, noted at (1994) 19 ELRev 67.

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Advocate General van Gerven adopted a much more *communautaire* interpretation. The public policy argument did not find favour with him; the general law on fraud was enough to protect people against the wrongful use of titles. Furthermore the rule of reason test failed on the proportionality test: the public could be protected by a requirement that any public presentation of the title had to be accompanied with the name of the place of origin. Nor was it possible to argue that this was a case in which the national rules on qualifications took precedence, since the LLM did not qualify Kraus to practise law; it merely enhanced his prospects of success in his chosen profession.

The state of flux in which the law is can also be illustrated by the more integrative judgment in the *Gebhard* case.<sup>27</sup> Gebhard was a German lawyer, who moved to Italy with his Italian wife in 1978. He practised first in collaboration with other lawyers in Milan, but in 1989 set up in practice on his own account. A key feature was the case was the distinction between services and establishment, since there is a Directive on lawyers' services which might have been of some assistance to Gebhard in his difficulties with the Italian Bar. There was at the material time no Directive on establishment for lawyers; the normal rule was that a national of another Member State would be subject to local regulation if established there. While it was possible for a provider of services to have an infrastructure for delivering services in a Member State, a person pursuing a professional activity who operates from an established professional base offering services to nationals of the host State comes under the provisions on establishment and not services. The Court concluded that there was no doubt that Gebhard was established in Italy and so subject to national rules. But the Court for the first time said in the context of the rules on establishment and the content of professional rules of conduct that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil the four conditions previously established in relation to services:

- They must be applied in a non-discriminatory manner.
- They must be justified by imperative requirements in the general interest.
- They must be suitable for securing the attainment of the objective which they pursue.
- They must not go beyond what is necessary to attain that objective.<sup>28</sup>

This brings us to the *Bosman* case<sup>29</sup> in which the Court of Justice for the first time applied the rules relating to non-discriminatory obstacles to workers within Article 48 (now 39) EC. At issue was the transfer system developed by national and transnational football associations. In short, the transfer system required a football club, which sought to employ a player whose contract with

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<sup>27</sup> Case C-55/94, *Gebhard*, [1995] ECR I-4165, noted at (1996) 21 ELRev 247 and (1996) 33 CMLRev 1073.

<sup>28</sup> At para. 37 of the decision.

<sup>29</sup> Case C-415/93, *Union Royale Belge des Sociétés de Football Association, ASBL and others v Jean-Marc Bosman and others*, [1995] ECR I-4921, noted at (1996) 21 ELRev 313 and (1996) 33 CMLRev 991.

another club had come to an end, to pay a sum of money (often substantial) to the club from which the player came. Bosman was playing for the third division Belgian club, Olympic de Charleroi and wanted to move to the French club, Dunquerque; he argued that the transfer rules prevented him from securing employment with the French club. The Court ruled that the transfer rules constituted a non-discriminatory obstacle to free movement of workers. Such an obstacle would only avoid being in breach of Article 48 EC if it could be shown that it was justified as pursuing a legitimate aim compatible with the Treaty required by 'pressing reasons of public interest.' The Court cited both *Kraus* and *Gebhard* in support of its conclusion.

It was argued that the system of transfer fees was necessary to maintain a financial and competitive balance between clubs and so support the search for talent and the training of young players. The Court accepted that these were pressing reasons of public interest, but went on to apply the ubiquitous proportionality test: both the *ends* pursued and the *means* employed by a restrictive measure must be justified. The Court concluded that the means employed did not satisfy the proportionality test. Other means would achieve the objective without inhibiting the free movement of workers.

So the approach first espoused in the *Cassis de Dijon* case has been transplanted and now covers all areas of free movement of persons, but without the *Keck* gloss on the exclusion of selling arrangements from the prohibition in Article 28 EC. However, the *Volker Graf* case<sup>30</sup> established that measures, which are 'too uncertain and remote' to affect access to the job market in another Member State cannot be regarded as having any appreciable affect on the rights of free movement, and so do not fall foul of the prohibition of restrictions in the free movement articles. Some, notably Advocate General Jacobs have argued for a similar approach in the context of the free movement of goods.<sup>31</sup> Accordingly it can be argued that there are rules in the context of the free movement of persons which are at least analogous to the *Keck* exception.

This line of cases is about regulating business. I would argue that it can be summarised as follows.<sup>32</sup> National rules<sup>33</sup> regulating economic activity can only be applied to the beneficiaries of the rules contained in the EC Treaty where they:

- apply equally to all engaged in the activity regardless of nationality;
- are justified as serving a legitimate purpose;<sup>34</sup>

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<sup>30</sup> Case C-190/98 *Volker Graf v Filmoseer Maschinenbau GmbH*, [2000] ECR I-493.

<sup>31</sup> See his Opinion in Case C-412/93 *Leclerc-Siplec*, [1995] ECR I-179.

<sup>32</sup> The test would appear to work for goods as well as for workers, establishment and services.

<sup>33</sup> In the context of goods, these must constitute State measures, but in the contexts of workers, establishment and services will include regulation by governing bodies which have a regulatory role in relation to the activity in question.

<sup>34</sup> A paraphrase of the Courts' terminology: 'imperative reasons relating to the public interest' is used in the context of workers, establishment and services, while 'necessary in order to satisfy mandatory requirements' is used in its case law relating to the free movement of goods.

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- are objectively necessary to safeguard that legitimate aim;
- are not already the subject of safeguards under rules applying in the home Member State;<sup>35</sup>
- are the least restrictive necessary to secure the legitimate aim.

The primary purpose of this line of case law interpreting the Treaty rules is to regulate national measures which impede market access by individuals or businesses from other Member States. Of course, a secondary effect of some of the rules will be the lawful assertion of individual rights, whether to use an academic title from a university in another Member State, or to be registered as a footballer by the professional regulator in another Member State.

## A bundle of rights for individuals and businesses

Much of what is said in this section is self evident from the text of the EC Treaty. Save in the context of the rules on workers, which can only apply to individuals, the beneficiaries of the Treaty rules can be business organisations as well as individuals. The rights enjoyed by business organisations are neither as clearly specified nor as comprehensive as those of individuals. Furthermore the rights of individuals are most clearly articulated in the context of the free movement of workers, though the interpretation of the prohibition of discrimination to cover both direct and indirect discrimination almost certainly results in individuals exercising the right of establishment enjoying many of the benefits specified for workers.

The key difference between the rights of individuals and business organisations relate to family unity, social rights, co-ordination of social security entitlements, and the right to remain after having worked in a Member State other than that of the person's nationality. These can only be enjoyed by people. Rights held in common are the right of entry and residence,<sup>36</sup> equality of treatment with nationals, and a right to fair and reasoned decisions from national authorities. Business organisations are likely to be beneficiaries of the prohibition of illegitimate national regulations discussed in the previous section of this paper much more frequently than individuals.

The area of co-ordination of social security entitlement<sup>37</sup> is of particular importance to business organisations who will frequently bear the burden of a substantial part of social security contributions for their employees. Business organisations have a very real interest in the co-ordinating rules on the applicable law when employees are posted to work in another Member State.<sup>38</sup>

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<sup>35</sup> This condition will only apply where a person or business established in one State is providing a service in another Member State, or is seeking to export a qualification which is equivalent to that in another Member State.

<sup>36</sup> In the case of business organisations, this will take the form of setting up offices, factories, branches or agencies through which the business will be conducted.

<sup>37</sup> See for a more detailed analysis of social security entitlements, R White, *EC Social Security Law*, Longman, 1999; and F Pennings, *Introduction to European Social Security Law*, 3<sup>rd</sup> edition, Kluwer, 2001.

<sup>38</sup> Many business organisations argue that the provisions in Article 14 of Regulation 1408/71 on posted workers are too restrictive in allowing a maximum of 24 months during which the employee can be subject to the social security system from which they come rather than the social security system of the place where they are working.

Though seldom mentioned, the ability of business organisations to recruit from among the pool of nationals of the Member States, and the three European Economic Area countries,<sup>39</sup> without having to engage in the time and expense of securing a work permit for an employee who is a foreign national is a right which has considerable value.

### The impact of citizenship of the Union

The benefits of movement for a variety of purposes accruing to nationals of the Member States pre-date the introduction of citizenship of the Union. The limited bundle of rights set out in the Treaty and the subsequent introduction of the Charter of Fundamental Rights of the European Union<sup>40</sup> give rise to a need to distinguish between those fundamental rights which should be accorded to all within the jurisdiction of a Member State, and those rights which additionally accrue to nationals of the Member States. The former are fundamental or human rights, while the latter are citizenship rights in their capacity as citizens of the European Union. One of the most important citizenship rights is the right of entry and residence without being subject to immigration control. The combination of the rules on the free movement of persons in the EC Treaty and the free movement directives<sup>41</sup> produces a situation in which there is something approaching a general right of free movement, though the provisions common to the three free movement directives, requiring as a condition of the exercise of the rights given by the directives that the person does not need to seek recourse to public funds to meet their day-to-day needs, limits the nature of these rights.

There are, however, signs that citizenship of the Union does mean more than the sum of the parts of the Treaty rules on the free movement of persons and of Community secondary legislation.

A case with startling potential is *Baumbast and R v Secretary of State for the Home Department*.<sup>42</sup> The case concerned two families, but for the purposes of this paper, I will focus on the Baumbast family. Mr Baumbast is a German national. He married Mrs Baumbast, a Colombian national, in 1990. There are two daughters, one a Colombian national (the child of an earlier relationship) and the other a dual national of Colombia and Germany. Mr Baumbast was an employee in the United Kingdom, followed by a period as a self-employed person, between 1990 and 1993. Mr Baumbast held a residence permits valid for five years, and the other members of the family immigration documents giving them corresponding rights of residence. Mr Baumbast's business failed,

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<sup>39</sup> Iceland, Liechtenstein and Norway.

<sup>40</sup> [2001] OJ C364/1.

<sup>41</sup> Council Directive 90/364/EEC of 28 June 1990 on the right of residence. [1990] OJ L180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity. [1990] OJ L180/28; and Directive 93/96/EEC of October 29, 1993 on the right of residence for students. [1993] OJ L317/59.

<sup>42</sup> Case C-413/99, Judgment of 17 September 2002, [2002] ECR nyr. I am grateful to my PhD student, Oxana Golyner whose contribution to discussions on the implications of this case, and whose treatment of it in her draft PhD thesis, have shaped my thinking about its significance.

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and he then worked in China and Lesotho for German companies. Throughout the material period, the family owned a home in the United Kingdom, and the daughters went to school in England. They never claimed any social benefits, and the family had comprehensive medical insurance in Germany. They travelled there from time to time for medical treatment.

In May 1995 Mrs Baumbast applied for indefinite leave to remain in the United Kingdom for herself and other members of her family. The Secretary of State subsequently refused to renew Mr Baumbast's residence permit and the residence documents of Mrs Baumbast and the daughters. In January 1998 an appeal against that refusal came before an immigration adjudicator. The Court of Justice summarises the decision of the adjudicator as follows,

He found that Mr Baumbast was neither a worker nor a person having a general right of residence under Directive 90/364. As regards the children, the Adjudicator decided that they enjoyed an independent right of residence under Article 12 of Regulation 1612/68. Moreover, he held that Mrs Baumbast enjoyed a right of residence for a period co-terminous with that during which her children exercised rights under Article 12 of that regulation. According to the Adjudicator, Mrs Baumbast's rights flowed from the obligation on Member States under that provision to encourage all efforts to enable children to attend courses in the host Member State under the best possible conditions.<sup>43</sup>

Mr Baumbast then appealed this decision to the Immigration Appeal Tribunal which referred questions to the Luxembourg Court. In brief, the Court decided that the children (including a child of one of the spouses' earlier relationship) of a person who has been a worker are entitled to remain in the Member State for the purposes of completing their education under Article 12 of Regulation 1612/68.<sup>44</sup> The primary carer of the children, irrespective of nationality, is also entitled to remain in the Member State in order to facilitate the exercise of the right. The most dramatic finding relates to Mr Baumbast's circumstances; the Court ruled,

A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.<sup>45</sup>

On the face of it a series of gaps in Community law appeared to exclude Mr Baumbast from enjoying the rights of free movement enshrined in the EC Treaty and in the secondary legislation. He had ceased to be a worker in the

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<sup>43</sup> At para. 21 of the judgment.

<sup>44</sup> Article 12 provides, 'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

<sup>45</sup> Answer to the third question posed by the national court.

United Kingdom, but, because he was employed by a German company to work abroad, clearly retained the status of a worker within the European Union. Could he nevertheless be regarded as a person of independent means in the United Kingdom? Unfortunately, he could not bring himself within the terms of Directive 90/364 because of the condition in that Directive requiring beneficiaries of its provisions to be 'covered by sickness insurance in respect of all risks in the host Member State.'<sup>46</sup> The Baumbast family was covered by such insurance in Germany, which was not the host Member State. The Advocate General notes that Community law had not kept pace with modern social realities relating to modern family relationships where divorce and remarriage are common, to changes in the work cycle and place of work, and to globalisation. Regulation 1612/68 was 'adopted at the high water mark of industrial mass production when employment conditions were relatively stable'.<sup>47</sup> Such considerations pointed to a gap in entitlement which at face value might lead to the conclusion that an economically active migrant worker, like Mr Baumbast, was excluded from the personal scope of Community law. Both the Advocate General and the Court of Justice resolved this dilemma by breathing new substance into Article 18(1) EC, taking by analogy the rights granted to nationals of the Member States in slightly different but cognate circumstances.

So Mr Baumbast enjoyed an independent right of residence flowing from Article 18(1) EC. We can now read this case in the light of the two earlier citizenship cases: *Martínez-Sala* and *Grzelczyk*.<sup>48</sup> Maria Martínez Sala, a Spanish national, was lawfully resident in Germany and found herself in need of financial support from the State. The Court ruled that the prohibition of discrimination on grounds of nationality applied in this case, and that Maria Martínez Sala was entitled to obtain social assistance on the same basis as German nationals. The referring court had conceded that her residence in Germany was lawful, and so the Luxembourg Court did not need to consider the limitations referred to in Article 18 EC. This suggested that perhaps the decision turned on its own special facts. But the *Grzelczyk* case showed that this was not so. Rudy Grzelczyk is a French national. He was a student at a university in Belgium. For the first three years of his course, he managed to maintain himself. He had undertaken some periods of work in Belgium to supplement his income. At the start of his fourth year, he found things tougher and applied for social assistance. This was initially awarded, but when the social assistance agency sought reimbursement from the Belgian Government, it was refused because Rudy was a Community national enrolled as a student. When Grzelczyk challenged this decision, the Labour Tribunal referred questions to the Luxembourg court.

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<sup>46</sup> Article 1, first paragraph of Directive 90/364. Emphasis added.

<sup>47</sup> Opinion of Advocate General Geelhoed, at para. 24; see generally paras 22-27 of the Opinion.

<sup>48</sup> Case C-85/96 *Martínez-Sala v Freistaat Bayern*, [1998] ECR I-2691; and Case C-184/99 *Grzelczyk v CPAS*, [2001] ECR I-6913.

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The Court notes that, from the file submitted by the national court, it is clear that the national court considered that Grzelczyk did not meet the requirements for being treated as a worker with the meaning of Community law. The question the Court addressed was whether the Belgian authorities could make entitlement to social assistance conditional on a national of another Member State being a worker, when no such condition applied to nationals. The Court noted that this was *prima facie* discrimination on grounds of nationality which is prohibited by the Treaty. The Court observed that Article 12 EC, prohibiting any discrimination on grounds of nationality, must be read in conjunction with the Treaty rules on citizenship of the Union. The Court said,

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.<sup>49</sup>

And went on:

There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the treaty confers on citizens of the Union.<sup>50</sup>

Directive 93/96/EC on the free movement of students indicates that they are not entitled to maintenance grants, but does not 'preclude those to whom it applies from receiving social security benefits'—on equal terms with nationals of the State of residence. It would follow that students who start a course not needing to have recourse to public funds and expect to be able to maintain themselves throughout the course, are not precluded from making a claim if their circumstances subsequently change.

This is a significant enhancement of the position of citizens of the European Union in countries other than their country of nationality. Equality of treatment in all matters is required unless there is some exception applicable to their circumstances.

## Implications

The implications of these three cases when read together are dramatic. One step further and the provisions of the EC Treaty and of the secondary legislation on specific rights for workers and self-employed persons, and on the right of residence, to be found in two regulations and nine directives<sup>51</sup> become largely redundant. The further step relates to the decoupling of the rights of free movement from economic activity. It remains arguable that the *Baumbast* case is dependent upon *Baumbast* being economically active in a way analogous to the requirements of Article 39 EC. However, once this decoupling

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<sup>49</sup> Case C-184/99 *Grzelczyk v CPAS*, [2001] ECR I-6913, at para. 31 of the judgment.

<sup>50</sup> At para. 35 of the judgment.

<sup>51</sup> Regulation 1612/68/EEC; Regulation 1251/70/EEC; Directive 64/221/EEC; Directive 68/360/EEC; Directive 72/194/EEC; Directive 73/148/EEC; Directive 75/35/EEC; Directive 90/364/EEC; Directive 90/365/EEC; and Directive 93/96/EEC.



occurs, then Article 18 EC sweeps away the need for much of the detailed secondary legislation currently in place. The requirement of equal treatment with nationals will cover nearly every eventuality.

There would, however, remain two areas which would require regulation. The first would be the circumstances in which the derogations in the EC Treaty could be used which are elaborated in Directive 64/221/EEC, and the need for explicit reference to Community standards when they are higher than national standards. It can be argued that a genuine citizenship of the European Union would eliminate the notion of employment in the public service as an exception to the rights in Article 39 EC and the corresponding exception for the exercise of official authority in Articles 45 and 55 EC.<sup>52</sup> It might also require the removal of the public policy, public security and public health exceptions in Articles 39(3), 46(1) and 55 EC. However, while there is a distinction between citizenship of the Union and individual Member State nationalities, Member States are certain to insist on the removal of those citizens of the European Union emanating from other Member States from their territories in the circumstances envisaged by these exceptions.

Rather more problematic at the moment is the Court's continuing loyalty to the principle that the EC Treaty does not apply to situations which are wholly internal to a Member State, and where there is no factor connecting them to any of the situations envisaged by Community law. It is arguable that national provisions which offer a lesser bundle of rights than those guaranteed for beneficiaries of Community law are capable of constituting an obstacle to free movement. In the *Bosman* case, the Court said,

Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.<sup>53</sup>

Let me try to pose a situation in which I think an argument could be run in which a United Kingdom national could attack a United Kingdom rule without needing to 'engage Community law.' Both husband and wife are working. There are young children. Husband is made redundant, but believes there are real work opportunities in the Netherlands. Husband's mother is not a United Kingdom national and is living outside the Union; she would be delighted to come to live with son or daughter-in-law and look after the young children. If husband goes to the Netherlands and finds work, he would have a right to install his mother there, and she could look after the children if they accompanied him to the Netherlands. But she could not come to the United Kingdom to live with wife and children there. Is the United Kingdom immigration rule in these circumstances an obstacle to free movement, and, if so, can it be objectively justified? If we go back to the words of paragraph 96 of the *Bosman* judgment, the provisions would seem to fit: the immigration rule is

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<sup>52</sup> See generally N Beenen, *Citizenship, Nationality and Access to Public Service Employment. The Impact of European Community Law*, Europa Law Publishing, 2001.

<sup>53</sup> Case C-415/93, *Union Royale Belge des Sociétés de Football Association, ASBL and others v Jean-Marc Bosman and others*, [1995] ECR I-4921, at para. 96 of the Judgment.

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a provision which deters a national of a Member State from leaving his country of origin. It should be noted that the Court contemplates raising an objection even though the rule emanates from within the national's own State (as in the case of *Bosman*). The question would then be whether the 'rule' is objectively justified. The Court could not, it seems, simply dismiss the case as having no Community element.

The Court has, however, re-affirmed the application of the reverse discrimination doctrine in a number of cases after *Bosman*. An example is the *RI.SAN* case.<sup>54</sup> Community law on the free movement of persons does not apply in a situation where all the facts are confined within a single Member State. The Court uses the same language as in the pre-*Bosman* cases: there is no connecting link to one of the situations envisaged by Community law on the freedom of movement for persons and freedom to provide services.

### Concluding comments

The essential thesis of this paper is that an analysis of Community law which draws a distinction between Community law rules on rights for individuals and on controlling national regulation of business activities can help to ensure the coherence of Community law. Furthermore distinguishing individuals from business organisations helps to add content to Community law on the rights which flow from citizenship of the Union. The case law in this area continues to develop and may soon produce a corpus of rights which would remove the need for detailed secondary legislation on rights for individuals. Such an approach would recognise the similarity of goods and services as economic commodities, while avoiding convergence which runs the risk of treating people like goods.

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<sup>54</sup> Case C-108/98, *RI.SAN v Commune di Ischia*, [1999] ECR I-5219.