

Continuity and Change in EU Law

Essays in Honour of Sir Francis Jacobs

Edited by
ANTHONY ARNULL
PIET EECKHOUT
and
TAKIS TRIDIMAS

Foreword by
Lord Bingham of Cornhill

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CONTINUITY AND CHANGE IN THE LAW RELATING TO PROVISION OF SERVICES

David Edward¹ and Niamh Nic Shuibhne²

1. Introduction

What are 'services' and how should they be regulated? In so far as the Treaty answers these questions at all, the answer is sketchy and not entirely coherent. Until the much-disputed 'Bolkestein Directive'³, legislative activity was patchy, and the task of bringing coherence to this aspect of the Treaty was left to the Court of Justice. Although the Court's case law on services, stimulated by Francis Jacobs, has been innovative and quite far-reaching, there has been little by way of academic discussion and analysis in comparison with the very extensive work undertaken on goods or persons. Services have been the academic Cinderella of the four freedoms. In that respect at least there has been continuity.

Where there has been change (and the change has been dramatic), it has been in the scope, volume and character of the economic activities with which the Services provisions of the Treaty have to deal. Fast, low-cost travel has transformed the ease of personal movement. More efficient telephones, fax and email, internet buying and selling, and other technological developments have recast the boundaries of 'movement' more fundamentally still. A 'service' transaction can now come within the scope of the Treaty with minimal (if any) degree of commitment on the part of the service provider outside the home State. Since recipients as well as providers are covered, few of us now escape the personal scope of services and neither we nor the providers necessarily have to move so that we can receive them. In consequence, services sit – sometimes uncomfortably – on the borderline between, on the one hand, the law regulating the freedom to market (particularly the freedom to market 'invisibles') and, on the other, the law governing the personal right of free movement of the service provider,⁴ or in the case of corporations, of the provider's employees.

During the period spanning Francis Jacobs' time at the Court, immediately following the Cockfield White Paper⁵ and the Single European Act, the basic ideas underlying the law of the internal market and the four freedoms came under repeated and intense scrutiny. *Keck and Mithouard*⁶ generated impassioned debate about the scope of Treaty rights and the relative importance of discrimination on

¹ Judge of the Court of Justice 1992-2004; honorary Professor of the University of Edinburgh

² Reader in EC Law, Europa Institute, University of Edinburgh.

³ The original Commission proposal was published as COM (2004) 2 final/3; a second, heavily revised proposal was published in summer 2006 (COM (2006) 160 final), now enacted as Directive 2006/123/EC on services in the internal market, [2006] OJ L376/36.

⁴ But not necessarily the personal right of the service recipient, as confirmed recently in Case C-290/04 *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel* [2006] ECR I-9461, discussed further below.

⁵ European Commission, *Completing the Internal Market*, COM (85) 310.

⁶ Case C-267-268/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097.

the one hand and market access on the other. (There was significantly less effort to analyse the comparable issues raised by *Grogan*⁷ and *Alpine Investments*⁸.) Later on, judgments like *Chen*⁹ and *Bidar*¹⁰ developed the seedling of EU citizenship in *Martínez Sala*¹¹ beyond what might have been anticipated into the field of freedom of movement, including the freedom to provide services. Francis Jacobs' contribution to all these discussions will remain for the enlightenment of posterity in his lucid and often challenging opinions.

As our contribution to this tribute to a fine jurist and a good friend, we do not attempt to give a comprehensive survey of the law of services as it developed over the period from 1988 to 2006. Rather, we offer a sketch map of the territory of 'services', and its place in the wider map of the internal market. We suggest that this neglected area of free movement law, particularly as regards its future development, deserves greater attention on the part of explorers. Perhaps one of them will be Cinderella's fairy prince.

2. Mapping the Scope of Services

The Treaty

The Treaty defines the Four Freedoms as 'freedom of movement for goods, persons, services and capital' (Article 3(1)(c) EC). According to this definition, it is the 'service' as such that should be free to move. However, the structure and wording of the Chapter on Services (Part Two, Title III, Chapter 3) suggest a different, though not entirely consistent, approach.

Chapter 3 opens with a prohibition of "restrictions on the freedom to *provide services*" (Article 49), suggesting that we are concerned with restrictions on the freedom of the provider – a 'person' – rather than on the freedom to move of the 'service' as some sort of abstract entity. This is echoed in Article 50 (first paragraph, second sentence) which illustrates the meaning of 'services' by reference to human 'activities' (industrial, commercial, craft and professional). Similarly, Article 50 (second paragraph) provides that "the person providing the service may ... temporarily pursue his activity in the State where the service is provided...."

Article 55 incorporates into Chapter 3 Articles 45 to 48 of Chapter 2, so linking the Chapter on Services to the Chapter on Establishment. The Chapter on Establishment is clearly about 'persons', and the reference in Article 50, second paragraph, to "pursuit of activities" echoes the wording of Article 47. In this perspective, services and establishment are different aspects of the law of free movement of persons, the former involving temporary movement, the latter permanent.

⁷ Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.

⁸ Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141.

⁹ Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

¹⁰ Case C-209/03 *Bidar v London Borough of Ealing; Secretary of State for Education and Skills* [2005] ECR I-2119.

¹¹ Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

But Article 50 is not wholly consistent with this approach since the first sentence defines ‘services’ in a negative way as being services that are ‘*not* governed by the provisions relating to freedom of movement for goods, capital and persons’. This suggests that what the Treaty has to say about ‘persons’ has been exhausted by Chapters 1 (‘Workers’) and 2 (‘Establishment’). ‘Services’ are about something else.

One reason for this lack of textual clarity may lie in the historical context in which this part of the Treaty was conceived and drafted – a world characterized by limited and generally slow means of cross-frontier transport; limited and generally slow cross-frontier postal services; very limited and very slow cross-frontier telephone services; no telex; no fax; no mobiles; no emails. Consequently, for most practical purposes, from the perspective of the Treaty-makers, movement of a service almost inevitably involved movement of the person of the service provider (or, as Directive 73/148¹² and *Luisi & Carbone*¹³ later pointed out, of the recipient).

It is perhaps also true that, when the Treaty was written, services, with certain exceptions, were not regarded as being economically all that important. The exceptions were transport, banking and insurance, each of which is expressly mentioned in Article 51. Transport was the most obvious example of ‘temporary’ cross-frontier services (temporary from the point of view of the user) but was excluded from the scope of Title III and made the subject of a separate Title. Banking and insurance were the most obvious (and perhaps at that time the only) examples of ‘invisible’ cross-frontier services capable of performance without personal displacement. Although not excluded, they were linked to freedom of movement of capital.

Since 1957, the services sector has grown and diversified to such an extent that the reference to the activities of craftsmen in Article 50 seems almost quaint. The importance of the sector for the economic future of Europe has been recognized and emphasised. The Union also faces the challenge of compliance with GATS, which arguably imposes a limit on the Union’s power to maintain (far less to extend) a protectionist internal regime. Yet the text of the Chapter on Services remains the same, and the Convention on the Constitution, which was supposed to provide us with a template for the next half-century, does not appear even to have asked itself whether the substantive Treaty provisions needed fresh appraisal. This legislative myopia persisted in the Bolkestein debate.

The ‘residual’ scope of services

According to the Treaty definition, the scope of services is ‘residual’ vis-à-vis persons, capital and goods. An activity is considered to fall within the services provisions only when it is not, or indeed

¹² OJ 1973 L172/14, now repealed and replaced by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L229/35.

¹³ Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377.

cannot be, covered by one of the other freedoms – an approach recently reaffirmed and applied in *Burmanjer*¹⁴. Perhaps it is this residual character that has contributed to services' Cinderella status (of being in the background, second-best, the poor relation, and so on).

But it should be remembered that the Cinderella story has a happy ending, and a more positively spun assessment of the Treaty provisions would be that the residual scope of services allows this Chapter to perform an all-encompassing sweeper function, bringing activities and transactions within the scope of Community law that could not otherwise have been captured. It is fair to say that the drafters of the services provisions probably did not intend this; they could not possibly have envisaged the way in which we trade today. But, although the force and potential of services' residual scope may be accidental, it is nonetheless potentially very important as a way of adapting the Treaty provisions as a whole to the effects of technological progress.

The 'personal' scope of services

Personal service providers or recipients must have the nationality of a Member State, like workers or 'natural persons' who seek to exercise the right of establishment. This is formally true also of corporations and other 'legal persons', in the sense that it is their 'nationality' that matters.¹⁵ Article 48 is very clear in attributing rights under Chapters 2 and 3 to the legal person as such (a point persistently overlooked by the numerous critics of the Court's judgment in *Centros*¹⁶). It is the corporation or other 'fictional' entity (as opposed to its directors or operative personnel, irrespective of their nationality or domicile) that is viewed as providing the service and is accorded the right to do so.

Where corporations are concerned, many 'service' activities nowadays are archetypically economic or financial activities which, from a regulatory point of view, have more in common with trade in goods or movement of capital than free movement of persons. It is not essential that either the provider or the recipient of the service (any more than the importer or exporter of goods or the dealer on the capital market) should physically move in order to trigger Community protection. A service can move 'virtually' or 'abstractly', such as financial advice received over the telephone or the purchase of an insurance policy, where the only thing that moves will be the policy document.

¹⁴ Case C-20/03 *Criminal proceedings against Burmanjer* [2005] ECR I-4133, paras. 33-35, citing Case C-275/92 *Her Majesty's Customs and Excise v Schindler* [1994] ECR I-1039, paragraph 22; Case C-390/99 *Canal Satélite Digital v Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS)* [2002] ECR I-607, paragraph 31; and Case C-71/02 *Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025, paragraph 46.

¹⁵ This point is clearly evidenced by the judgment in Case C-290/04 *Scorpio* cited above, footnote 4. Even though the 'service' passed from one Member State to another, and the service recipient was a legal person with Member State 'nationality', the third country nationality of the provider was found to take the situation outwith the scope of Community law on the basis of the inference to be drawn from Article 49, second paragraph (although not in the view of Advocate-General Léger).

¹⁶ Case C-212/97 *Centros* [1999] ECR I-1459.

Nevertheless, services provided by legal persons are provided only through the agency of human beings. Especially in the construction industries, it is artificial wholly to divorce the freedom of the employer to provide construction services from the rights of skilled employees (craftsmen) to deploy their skills where the market offers the opportunity to do so – a consideration underlying Court’s reasoning in judgments such as *Corsten*, *Arblade* and *Schnitzer*.¹⁷

Perhaps most importantly, there are many reasons nowadays, including tax considerations, why individuals engaged in quite modest self-employed activities pursue those activities through the medium of a company. There are many species in the corporate zoo, and the small family company is one of them.

So, although Article 48 of the Treaty might appear indifferent to the rights of the human beings who are hidden behind the corporate veil of service providers, to ignore them would hardly be consistent with the intention of the Treaty which, notably in its reference to craftsmen and professionals in Article 50, clearly envisages that Chapter 3 has something to do with the economic opportunities of real people. This may, at least psychologically, affect the view one takes of the nature of the activity, the rights that should attach to it and the way in which it should be regulated.¹⁸

The ‘private’ scope of services

The scope of responsibility for compliance with the Treaty freedoms was extended in *Walrave* beyond the Member State (and its emanations) to “rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services”.¹⁹ Here we are looking, not at the provider of services, but at the private individual or organisation that might seek to impede the freedom of the provider. Does Chapter 3 impinge on private relationships or on the actions of non-state actors that may obstruct the freedom to provide services?

In the case of workers, the decision in *Angonese* extended the scope of Article 39 into the sphere of (individual) private employment.²⁰ But the reference in *Walrave* to ‘provision of services’ has not led to any comparable development (for the time being at least) in the field of services and there are several pointers in a different direction. For example, Directive 2006/123 seems to be inspired by the Court’s solution (instituted in the *Strawberries* case and widened considerably in *Schmidberger*²¹) to

¹⁷ Case C-58/98 *Corsten* [2000] ECR I-7919; Case 369/96 *Criminal proceedings against Arblade and others* [1999] ECR I-8453; Case C-215/01 *Schnitzer* [2003] ECR I-14847.

¹⁸ Again, see the reasoning of Advocate-General Léger in this vein, in his Opinion on Case C-290/04 *Scorpio*, cited above, footnote 4, especially from paragraph 106 onwards.

¹⁹ Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405, paragraph 17 (with paragraph 18 onwards setting out the reasoning of the Court).

²⁰ Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139.

²¹ Case C-265/95 *Commission v France* [1997] ECR I-6959 and Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

the problem of non-state obstacles to free movement of goods. This draws, at various points,²² from Article 10 EC and establishes a legally defensible halfway house by imposing responsibility on the state to control the protectionist effects of private action. In the field of legislation, recent initiatives on air passenger compensation and mobile phone roaming charges, for example,²³ have proceeded down the effective but politically difficult route of harmonising regulations, perhaps demonstrating a preference *against* enhanced horizontal obligations being placed directly on service providers.

Import and export of services

Whatever other similarities or comparisons there may be between services and goods, the Chapter on Services does not distinguish between export and import as does the Chapter on Goods (Articles 28 and 29 EC, exemplified by *Groenveld*²⁴). *Alpine Investments* is the benchmark for services.

The factual scope of 'services' and their relationship with the other freedoms

As we have noted, the Treaty treats the scope of services as residual vis-à-vis the other freedoms. But as we have also noted, the service sector has expanded out of all recognition since the Treaty was written. The apparently simple, 'residual', approach of the Treaty is easy to state but less easy to apply in the modern context. In particular, it is not easy to define the point at which pursuit of an activity in another Member State ceases to be 'temporary' (Article 60, second paragraph) and constitutes establishment. On this point, there seemed at one stage to be a fundamental difference of approach between the Community legislator and the Court of Justice.²⁵

From the point of view of the Treaty-makers back in 1957, when travel and communications were slow, the distinction between permanent establishment and temporary provision of services may have appeared rather obvious. Except in frontier areas, there were practical obstacles to carrying on economic activities in more than one Member State at the same time, so the temporary/permanent distinction was probably felt to be adequate. This is no longer so, and in *Gebhard*²⁶ and more recently in *Schnitzer*²⁷ the Court sought to offer guidelines as to how the national courts should approach the distinction between establishment and services.

²² See especially, Article 20 of the Directive ('non-discrimination'), which compels 'Member States [to] ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence' (emphasis added).

²³ See Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, [2004] OJ L46/1, and Regulation 717/2007 on roaming on public mobile telephone networks within the Community, [2007] OJ L171/32.

²⁴ Case 15/79 *Groenveld v Produktschap voor Vee en Vlees* [1979] ECR 3409; more recently, see Case C-108/01 *Consorzio del Prosciutto di Parma and and Salumificio S. Rita v Asda Stores Ltd and Hygrade Foods Ltd* [2003] ECR I-5121.

²⁵ See the original Commission proposal for the Bolkestein Directive (cited in note 1 above).

²⁶ Case C-55/94 *Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

²⁷ Cited above, footnote 17.

In the run-up to enactment of the Bolkestein Directive, the political institutions appeared either to have been ignorant of the Court's case law, or to have been willing deliberately to ignore it in their attempt to create a form of 'deemed establishment' whenever the work involved in provision of a service extended beyond a specified period of time. So it is important to stress that, as the judgment in *Schnitzer* explains, 'temporary' does not necessarily mean 'brief' or 'of short duration'.²⁸

The logic can best be illustrated by reference to construction contracts.²⁹ A contractor, particularly an SME, that seeks to enter the market in another Member State will normally wish to test the market before committing capital and manpower to a permanent establishment in that Member State. Construction contracts may last several months, if not years. The contractor who bids successfully for a first (and perhaps only) contract in another Member State should not be deemed to have become established there by reason only of the duration of that contract. The extent to which the contractor should be subjected to local labour and other laws is a separate question and, as the Court has said,³⁰ is essentially a matter of proportionality. That analysis should not be confused by creating a false doctrine of deemed establishment.

A further 'factual' difficulty relates to the fuzziness with which one is faced when trying to attach appropriate weight to the different elements within a mixed activity that has multiple elements – for example, where an information, registration or maintenance service is linked to the purchase of goods, or where the recipient of medical services has to purchase medicines as an integral part of the treatment received. The Court recently summarised the applicable rules in *Burmanjer*,³¹ outlining a test based on the primary/secondary purposes of the activities in question viewed from the perspective of each of the four freedoms. Services come into play only if none of the others apply. Application of this test, although enjoined by the Treaty, ought not, however, to lead to a situation in which obstacles to the provision of services are viewed as of secondary importance as compared with obstacles to the other three freedoms.

In determining the components of an activity, advertising presented an especially thorny issue in *Grogan*³². It had been established in the case law on the free movement of goods that a restriction on advertising is capable of violating Article 28 EC.³³ Plainly, in *Grogan*, there was no question of obstructing the marketing of goods, and the subject-matter of the case could fall within the scope of the Treaty only under the Chapter on services.

²⁸ See, in particular, paras. 31-32 of the judgment in *Schnitzer*, cited above, footnote 17.

²⁹ See also the Opinion of Advocate General Jacobs in Case C-76/90 *Säger v Dennemayer* [1991] ECR I-4221, paragraph 25.

³⁰ See again the judgments cited above footnote 17.

³¹ See again, paras. 33-35 of the judgment in *Burmanjer*, cited above footnote 14.

³² Cited above, footnote 7; we return to the more thematic point underlying case law on advertising, that of market access, further below.

³³ See especially, Case C-362/88 *GB-INNO-BM* [1990] ECR I-667.

In order to resolve the issue, the Court distinguished between information “distributed on behalf of an economic operator established in another Member State” and student-led provision of information on abortion and abortion clinics. The latter was described as information that constituted “a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State”.³⁴ To this distinction the Court added the absence of ‘remuneration’ (see below), thus enabling the finding that “the link between the activity of the students’ associations ... and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article [49 EC]”.³⁵

The *Grogan* judgment generated heated commentary on the Court’s dipping into the ‘moral plane’ of abortion issues,³⁶ and the Court’s legal construction of services/advertising was strongly criticised.³⁷ But the judgment conceals a much wider and deeper debate about whether the Treaty compels only the removal of discriminatory obstacles for the benefit of service providers or realisation of the broader goal of creating a free market in services for the benefit of European citizens in general, a debate to which we return in section 3 below.

The criterion of remuneration

Article 50 provides that “Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration ...”. This criterion has long formed a critical element of the definition of services that fall within the scope of the Treaty and, as noted above, was invoked, gratefully if inelegantly, as part of the Court’s solution to the problem in *Grogan*. As a criterion, it suffers from two uncertainties. First, by whom must the service-provider be remunerated? Second, what is the significance of the word ‘normally’? Where a service is provided without remuneration, does it nevertheless fall within the scope of the Treaty if it is ‘normally’ provided for remuneration? If so, in what context and by whom must it ‘normally’ be so provided?

³⁴ *Grogan*, paragraph 26.

³⁵ *Grogan*, paragraph 24; *cf.* the Opinion of Advocate-General Van Gerven, especially paragraph 18 onwards.

³⁶ *Grogan*, paragraph 20; key literature here includes J. Coppel and A. O’Neill, ‘The European Court of Justice: Taking rights seriously?’, (1992) 29 *Common Market Law Review* 669; J.H.H. Weiler and N.J.S. Lockhart, “‘Taking Rights Seriously’ seriously: The European Court of Justice and its fundamental rights jurisprudence”, (1995) 32 *Common Market Law Review* vol. 32:1, 51, vol. 32:2, 579; D.R. Phelan, ‘Right to life of the unborn v. promotion of trade in services: The ECJ and the normative shaping of the European Union’, (1992) 55 *Modern Law Review* 670; and G. de Búrca, ‘Fundamental rights and the reach of European Community law’, (1993) 13 *Oxford Journal of Legal Studies* 283.

³⁷ See especially, S. O’Leary, ‘Freedom of establishment and freedom to provide services: The Court of Justice as a reluctant constitutional adjudicator: An examination of the abortion information case’, (1992) 17 *European Law Review* 138; O’Leary captures the *Grogan* judgment astutely when she comments (p. 139) that “[the Court] appears eager to assert its role as a legitimate participant in the legal issue but shies away from any concrete resolution of the matter’.

As regards the first question, the Court gave a clear answer in *Bond van Adverteerders*³⁸. It is not necessary that the remuneration should pass directly from the beneficiary of the service to the provider. In the same year, however, the Court in *Humbel*³⁹ adopted a different approach as regards payment for vocational training within the public educational system. More recently, the Court has been more flexible in its case law on cross-border health care provision⁴⁰, and citizenship enabled the Court to give a fresh answer to the problem of access to publicly-funded education (and/or related benefits) in *Grzelczyk, D'Hoop and Bidar*⁴¹.

A source of further tension on this point between the legislator and the Court could yet be simmering under the surface. Directive 2006/123 (particularly Recital 34 of the Preamble) purports to exclude publicly-funded education from the purview of services. But it is not at all clear that the exclusion is valid in light of the evolving case law on the citizen's right of access to education as a publicly-funded service.⁴²

It may therefore become important to determine the answer to the second question – what does 'normally' mean? Clearly, a service does not fall outside the scope of the Treaty simply because, in the instant case, it is not provided for remuneration. The question is whether it is 'normally' provided for remuneration. The original intention of the Treaty-makers may have been to deal with a situation where a service-provider is denied access to another Member State simply because, in the instant case, he/she does not intend to charge for the service, although this would not normally be so, and perhaps also to avoid bureaucratic arguments about whether the sum paid is sufficient to constitute 'remuneration'. But the scope of the question is wider and it may be necessary to determine whether, in assessing 'normality', we are to look at the normal practice of the individual service-provider involved in the transaction at issue, at that of service-providers in that particular sector more generally, or at the normal situation in other Member States as well as the State immediately concerned. This problem does not appear to have arisen as yet.

The link between the service and the right claimed

³⁸ Case 352/85 *Bond van Adverteerders v Netherlands* [1988] ECR 2085, especially paragraph 16.

³⁹ Case 263/86 *Belgium v Humbel* [1988] ECR 5365.

⁴⁰ For a useful review of the evolution and principles of the medical services case law, see the Opinion of Advocate-General Geelhoed in Case C-372/04 *Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325, from paragraph 46 onwards.

⁴¹ Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, and Case C-224/98, *D'Hoop v Office national de l'emploi* [2002] ECR I-619 and Case C-209/03 *Bidar v London Borough of Ealing; Secretary of State for Education and Skills* [2005] ECR I-2119.

⁴² In Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 31 onwards, Advocate-General Jacobs argued for the preservation of strictness with regard to publicly funded education in contrast to developments in respect of healthcare – although he did attach a rider should the law change in respect of entitlement to student maintenance grants, a proposition that has since been realised in *Bidar*. The debate was continued more recently by Advocate-General Ruiz-Jarabo Colomer in (the still pending) Case C-11/06 *Morgan and Bucher*; see in particular, paras. 97-103 of his Opinion, delivered on 20 March 2007.

The legislative and judicial extension of Treaty coverage to receipt as well as provision of services raises a further issue as to the extent to which there must be a direct link between the service in question and the right claimed.

In *Luisi and Carbone*⁴³, the services in question were health care services in another Member State. The right claimed by the recipients of those services was the right to export sufficient currency from the home state to pay for them, thereby exceeding the national currency control limit. The link between the service and the right was therefore indirect, although obvious enough. In *Carpenter*⁴⁴ the threatened deportation of Mrs Carpenter from the UK was found to be detrimental to the conditions under which Mr Carpenter provided services in other Member States. But the link between the fundamental right of respect for the Carpenters' family life in the UK and the actual exercise of Mr Carpenter's service activities in other Member States was, to say the least, tenuous and the Court, perhaps wisely, did not seek to analyse it.

In other cases, the Court has simply *presumed* that there was a link between the service and the right. In *Cowan*,⁴⁵ the Court presumed that Mr Cowan, as a tourist, was necessarily a recipient of services in France – “tourists, among others, *must* be regarded as recipients of services”⁴⁶ But there was no other link between any of the services Mr Cowan was presumed to have enjoyed in France (except conceivably transport services on the Metro) and the right he claimed – the right to receive compensation for criminal injuries. The presumption was more extreme still in *Bickel and Franz*,⁴⁷ as we have no idea whether Mr Bickel, in particular, ever got out of his lorry to receive services in Italy. The judgment is suitably vague in applying Article 12 EC on this point, so it is unclear whether the law protected Mr Bickel under Article 49 or Article 18 EC.

Problems thrown up by this type of reasoning⁴⁸ clearly demonstrate the strains inherent in claiming rights on such an ephemeral basis as services, and it is no surprise that many of these situations are now overtaken by citizenship, a change in approach that began to unfold in *Bickel* itself.

Lastly, on this point, it should be noted that an actual, real-life, recipient does not need to be identified when the freedom to provide services is being considered.⁴⁹

⁴³ Cited above, footnote 13.

⁴⁴ Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

⁴⁵ Case 186/87 *Cowan v Trésor Public* [1989] ECR 195; the splitting of personal and substantive or material scope in this way is widely considered to have laid the foundations for the Court's landmark decision on EU citizenship just over a decade later, Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

⁴⁶ *Cowan*, *ibid*, paragraph 15 (emphasis added).

⁴⁷ Case C-274/96 *Criminal proceedings against Bickel and Franz* [1998] ECR I-7637.

⁴⁸ Described as the ‘functional method of the Court’ to the non-discrimination principle in C. Tomuschat, case comment on Case C-85/96 *Martínez Sala v Freistaat Bayern*, (2000) 37 *Common Market Law Review* 449-457 at 451, i.e. where ‘[t]he Court simply asks whether the legal proposition or practice under review exerts any impact on one of the freedoms under the Treaty’.

⁴⁹ See, for example, *Alpine Investments*, cited above, footnote 8, paragraph 35, and Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1795,

3. The place of Services in the wider map of the Internal Market

How does the law on services fit into the more general law of the internal market? Recent scholarship has involved tracing patterns and symmetries (or the absence of them) across the four freedoms. Do the rules and principles of the internal market fit into a coherent framework, irrespective of whether goods or people or companies are involved, and *should* there be a coherent framework that achieves this in any event? If a rule or principle has had a ripple effect across the freedoms, it might be thought that it must have started from one of them and, more particularly, as Oliver and Roth suggest, that “free movement of goods was once the trailblazer, [but] the other freedoms have now caught up and in some cases have even overtaken it.”⁵⁰ We suggest that this approach is misleading, and that the case-law on services was just as important as the case-law on goods. Goods were the trailblazer only in the sense that there were more cases about them and that, for a period, the trail led down a *fausse piste*.

The legal infrastructure of the internal market, underpinning the Single European Act and the 1992 programme, is usually traced back to *Dassonville*⁵¹ and *Cassis de Dijon*⁵². It is often overlooked that *Van Binsbergen*⁵³ was virtually contemporaneous with *Dassonville* and predated *Cassis* by several years.

In *Dassonville*, the definition of measures having equivalent effect to a quantitative restriction was genuinely expansive. As it turned out, the *Dassonville* formula⁵⁴ – borrowed from competition law – was probably too expansive and led to difficulties later which *Keck and Mithouard* failed to resolve. The formulae adopted in *Van Binsbergen* were more careful and more precise⁵⁵:

“[T]he restrictions to be abolished pursuant to [Article 49 EC] include *all requirements* imposed on the person providing the service by reason *in particular* of his nationality or of the fact that he does not habitually reside in the state where the service is provided, which do not apply to persons established within the national territory *or which may prevent or otherwise obstruct* the activities of the person providing the service”

“[T]he *precise object of [Article 49 EC]* is to abolish restrictions on freedom to provide services imposed on persons who are not established in the state where the service is to be provided.”

paragraph 39, extending the *Alpine* reasoning more overtly to potential advertisers (paragraph 38); see also Case C-70/95 *Sodemare and others v Regione Lombardia* [1997] ECR I-3395.

⁵⁰ P. Oliver and W.-H. Roth, ‘The internal market and the four freedoms’, (2004) 41 *Common Market Law Review* 407, at 439, continuing that ‘it is widely considered that the provisions on workers and services have taken over the role of pioneer since the early 1990s and especially since *Keck*.’

⁵¹ Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

⁵² Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

⁵³ Case 33/74 *van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

⁵⁴ *Dassonville*, cited above, footnote 51, paragraph 5.

⁵⁵ See *Van Binsbergen*, cited above, footnote 53, paragraphs 10 and 11 (emphasis added).

The judgment in *van Binsbergen* also introduced the idea of “rules justified by the general good” – in that case “[professional] rules relating to organization, qualifications, professional ethics, supervision and liability”. This formula was repeated in the context of establishment in *Thieffry*⁵⁶ with the rider that application of the admissible rules must be “effected without discrimination”. Again, it can be argued, this was a clearer and more precise version of the ‘mandatory requirements’ criterion enunciated in *Cassis*⁵⁷.

The crucial point, so it seems to us, is not which came first, or which was the trailblazer, but that, already in the early 1970s, the Court was formulating a general internal market approach, whose common concern was to cut through legislatively authorised, and therefore stubbornly resistant, obstacles to intra-State trade that were not overtly discriminatory though their application might have that effect. The wider ambition of realising a genuine internal market, rather than freedom of movement for goods or services as such, is a better descriptor of the ‘trailblazer’ of that time.

It was this simple internal market approach that got lost in the case-law on goods leading up to *Keck* – a trend that the judgment in *Keck* sought to correct but only succeeded in confusing. The trend was due to an extravagant interpretation of the *Dassonville* formula which, as noted, had been borrowed from competition law without, however, allowing for any *de minimis* or rule of reason exception. Any imagined limitation of the freedom to market imported goods was thought to fall within the scope of the formula and did not need to be tested against the reality of access to the actual marketplace where domestic and imported goods were to compete for the attention of the consumer. *Keck* sought to focus attention on the domestic marketplace of the Member State of import by referring to *modalités de vente* (inadequately and inelegantly translated ‘selling arrangements’⁵⁸). But this only made the confusion worse since it did not define at what point or points in the supply chain the ‘selling arrangement’ might apply.

An early opportunity to make clear the intention of *Keck* came in *Alpine Investments*, where it was argued that cold-calling was a form of “selling arrangement” and therefore fell outside the scope of the Treaty. In one paragraph⁵⁹, the Court resumed and explained what had been said in *Keck*:

[T]he application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other

⁵⁶ Case 71/76 *Thieffry v Conseil de l’Ordre des avocats à la cour de Paris* [1977] ECR 765.

⁵⁷ *Van Binsbergen*, cited above, footnote 53, paragraph 12; *Thieffry*, cited above, footnote 56, paragraph 12; *Cassis*, cited above footnote 52, paragraph 8.

⁵⁸ The inadequacy of the translation and the confusion to which it has led illustrate the problem of agreeing a text in one language without making sure that it can be adequately translated into others. One of the present authors pleads guilty in this respect.

⁵⁹ Paragraph 37.

Member States. The reason is that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.

Keck was not as restrictive nor *Alpine Investments* as radically innovative an interpretation of the principle of market access as they might have seemed at the time.⁶⁰ Together they established or reasserted the twofold test of discrimination and access to the domestic market. This has become clearer in subsequent judgments, discrimination being treated as one (but only one) category of obstacles to market access, rather than the other, more restrictive way around.⁶¹ So, in *Säger*, the Court stressed that

Article [49 EC] requires *not only the elimination of all discrimination* against a person providing services on the ground of his nationality but also *the abolition of any restriction, even if it applies without distinction* to national providers of services and to those of other Member States, when it is liable to prohibit *or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services.⁶²

If market access is ultimately the best criterion, applicable across the range of internal market law, there must nevertheless be some way of delimiting the scope of the freedoms in relation to non-discriminatory obstacles. Otherwise, there is a danger of setting off again down the *fausse piste* that ended with *Keck*.

Here, the immature concept of remoteness might have a part to play. As we have noted, *Dassonville* imported the breadth of the competition test ('actually or potentially') without the limitations of a *de minimis* test. In competition law, however, the *de minimis* principle is a *quantitative* one, relating directly to volume, and this aspect of the principle was rejected in the ambit of free movement law.⁶³ The *qualitative* aspect of the principle – remoteness – has sometimes been applied in free movement cases, though sporadically and therefore somewhat unsatisfactorily.

⁶⁰ See N.Nic Shuibhne, 'The free movement of goods and Article 28 EC: An evolving framework', (2002) 27 *European Law Review* 408; S. Enchelmaier, 'Four freedoms, how many principles?', (2004) 24 *Oxford Journal of Legal Studies* 155.

⁶¹ See especially, Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151 and Case C-405/98 *Konsumtombudsmannen v Gourmet International Products AB (GIP)* [2001] ECR I-1795; in *Gourmet*, see also the Opinion of Advocate-General Jacobs, paras. 29-31 in particular.

⁶² Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, paragraph 12. The April 2006 editorial in the *Common Market Law Review* describes *Säger* as the 'grandfather' of the country of origin principle – arguably making the watered-down Directive 2006/123 more 'revolutionary' (albeit in a negative or 'reverse' sense) than the originally conceived Bolkestein version (see (editorial), 'The services directive proposal: Striking a balance between the promotion of the internal market and preserving the European social model?', (2006) 43 *Common Market Law Review* 307, at 309).

⁶³ In respect of goods, see the classic authority in the Danish Beekeeping Case (Case C-67/97 *Criminal Proceedings against Bluhme* [1998] ECR I-8033).

Thus a test of remoteness (“too tenuous”) was adopted for services in *Grogan*⁶⁴, and a similar test (“too uncertain and indirect”) was adopted for goods in *Krantz*⁶⁵ and for workers in *Graf*⁶⁶. It is arguable that the Court in *Alpine Investments* was careful to establish, at the start of its analysis⁶⁷, that the barrier to movement was *not* too remote.

The Court has not adopted a remoteness test as part of the three-stage obstacle/objective justification/proportionality approach required by *Gebhard* and, more recently, *Bacardi France*⁶⁸. But, apart from that, remoteness as a concept (or any variant of it) raises problems that are familiar to lawyers practising in the field of personal injuries where cases can be bedevilled by problems of causation of philosophical complexity. If application of the test – “Is the causal connection too remote?” – is not to depend on the length of the judge’s foot, it calls for some explanation of how it is to be applied. But the search for that explanation leads too often to much spilling of ink inventing what turn out to be no more than different ways of saying the same thing.

Perhaps, therefore, the simplest solution is *not* to create a separate test or criterion of remoteness, but to treat remoteness as being an aspect of the question “Is there an ‘obstacle’ to freedom of movement?” The issue is more economic and practical than legal – “What is the obstacle and how does it work?” The answer will, of course, depend on judicial assessment of the facts but that assessment need not be arbitrary and should be evidence-based. If, as a practical matter, there is no obstacle, then the situation in question is too ‘remote’ to fall within the scope of Community law.

Up to now, we have focussed on the parallels between goods and services. The relationship between services and persons is a good deal fuzzier, though not as regards the establishment of individual professionals and services provided by them. The main issue in *Gebhard*⁶⁹ was, after all, to determine the line of demarcation between establishment and services, and the three-stage obstacle/justification/proportionality test was enunciated for both. In addition, the Treaty provisions on citizenship and the proposed re-ordering of the Treaty freedoms (initiated in the Constitutional Treaty and thus transposed to the Reform Treaty agenda) have strengthened the commitment to the personal right of free movement, freedom of establishment and freedom to provide services.

It seems to us that this commitment is subject to strain at two points – in both cases because, nowadays, service providers are so often legal rather than natural persons and therefore entitled to the benefits of

⁶⁴ Paragraph 24.

⁶⁵ In earlier case law, see the decisions in Case C-69/88 *Krantz* [1990] ECR I-583 and Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009; more recently, see *Burmanjer*, paragraph 31 (“if those rules did have such an effect, it would be *too insignificant and uncertain* to be regarded as being such as to hinder or otherwise interfere with trade between Member States’, emphasis added) and paragraph 32.

⁶⁶ Case C-190/98 *Graf v Filmoser Maschinenbau GmbH* [2000] ECR I-493.

⁶⁷ *Alpine Investments*, paragraph 24; this is fleshed out by A. Arnall, *The European Union and its Court of Justice*, (OUP, 2006, 2nd ed.), p. 491; he pursues the thread through to *Delière* and Joined Cases C-544/03 and C-545/03 *Mobistar v Commune de Fléron* [2005] ECR I-7723.

⁶⁸ Case C-429/02 *Bacardi France v Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and GiroSport SARL* [2004] ECR I-6613, paragraph 34.

⁶⁹ Cited above, footnote 26.

Article 48. (The recent decision in *Scorpio*⁷⁰ excludes third country corporations from the benefit of the Treaty provisions on services, but that can normally be got round by incorporation of subsidiaries within the EU.)

As we have noted, the services sector covers many activities of an economic or financial nature which involve 'invisible' or 'virtual' transactions across frontiers without any physical movement at all. These activities are almost always conducted by corporate entities – frequently multinationals or their subsidiaries – and increasingly call for regulation for a variety of public interest reasons, including compliance with competition law and consumer protection. The frontiers across which these activities are conducted are not confined to the internal frontiers of the European Union which is, moreover, bound by the rules of GATS.

One question which seems to us to call for deeper analysis is whether the extent, manner and intensity of regulation of corporate activities in the field of services has any logical connection with regulating 'personal' free movement rights. Does it make sense for financial services sold over the Internet to be discussed in the same terms as the personal services of the individual craftsman? Is it appropriate to analyse the rights of a multinational law firm or accountancy firm with limited liability on the same basis as those of the local practitioner whose involvement in cross-frontier transactions is liable to be sporadic and infrequent?

Questions such as these were probably at the root of the objections to the "country of origin" principle underlying the original Bolkestein proposal, on the view that it is unrealistic to assume that the authorities of Member States are in a position to police the Union-wide, and in some cases world-wide, policies and practices of their corporate 'nationals'. Given the range and complexity of the transactions that have to be regulated, one must ask whether the sketchy Treaty provisions, even if fleshed out by the case law of the Court, are an adequate legal basis for effective regulation. (It is not enough to say that the Union legislator can make good the lacunae or deficiencies of the Treaty since these lacunae and deficiencies can be made good only within the limits of the Treaty.)

A comparable, but quite different, point of strain exists in relation to the rights of the individual worker who exercises his/her skills as an employee of a corporate entity (whether a large scale operator, such as a construction company, or a small family company). The Treaty gives 'workers' extensive rights and these have been jealously protected by the Court and the legislator. Article 15(1) of the Charter of Fundamental Rights proclaims the "right to engage in work and to pursue a freely chosen or accepted occupation". But where the individual worker is the employee of a corporate service-provider whose efficiency (*not necessarily low wage efficiency*⁷¹) threatens to disturb the comforts of a protected 'social market', then the right of the individual (the dreaded 'Polish plumber') to pursue his/her chosen occupation must, it appears, give way to the avoidance of 'social dumping'.

⁷⁰ Cited above, footnote 4.

⁷¹ In *Corsten*, cited above, footnote 17, the Dutch company offered to lay composition floors for "considerably less" (almost 50% less) than German companies protected by the *Handwerksordnung*.

One does not need to be a neocon (or in some vocabularies, a neoliberal) to ask whether this approach is consistent with the intentions of the Treaty-makers. Their intention was decidedly not to promote “the unhindered pursuit of commerce”⁷². On the other hand, it is surely to their credit that they recognised and proclaimed, as part of the internal market idea, the right of human beings to realise their potential, if necessary in competition with each other. There are both legal and moral reasons for questioning the sort of regime to which some at least of the Masters of the Treaties appear to be committed – a regime under which a high-sounding preoccupation with the human right to realise one’s potential ignores the reality of the way in which that right is exercised in modern conditions. ‘Competition’ is not a dirty word to be eliminated from the aims of the Treaty: it is a counterpart of the economics of free movement of real people.

4. Concluding remarks

Our brief journey into the territory of services has, we hope, exemplified the core themes of this volume: *continuity*, especially the jurisprudential thread reaching back to *Van Binsbergen* to which Advocate-General Jacobs contributed his own characteristic powers of analysis; and *change* – the transformed services environment, and perhaps also the new political environment in which the Treaty principles must now be applied.

The function of the Court in an Article 234 reference is to provide guidance to the referring court in dealing with the case before it. Where the Treaty remains vague, it is inevitable (and, looking to Article 220 EC, expected) that the Court will also offer some general propositions to substitute for that vagueness. Experience of the case law on goods from *Dassonville* to *Keck and Mithouard* is a warning against excessively broad judicial pronouncements. Judges best maintain the “logic or symmetry of the law”⁷³ on a case-by-case basis.

So perhaps it is somewhat unreasonable for us to complain when the political institutions seek to provide us with new textual bricks. We are, however, entitled to ask whether the new bricks are good bricks, fit for purpose. It remains to be seen whether Directive 2006/123 in its final form passes this test. We must also ask whether the formulae of a Treaty fifty years old are adequate as a basis for regulating the market in services in the economic and technological conditions of the twenty-first century. So we may wonder why the substantive provisions of the Treaty seemed so irrelevant in the recent intense discussions of Treaty reform. We may nevertheless be forced to answer that the levity with which today’s Treaty-makers are prepared to tinker with the text of the Treaty over the dinner table suggests that it is better to leave the texts as they are and trust to the pragmatic instincts of the Court.

⁷² See especially the opening line of the Opinion of Advocate-General Tesouro in Case C-292/92 *Hünormund v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787.

⁷³ *Dicey Law and Opinion in England*, 2nd edition, 1914, Lecture XI, page 364.