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Freedom of Services in the EEC

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Ernst Steindorff

Abstract

In Part I, after discussing the international context, this Article outlines the EEC issues. Part II traces the early development of freedom of services and shows how there was reluctance to implement freedom of services. As will be shown in Part III, the European Court of Justice accorded direct effect to freedom of services so that this freedom can be invoked before state courts; it has preeminence over state rules that restrain freedom of services. Part IV discusses the other freedoms that contribute to freedom of services. The policy on coordination and approximation of laws, i.e. the policy on Community legislation, has undergone quite a change, which can be traced in the field of services. This trend will be explored in Part V. Finally, in Part VI, broadcasting and insurance will be used as examples of the ongoing struggle between preservation of state powers on the one hand and the striving for freedom of services in the Common Market on the other.

FREEDOM OF SERVICES IN THE EEC

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INTRODUCTION

This Article will deal with freedom of services in the European Economic Community ("EEC"), as derived from Articles 59-66 of the Treaty of Rome ("Treaty"). In Part I, after discussing the international context, this Article outlines the EEC issues. It will be shown how two freedoms — of services and of establishment — concur in facilitating interstate trade in services. Part II traces the early development of freedom of services and shows how there was reluctance to implement freedom of services. A general program was enacted that referred to legislative acts that had to be passed by the Council. Such acts were designed only to abolish discriminatory treatment of foreigners. This reluctance to implement freedom of services was slowly overcome in several steps. As will be shown in Part III, the European Court of Justice accorded direct effect to freedom of services so that this freedom can be invoked before state courts; it has preeminence over state rules that restrain freedom of services. The Court holds now that this freedom can also be invoked by those who want to procure services from persons from another Member country. Additionally, the Court finally accepted in 1986 that freedom of services can be relied on to prohibit all state legislation that creates a burden on interstate trade in services not justified by the common weal, in addition to state rules that deny equal treatment to foreigners.

The result of this holding is that coordination and approximation by the Community of Member-State laws, *i.e.*, Community legislation, is reduced to an instrument of facilitation of trade in services. However, coordination and approximation are no longer a precondition for such freedom. This most cumbersome legislative process of the Community is replaced, to some extent, by the work of the judiciary.

Part IV discusses the other freedoms that contribute to freedom of services. The policy on coordination and approxi-

mation of laws, *i.e.*, the policy on Community legislation, has undergone quite a change, which can be traced in the field of services. This trend will be explored in Part V. Finally, in Part VI, broadcasting and insurance will be used as examples of the ongoing struggle between preservation of state powers on the one hand and the striving for freedom of services in the Common Market on the other.

I. FREEDOM OF SERVICES AND ESTABLISHMENT

The EEC Treaty facilitates trade in services by guaranteeing two freedoms. First, Article 52 guarantees freedom of establishment, which enables nationals of Member States to effect an establishment in any other Member State so as to render services there.¹ Second, Article 59 grants the freedom to provide services to persons when they are "established in a State of the Community other than that of the person for whom the services are intended."² Article 59 thus opens the door for what Barton calls "transient trade in professional services."³ This Article will deal mainly with transient trade in services and will neglect to some extent what Community law has introduced as freedom of establishment.

A. The OECD Approach

On December 12, 1961, the Council of the OECD (at that time OEEC) adopted the Code of Liberalization of Current Invisible Operations,⁴ which provides in Article 1 lit. a that Members shall eliminate restrictions between one another on cur-

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 52, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179 - II), at 23, (official English trans.), 298 U.N.T.S. 11, 37-38 (1958) (unofficial English trans.) [hereinafter EEC Treaty].

2. EEC Treaty, *supra* note 1, art. 59, 1973 Gr. Brit. T.S. No. 1, at 25, 298 U.N.T.S. at 40.

3. Barton, *Negotiation Patterns for Liberalizing International Trade in Professional Services*, 1986 U. CHI. LEGAL F. 97, 110.

4. CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS (Org. for European Economic Co-operation 1961). Many Members have lodged reservations according to Article 2(b) of the Code, e.g. in the field of insurance. According to Article 3 the provisions of the Code shall not prevent a Member from taking action that it considers necessary for the maintenance of public order or the protection of public health, morals, and safety. Article 7 provides that Members need not take the whole of the measures of liberalization if their economic and financial situations justify such a course. *Id.*

rent invisible transactions and transfers.⁵ There are seven such restrictions: restrictions on local ownership, on international payments, on the mobility of professional personnel, on technology and information transfers, on market access through local procurement policy, and on the business scope of firms.⁶ These are the major restrictions, which the OECD Code may have envisioned and which have to be dealt with throughout this article.⁷

B. *Differences between Article 59 and Article 52*

Articles 59 and 52 are distinguishable in two aspects. First, while Article 59 applies to services only, freedom of establishment may be used for other purposes, such as the establishment of a plant in another country in order to produce goods there. Freedom of establishment also includes "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings . . . under the conditions laid down for its own nationals by the law of the country where such an establishment is effected"⁸ In other words, Article 52(2) provides for a right of access without discrimination for those who want to establish in another country.

Second, Article 59(1) declares that restrictions on freedom to provide services shall be abolished.⁹ This rule is not necessarily restricted to discrimination. In its wording, Article 59 creates only a right to provide services. However, in contrast to the right of establishment, there is also a corollary right

5. A review, prepared on the responsibility of the Committee for Invisible Transactions of the OEEC, preceded the Code. It defines the concept of liberalization as follows: "Liberalisation of invisibles as it is understood in the O.E.E.C. involves the removal of restrictions of all kinds, so that the residents of different Member countries are, broadly speaking, as free to transact business with each other as are the residents of a single country." *ORG. FOR EUROPEAN ECONOMIC COOPERATION, LIBERALISATION OF CURRENT INVISIBLES AND CAPITAL MOVEMENTS BY THE OEEC* (1961).

6. Noyelle & Dutka, *The Economics of the World Market for Business Services: Implications for Negotiations on Trade in Services*, 1986 U. CHI. LEGAL F. 57, 77.

7. Multilateral and bilateral international conventions and negotiations as well as the economics of interstate services are discussed in excellent contributions by American lawyers and economists in *Barriers to International Trade in Professional Services*, 1986 U. CHI. LEGAL F.

8. EEC Treaty, *supra* note 1, art. 52, 1973 Gr. Brit. T.S. No. 1, at 23, 298 U.N.T.S. at 37-38.

9. *Id.* art. 59, 1973 Gr. Brit. T.S. No. 1, at 25, 298 U.N.T.S. at 40.

to receive services, for example, in a restaurant or hotel in another country.

C. Other Freedoms

Besides those set forth in Article 52, there are other freedoms that facilitate but are not limited to trade in services. Freedom of payments as well as freedom of movement for workers are two examples.¹⁰ This article is not devoted to these other freedoms. It will, however, deal with such other freedoms as well as with Article 52 insofar as it is necessary to show how they contribute to facilitating trade in services or in invisible goods, as they are called in the OECD documents.

II. EARLY DEVELOPMENT

A. Outline of the Treaty Provisions

Article 59 envisions liberalization of services. Article 60(1) includes those services that are normally provided for remuneration. The Court decisions sometimes speak of "gainful" services. Freedom of services is granted for all trade not governed by the treaty provisions relating to freedom of movement for goods, capital, and persons.¹¹ Article 59 liberalizes everything that is not liberalized by other chapters of the Treaty. We shall have to see how a delimitation of the different trades can be achieved.¹²

Article 60 specifies as services activities of an industrial or commercial character, of craftsmen, and of professionals. This enumeration creates borderline cases of broadcasting, educational, and sporting activities.¹³

Article 60(3) allows persons providing services temporar-

10. See *id.* art. 48, 1973 Gr. Brit. T.S. No. 1, at 21-22, 298 U.N.T.S. at 36 (workers); *id.* art. 67(2), 1973 Gr. Brit. T.S. No. 1, at 27, 298 U.N.T.S. at 42 (payments).

11. Article 60 speaks of services "in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons." *Id.* art. 60, 1973 Gr. Brit. T.S. No. 1, at 25-26, 298 U.N.T.S. at 41; see Vignes, *Etablissement et Services*, in 3 J. MÉGRET, J.-V. LOUIS, D. VIGNES, M. WAELBROECK, J. DOUSSET & M. SARMET, *LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE* 109 (1971) [hereinafter J. MÉGRET]; E. WOHLFARTH, U. EVERLING, H. GLAESNER & E.R. SPRUNG, *DIE EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT 195-96* (1960).

12. See *infra* Part IV.

13. EEC Treaty, *supra* note 1, art. 60, 1973 Gr. Brit. T.S. No. 1, at 25-26, 298 U.N.T.S. at 41; see *infra* Part IV; see also VAN GERVEN, *LES NOUVELLES: DROIT DES COMMUNAUTÉS EUROPÉENNES* 741 (1969) (No. 1856). One commentator has stated, "La

ily to pursue their activity in the State where the service is provided.¹⁴

Article 61(1)¹⁵ refers to a specific title of the Treaty with respect to transport.¹⁶ Article 61(2) orders the liberalization of banking and insurance connected with movements of capital to be effected in step with the progressive liberalization of movement of capital.¹⁷ Directives have been enacted to achieve this liberalization.¹⁸

Article 63 seeks to attain implementation of freedom of services by two steps: first by drawing up a general program and then by enacting directives.¹⁹

B. *The Background*

1. The Spaak Report

In preparing the so-called "relance européenne," the Member States of the European Coal and Steel Community had established a Commission whose chairman was the Belgian Foreign Minister, Paul-Henri Spaak. The Commission's Final Report, published on April 21, 1956,²⁰ did not mention freedom of establishment but devoted a whole chapter to freedom of services. It started from the OECD Code and mentioned that services must be understood more narrowly than trade in invisibles, liberalization of which is envisioned in the OECD Code.²¹

notion de prestation de services' visée par les articles 59 à 66 est aussi limitée aux services rendus dans des buts économiques . . ." *Id.*

14. EEC Treaty, *supra* note 1, art. 60, 1973 Gr. Brit. T.S. No. 1, at 25-26, 298 U.N.T.S. at 41.

15. Articles 55 and 66 exclude the exercise of official authority from freedom of establishment and of services, and authorize the Council to exclude further activities. No serious problems have arisen so far.

16. EEC Treaty, *supra* note 1, art. 61(1), 1973 Gr. Brit. T.S. No. 1, at 26, 298 U.N.T.S. at 41; *see also* European Parliament v. Council, Case 13/83, 1985 E.C.R. 1513, Common Mkt. Rep. (CCH) ¶ 14,191 (holding that the Council violated the Treaty by not implementing freedom of services in the field of transport).

17. EEC Treaty, *supra* note 1, art. 61(2), 1973 Gr. Brit. T.S. No. 1, at 26, 298 U.N.T.S. at 41.

18. *See infra* Part VI.

19. EEC Treaty, *supra* note 1, art. 63, 1973 Gr. Brit. T.S. No. 1, at 26, 298 U.N.T.S. at 41-42.

20. REGIERUNGS-AUSSCHUSS, EINGESETZT VON DER KONFERENZ VON MESSINA, BERICHT DER DELEGATIONSLEITER AN DIE REGIERUNGSCHEFS (1956).

21. The Final Report defines its aims for the future as follows:

1. Mit Vorrang sollen diejenigen Dienstleistungen behandelt werden, die

Two points should be highlighted: First, although realizing that production of and trade in services becomes more and more important for a modern economy, the report accorded priority to those services that bear on goods, *i.e.*, hardware. Production of and trade in goods still take priority when it comes to liberalization.

Second, the Report states that a distinction must be made between two sorts of national acts and rules which potentially restrict trade in services: those that serve public policy and the common weal, and those that protect producers of services.

2. Response in the EEC Treaty

a. *Fundamental Right*

The EEC Treaty responds to these two statements. Article 3(c) includes freedom of services in the "activities" of the Community on the same terms as it includes free movement of

unmittelbar und wesentlich die Produktionskosten beeinflussen und deren Liberalisierung zum Funktionieren des Gemeinsamen Marktes für Güter beiträgt,

2. Es muss darauf geachtet vorgesehenen, dass die in den einzelstaatlichen Vorschriften vorgesehenen Bedingungen, so lange sie bestehen bleiben, ohne Diskriminierung nach Wohnsitz und Staatsangehörigkeit angewendet werden.

3. Für die freien Berufe, zu deren Ausübung Universitätsdiplome nötig sind, ist eine möglichst weitgehende Gleichwertigkeit und Gleichstellung anzustreben.

4. Die bestehenden Regelungen müssen daraufhin überprüft werden, inwieweit und mittels welcher Änderungen sie Notwendigkeiten der öffentlichen Ordnung entsprechen oder ob sie vielmehr ein System zum Schutz oder zur Erhaltung von Vorzugsstellungen darstellen.

(1. Those services that exert direct, important, and positive influence on production costs of the goods of the Common Market and contribute to liberalization of its function, must be accorded top priority.

2. Care must be taken that those regulations spelled out by the individual Member States be applied to all, without discrimination, as to place of residence and citizenship.

3. For the freestanding professions, requiring university diplomas for their practice, the widest possible equality and equivalency is to be sought.

4. Existing regulations must be carefully examined to ascertain the extent to which they carry out the needs of the public and commonwealth; and if necessary, what changes thereof are required to achieve this. Hence, to establish with certainty that other systems do not achieve undue preferential status or protection.)

Id. at 45.

goods, in Article 3(a).²² Relying on these clauses, the Court has held that freedom of services, like free movement of goods, is one of the fundamental rights granted by the EEC Treaty.²³

There is a distinction, however, according to whether services are connected with trade in goods. This corresponds to the Commission's report and will be dealt with under c. below. Moreover, Article 61 provides for some exceptions for transport, banking, and insurance insofar as they include movements of capital.

b. *Public Policy*

Article 66, by referring, *inter alia*, to Article 56, permits safeguarding public policy, public security, and public health, in the States where those services are provided.²⁴ It will be shown that the protection of these public goods is incorporated also in the interpretation of Article 59.

c. *The Treaty's Plan For Implementation of the Program*

In contrast to the Treaty's rigidity as to free movement of goods, Article 63 is flexible with the implementation of freedom of services. First, a general program for the abolition of existing restrictions on services had to be devised by the Council.²⁵ Second, such a program would have to treat each service individually. For example, Article 63(3) accords priority to those services that directly affect production costs or promote trade in goods.²⁶ Finally, Article 63(2) requires that the abolition of restrictions be implemented by Council directives proposed by the Commission after consultation with the Economic and Social Committee and the Assembly.²⁷ This proce-

22. EEC Treaty, *supra* note 1, art. 3, 1973 Gr. Brit. T.S. No. 1, at 3, 298 U.N.T.S. at 15-16.

23. Commission v. Germany, Case 205/84, 1986 E.C.R. —, —, ¶ 54, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,162; Webb, Case 279/80, 1981 E.C.R. 3305, 3325, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8784 at 7332; Watson and Belmann, Case 118/75, 1976 E.C.R. 1185, 1198, ¶ 16, Common Mkt. Rep. (CCH) ¶ 8368 at 7681.

24. EEC Treaty, *supra* note 1, art. 66, 1973 Gr. Brit. T.S. No. 1, at 27, 298 U.N.T.S. at 42.

25. *Id.* art. 63(1), 1973 Gr. Brit. T.S. No. 1, at 26, 298 U.N.T.S. at 41.

26. *Id.* art. 63(3), 1973 Gr. Brit. T.S. No. 1, at 26, 298 U.N.T.S. at 42.

27. *Id.* art. 63(2), 1973 Gr. Brit. T.S. No. 1, at 26, 298 U.N.T.S. at 42.

dures guaranteed that economic as well as the social problems of services, from insurance to health care, were taken care of.

C. *The General Program*

1. Outline of the Program

On December 18, 1961, the Council approved both the program to implement freedom of services,²⁸ in accordance with Article 63(1), and a program dealing with freedom of establishment. On the whole, the program on services aims at opening access to the market of other countries. Its insistence on the applicability of the law of the countries where a service is rendered implied, however, that it did not aim at anything like an internal market, as shall be completed under the Single European Act and is envisioned in the OECD document quoted above.

The main provisions of the program are the following:

- Section II provides for free entry and exit from other countries for the benefit of all nationals of Member States. The right of permanent residence is also included.

- According to Section III, foreigners must not be discriminated against, and all State measures imposed specifically on nationals of other countries must be suppressed. This provision applies also to measures that do not constitute express discrimination but do in fact put a burden mainly on foreigners.

- We do not insist on the question whether the program really attacks only discriminatory measures. But it must be stressed that, according to the program, restrictions must be abolished, no matter whether they were imposed on the provider of the services directly, or whether they are created indirectly, via the receiver of the services. For example, a social security regulation that excluded reimbursement for medical treatment in another EEC country would be an impermissible indirect restriction.

- A time schedule, in Section V, does not distinguish between different kinds of services, but also adds specific rules for governments procuring construction services from industries in other countries. Construction is a service within the

28. O.J. L 32/62 (1962), O.J. Eng. Spec. Ed. 1974, at 3.

meaning of the Treaty.²⁹ Government interests, however, should be protected according to the program by a quota system and a principle of reciprocity.

- Recognition of foreign diploma and other qualifications, according to Section IV, shall be made a subject of investigation.

While the program addressed restrictions imposed on the receiver of services that had a negative effect on the provider, it did not raise the question whether receivers should have an independent right, enabling them to choose between domestic and foreign offers for services.³⁰

The program, though voted unanimously by the Council, has no binding effect.³¹ However, it has influenced strongly the Community's activities in the fields of harmonization and of coordination of laws.

2. Early Attitude of the Commission

In 1960,³² the Commission had released a document whose attitude was described as more liberal by Maestripiéri.³³ It concluded that:

— In a number of cases, freedom of services has an absolute character as opposed to the relative character of freedom of establishment: as in free movement of goods or capital, it is the elimination of restrictions, and not the elimination of discriminatory restrictions, which is aimed at:
 — the obstacles that inconvenience the recipient of services, that is to say, the limits on the acquisition of services and on its direct effect, as one will see later, are of great

29. *Transporoute v. Minister of Public Works*, Case 76/81 1982 E.C.R. 417, Common Mkt. Rep. (CCH) ¶ 8812.

30. *Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 and 26/83, 1984 E.C.R. 377, Common Mkt. Rep. (CCH) ¶ 14,038.

31. C. MAESTRIPIERI, *LA LIBRE CIRCULATION DES PERSONNES ET DES SERVICES DANS LA CEE* 60 (1972).

General Advocate Warner found that the program was "on any view incomplete" and that it "did not lie within the power of the Council, by the General Program, to narrow the scope of Article 59-any more than it lay within its power to widen it. In any case, the Council did not purport to do any such thing." *Walrave v. UCI [Union Cycliste Internationale]*, Case 36/74 1974 E.C.R. 1405, 1425, Common Mkt. Rep. (CCH) ¶ 8290, at 7347.

32. Doc. III/COM (60) 92 final, at 22 (Jul. 28, 1960), reprinted in C. MAESTRIPIERI, *supra* note 31, at 48.

33. C. MAESTRIPIERI, *supra* note 31, at 47.

importance because, however indirectly, they affect without any doubt the provider of services, sometimes even very appreciably;

— however, equal treatment remains the rule when the provider moves to the recipient's country to furnish a service there (one may then say that the conditions of earning profits for such services are those of establishment without the duration).³⁴

As early as 1960, the Commission posed the crucial questions in this area: Should freedom of services be approached in a manner analogous to free movement of goods or to freedom of establishment? And further: Does the Treaty protect the interests only of providers of services, or also of the receivers of such services who may wish to have more choices in the Common Market?

D. Early Implementation of Council Directives

1. *van Binsbergen*

In 1974, the Court in *van Binsbergen* described how freedom of services should have been implemented by legislation. The Court said:

21. Within the scheme of the chapter relating to the provision of services, these directives are intended to accomplish different functions, the first being to abolish, during the transitional period, restrictions on freedom to provide services, the second being to introduce into the law of the Member States a set of provisions intended to facilitate the effective exercise of this freedom, in particular by the mutual

34. Doc. III/COM (60) 92 final, at 22 (Jul. 28, 1960), reprinted in C. MAESTRIPIERI, *supra* note 31, at 48. The original reads as follows:

— dans de nombreux cas, la liberté des services a un caractère absolu, qui s'oppose au caractère relatif du libre établissement: comme dans la libre circulation des marchandises ou des capitaux, c'est l'élimination des restrictions, et non celle des restrictions discriminatoires, qui est visée;

— les obstacles qui gênent le destinataire (c'est-à-dire les limites à la liberté d'acquisition de la prestation et à son plein effet, ainsi qu'on le verra plus loin) sont d'une grande importance puisque, bien qu'indirectement, ils atteignent sans aucun doute le prestataire, parfois même très sensiblement;

— c'est cependant l'égalité de traitement qui reste la règle, lorsque le prestataire se déplace dans le pays du destinataire pour y fournir le service (on peut alors dire que les conditions de réalisation de la prestation sont celles de l'établissement sans la durée).

Id. at 22, reprinted in C. MAESTRIPIERI, *supra* note 31, at 48.

recognition of professional qualifications and the coordination of laws with regard to the pursuit of activities as self-employed persons.

22. These directives also have the task of resolving the specific problems resulting from the fact that where the person providing the service is not established, on a habitual basis, in the State where the service is performed he may not be fully subject to the professional rules of conduct in force in that State.³⁵

2. Legislation by the Council

Community commentator Maestriperi has reported that by the end of 1971 the Council had adopted thirty-nine directives with respect to services.³⁶ Most directives removed restrictions, but others enacted so-called transitory measures or dealt with coordination of laws.

The legislative work performed over the ten-year period from 1961 to 1971 was considerable. However, it was in no way sufficient to fully implement the program and, therefore guaranteeing freedom of services within the Community. The reasons for the failure are easy to explain. First, each profession requires separate, specific rules with respect to standards and education. Such rules must be enacted one by one.

Additionally, services include such sensitive areas as insurance, where harmonization of laws and coordination of regulation and administrative practice raise problems of public policy. The Council cannot be expected to agree easily on solutions that do not coincide with the former laws of the States.

Two instruments have been devised to overcome the difficulties of the legislative process. One is a new and more modest approach to harmonization and coordination than the program contained. The other one is so-called direct applicability or effect of freedom of services. Direct effect means that State measures that restrain services are forbidden *ipso iure*; such measures need not be abolished by directives as had been envisioned in the program.

35. *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*, Case 33/74, 1974 E.C.R. 1299, 1311, ¶¶ 21-22, Common Mkt. Rep. (CCH) ¶ 8282, at 7212.

The problems dealt with under recital 22 may be compared to those raised in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

36. C. MAESTRIPERI, *supra* note 31, at 96.

III. DIRECT EFFECT

A. The Principle

1. In General

Direct effect or applicability is a well-known concept of Community law by which the majority of fundamental freedoms of the EEC Treaty create individual rights that the national courts must protect.³⁷ The rights can be invoked before these courts without implementation by legislative acts.³⁸ Thus, the difficulties of the Community's legislative process are to some extent overcome.

Direct effect presupposes that Articles of the EEC Treaty are self-executing and that the relevant transitional period has expired. Article 8(7) declares that "the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all measures required for establishing the common market must be implemented."³⁹

2. Services

Eleven years after the leading case of *van Gend & Loos v. Nederlandse Administratie der Belastingen*⁴⁰ accorded direct effect of an Article, the Court decided in *van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*⁴¹ that the first paragraph of Article 59 and the third paragraph of Article 60 have direct effect and

37. The leading case is *van Gend & Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, 1963 E.C.R. 1, Common Mkt. Rep. (CCH) ¶ 8008. Judge Pescatore spoke of an "infant disease." Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983).

38. *Commission v. Italy*, Case 193/80, 1981 E.C.R. 3019, 3033, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8788, at 7364. The Court stated:

The fundamental principle of a unified market and its corollary, the free movement of goods, may not under any circumstances be made subject to the condition that there should first be an approximation of national laws, for if that condition had to be fulfilled the principle would be reduced to a mere cipher.

Id. This is confirmed in *van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*, 1974 E.C.R. 1299, Common Mkt. Rep. (CCH) ¶ 8282; see *infra* note 41.

39. EEC Treaty, *supra* note 1, art. 8(7), 1973 Gr. Brit. T.S. No. 1, at 5, 298 U.N.T.S. at 18.

40. Case 26/62, 1963 E.C.R. 1, Common Mkt. Rep. (CCH) ¶ 8008.

41. *van Binsbergen*, 1974 E.C.R. at 1311-12, ¶¶ 23-26, Common Mkt. Rep. (CCH) ¶ 8282, at 7212. In paragraph 26, the Court says: "Articles 59 and 60 impose a well-defined obligation, the fulfillment of which by the Member States cannot be delayed

may be relied on before national courts. In its arguments, the Court mentioned, *inter alia*, that in light of Article 8(7), Article 59 became unconditional on the expiration of the transitional period.

B. *The Activities Covered by Direct Effect*

1. The Early Cases

In *van Binsbergen* the Court had to decide whether a legal representative is entitled to act for parties where representation by an "advocaat" is not obligatory.⁴²

In *Sacchi*,⁴³ the Court did not have to answer a question on the direct effect of Article 59. But the case is important for the delimitation of freedom of services. The Court considered an Italian law that granted exclusive rights in the field of television, *i.e.*, for broadcasting and for transmitting by cable. The question was not whether state monopolies in this field violate Article 59. Instead, the Court was asked to decide whether freedom of movement of goods is restrained if the monopoly includes advertising.

The answer may be in the affirmative if domestic products are favored. Regulation of services in that case has an indirect impact on advertising for, and free movement of, goods. Therefore this latter freedom is to be relied upon. The Court found that transmission of television signals, including those in the nature of advertisements, must be regarded as provision of services. Services may, however, come under the provisions relating to the free movement of goods if trade in goods is restricted. This confirms that Articles 59 and 60 have to be applied wherever other freedoms do not cover a specific trade.

*Walrave v. UCI*⁴⁴ concerned rules of a federation in the field of sports, specifically, cycling behind motorcycles. The rule in question stated that the pacemaker must have the same nationality as the stayer.⁴⁵ Because this rule discriminated

or jeopardized by the absence of provisions which were to be adopted in pursuance of powers conferred under Articles 63 and 66." *Id.*

42. *Id.* at 1307-08, ¶¶ 1-4, Common Mkt. Rep. (CCH) ¶ 8282, at 7210-11.

43. Case 155/73, 1974 E.C.R. 409, Common Mkt. Rep. (CCH) ¶ 8267.

44. Case 36/74, 1974 E.C.R. 1405, Common Mkt. Rep. (CCH) ¶ 8290.

45. A stayer is the teammate on the bicycle who follows the pacer, his teammate on the motorcycle, whose function it is to create a moving vacuum for the stayer. *Id.* at 1417, ¶ 2, Common Mkt. Rep. (CCH) ¶ 8290, at 7342.

against other nationals, the Court found that Article 59 also can apply to rules of a federation.⁴⁶ The Court held that with respect to Article 2,⁴⁷ sports are subject to Community law only insofar as they are remunerated services,⁴⁸ in which case sports comes within the scope of Article 59. Foreigners must therefore not be excluded from such activity.⁴⁹ The prohibition of such discrimination, however, does not affect the composition of sports teams, especially national sports teams, because the formation of such teams is a question of purely sporting interest and as such has nothing to do with economic activity.⁵⁰

Only the second aspect of the Court's holding is of interest here. The judgment indicates that the jurisdiction of the Community is not limited to the economy in a narrow sense, but such jurisdiction extends to *all* sectors of life *insofar* as they are touched by Community rules. This applies not only to sports, but also to defense, education, and other fields. The Advocate General, Mr. Warner, told the Court that he has no doubt that Article 59 has direct effect on these areas.⁵¹

Indication that tourism may be included in freedom of services may be found in *Watson and Belmann*.⁵² *Watson* dealt with a complex issue of Italian registration formalities for foreigners and the issue of whether such formalities create obstacles for the freedom of movement for persons.⁵³ The Italian judge, who had referred the case to the Court under Article 177,⁵⁴ had not explained why a young English girl living with

46. *Id.* at 1422, ¶ 5, Common Mkt. Rep. (CCH) ¶ 8290, at 7344.

47. EEC Treaty, *supra* note 1, art. 2, 1973 Gr. Brit. T.S. No. 1, at 3, 298 U.N.T.S. at 15.

48. *Walrave*, 1974 E.C.R. at 1421, ¶1, Common Mkt. Rep. (CCH) ¶ 8290, at 7344.

49. *Id.* at 1417, ¶¶ 5-6, Common Mkt. Rep. (CCH) ¶ 8290, at 7342-43.

50. *Id.* at 1421, ¶ 2, Common Mkt. Rep. (CCH) ¶ 8290, at 7344.

51. *Id.* at 1424, ¶ 1, Common Mkt. Rep. (CCH) ¶ 8290, at 7346. In *Coenen v. Sociaal-Economische Raad*, Article 59 was applied to the activities of an insurance intermediary. Case 39/75, 1975 E.C.R. 1547, Common Mkt. Rep. (CCH) ¶ 8332.

52. Case 118/75, 1976 E.C.R. 1185, Common Mkt. Rep. (CCH) ¶ 8368.

53. *See id.* at 1195-96, ¶¶ 1-5, Common Mkt. Rep. (CCH) ¶ 8368, at 7679. Free movement of persons, as included in Article 3 lit. c, has been granted by Directive No. 73/148 of May 21, 1973 with regard to establishment and the provision of services.

54. EEC Treaty, *supra* note 1, art. 177, 1973 Gr. Brit. T.S. No. 1, at 58, 298 U.N.T.S. at 76-77.

an Italian family had come to Italy. The Advocate General, Mr. Trabucchi, discussed two possibilities.⁵⁵ If she came to Italy as an "au pair," she was rendering services, so that freedom of services could come into play. But what if she came as a tourist? The Advocate General noted that there is a strong tendency to include tourism in freedom of services. He hesitated, however, to extend free movement to cases involving tourists, because otherwise there would remain no limits to the freedom of movement of persons. Although the Court did not have to pronounce on that question, it does not seem to share the hesitations of the Advocate General. The case suggests that tourism is included in the freedom of services.⁵⁶

In the 1978 *Koestler* case, a bank carrying out orders on a stock exchange was considered to be tendering a service that must be evaluated under Article 59.⁵⁷ A few months later, in the *van Wesemael* case, the activities of an employment agent for entertainers were held to be subject to Article 59.⁵⁸

2. Recent Cases

It may be noted that all the preceding cases were decided before the famous *Cassis de Dijon* case,⁵⁹ which opened the door for a wide, though restricted direct application of Article 30 on the movement of goods.

The 1980 judgment in *Debauve*⁶⁰ confirmed *Sacchi* insofar as it took for granted that both broadcasting and cable television are activities subject to Article 59. The Court in *Debauve*

55. *Watson*, 1976 E.C.R. at 1202, ¶ 2, Common Mkt. Rep. (CCH) ¶ 8368, at 7682.

56. *Accord Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 and 26/83, 1984 E.C.R. 377, Common Mkt. Rep. (CCH) ¶ 14,038. The direct effect of Articles 59(1) and 60(3) is confirmed in the last of the series of cases dating from 1974 to 1976. *Donà v. Mantero* upheld *Walrave* in the context of football. *Donà v. Mantero*, Case 13/76, 1976 E.C.R. 1333, 1341, ¶¶ 17-20, Common Mkt. Rep. (CCH) ¶ 8369, at 7694-95.

57. *Société Générale Alsacienne de Banque v. Koestler*, Case 15/78, 1978 E.C.R. 1971, 1978, ¶ 1, Common Mkt. Rep. (CCH) ¶ 8514, at 7309.

58. *Ministère Public and A.S.B.L. v. van Wesemael*, Joined Cases 110 and 111/78, 1979 E.C.R. 35, 52, ¶¶ 28-29, Common Mkt. Rep. (CCH) ¶ 8533, at 7649-50.

59. *Rewe v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, 1979 E.C.R. 649, Common Mkt. Rep. (CCH) ¶ 8543.

60. *Procureur du Roi v. Debauve*, Case 52/79, 1980 E.C.R. 833, Common Mkt. Rep. (CCH) ¶ 8661.

construed Article 59 for the first time along the criteria that it had fixed in *Cassis de Dijon* for Article 30.⁶¹

Again in 1980, the first *Coditel* case discusses broadcasting and diffusion of television as services under Article 59 and discusses whether Articles 59 and 60 "prohibit an assignment, limited to the territory of a Member State, of the copyright in a film."⁶² Here again, one may be struck by the parallel of Articles 30 and 59 with respect to industrial and intellectual property, the use of which may be an instrument to partition the common market.

Transporoute v. Minister of Public Works, decided in 1982, dealt with an invitation to tender bids under public-works contracts.⁶³ Two directives of the Council had already contributed to freedom of services in this field.⁶⁴ Slightly earlier in *Webb*, provision of manpower was categorized as provision of services.⁶⁵

In *Haug-Adrion v. Frankfurter Versicherungs-AG*,⁶⁶ plaintiff, an official of the Commission, introduced Article 59. A German insurer had refused to grant plaintiff a bonus for a car registered under customs plates for purposes of transferring the car from Germany to Brussels. The Advocate General, Mr. Lenz, was of the opinion that only rights of the receiver and not of the provider of services were at issue, and that, therefore, Article 59 could not be invoked.⁶⁷ The Court referred to Article 59 together with Articles 7⁶⁸ and 48⁶⁹ to find out whether the insurer was illegally discriminating against plaintiff. The Court did not question that any discrimination in that case could be caused only by the insurer's general conditions. This action of the Court may be deemed to confirm *Walgrave*, according to

61. EEC Treaty, *supra* note 1, art. 30, 1973 Gr. Brit. T.S. No. 1, at 13, 298 U.N.T.S. at 26.

62. *Coditel v. Cine Vog Films*, Case 62/79, 1980 E.C.R. 881, 902, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8662, at 7843.

63. Case 76/81, 1982 E.C.R. 417, Common Mkt. Rep. (CCH) ¶ 8812.

64. *Id.* at 426, ¶¶ 6-7, Common Mkt. Rep. (CCH) ¶ 8812, at 7650.

65. Case 279/80, 1981 E.C.R. 3305, 3322-23, ¶¶ 6-11, Common Mkt. Rep. (CCH) ¶ 8784, at 7330-31.

66. Case 251/83, 1984 E.C.R. 4277, Common Mkt. Rep. (CCH) ¶ 14,135.

67. *Id.* at 4294 (Opinion of Advocate General Lenz).

68. EEC Treaty, *supra* note 1, art. 7, 1973 Gr. Brit. T.S. No. 1, at 4, 298 U.N.T.S. at 17.

69. *Id.* art. 48, 1973 Gr. Brit. T.S. No. 1, at 21-22, 298 U.N.T.S. at 36.

which Article 59 is not restricted to public law acts. Additionally, although the Court did not respond explicitly to the question raised by the Advocate General, the judgment can be read to confirm his argument. This reading would imply that Article 48 and not 59 would be relevant if a person, working in another EEC country or providing services there, was disadvantaged in his activities by an insurer, as compared to persons in the same situation at home. Article 59 may not, however, accord a right to the potential receiver of services against a provider. The problems just raised resemble to some extent the questions that arose in *Sacchi*.

*Luisi and Carbone*⁷⁰ concerned fines imposed on Italian nationals for exporting currency into other EEC countries. Both plaintiffs invoked Articles 59, 60, and 106,⁷¹ the latter obliging the Member States to authorize payments connected with the movement of goods, services, and capital, to the extent that this movement is liberalized pursuant to the EEC Treaty.⁷² One plaintiff maintained that she had exported currency to pay for medical treatment in another country, and both argued that they were traveling in another EEC country as tourists, and receiving services there. According to the Court, tourists, persons receiving medical treatment, and persons traveling for the purpose of education or business are to be regarded as recipients of services. This conclusion means that all these services, contrary to Advocate General Trabucchi,⁷³ are subject to Article 59. Payments are liberalized by Article 106 insofar as they are necessary for services.⁷⁴

70. *Luisi and Carbone*, 1984 E.C.R. at 397-98, ¶ 2, Common Mkt. Rep. (CCH) ¶ 14,038.

71. *Id.* at 403, ¶ 16, Common Mkt. Rep. (CCH) ¶ 14,038, at 14,606.

72. EEC Treaty, *supra* note 1, art. 106, 1973 Gr. Brit. T.S. No. 1, at 39-40, 298 U.N.T.S. at 56.

73. *Watson*, 1976 E.C.R. at 1203-04, Common Mkt. Rep. (CCH) ¶ 8368, at 7683 (Opinion of Advocate General Trabucchi).

74. *Luisi and Carbone*, 1984 E.C.R. at 408, Common Mkt. Rep. (CCH) ¶ 14,038, at 14,608-09.

All cases reported so far have been referred to the Court by national courts pursuant to Article 177. There are only four recent cases where the Commission instigated procedures against Member States under Article 168 for violation of freedom of service. In these cases the Court found that insurance as well as coinsurance is a service within the meaning of the EEC Treaty. *Commission v. Germany*, Case 205/84, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,339; *Commission v. French Republic*, Case 220/83, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,340; *Commission v. Denmark*, Case 252/83, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶

Our reading of *Haug-Adrion*, therefore, must be revised. Freedom of services creates a right for receivers to the extent that they must have access to competing providers of services in all EEC countries. *Haug-Adrion* must be understood as excluding from Article 59 the receiver's right not to be discriminated against by one and the same provider of services. Protection in this case can be granted only by other freedoms of the receivers.

2. Conclusions

a. *Importance of Freedom of Services*

This overview of the cases confirms what could be deduced from the legislative history. Article 60, defining the services that have been liberalized in the EEC, includes a variety of activities. This articulation by the Treaty requires both differentiation of activities through legislation (directives), and the careful direct application of the Articles to Member State laws. The case law teaches us that freedom of services is not relevant when trade has been liberalized by other Treaty provisions. However, wherever other provisions do not apply, Article 59 comes in and guarantees that no economic activity is excluded from the Common Market jurisdiction. As the court said in *Webb*, "[a]ccording to the wording of the first paragraph of Article 60 . . . the expression 'services' means services which are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movements for goods, capital and persons."⁷⁵

b. *Only Economy?*

The sports cases teach a most important lesson whose relevance extends far beyond Article 59. According to Article 2, the EEC is an economic community only. Arguments could be made that state administration, defense, sports, theater, and television are not parts of the economy and, therefore, not governed by EEC law, remaining within Member State jurisdiction. But the cases show that 'economy,' for the purposes of Community law, must be defined according to the special pro-

14,341; *Commission v. Ireland*, Case 206/84, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,342.

75. *Webb*, 1981 E.C.R. at 3322, ¶ 8, Common Mkt. Rep. (CCH) ¶ 8784, at 7331.

visions of the Treaty. Hence, services are subject to the Treaty if they are provided for remuneration and thereby fulfill the conditions of Article 60(1). Paragraph 2 adds examples but does not exclude further activities. The result is that sport or cultural life is not *in toto* regulated by Community law, but only insofar as services are provided for remuneration. And again, these services are not regulated *in toto*, but only insofar as regulation is necessary for liberalization. The same rule applies for Article 48.

3. No Exceptions

The special nature of a particular service will not remove the service from the coverage of Article 59. The Court in *Webb* rejected such an argument by the French government, affirming *van Binsbergen*.⁷⁶

C. *Interstate Trade, Movement of Persons, and Rights of Receivers*

1. Domestic Cases

According to Article 59(1) freedom of services is granted for cases where provider and receiver reside in different countries, so that we can speak of interstate trade.

In the German insurance case, the Court left open the question whether Article 59 could be invoked where only the risk is located in another country.⁷⁷

In *Debauve*, the Court said, without reference to Article 59(1), that the Treaty provisions on freedom to provide services cannot apply to activities whose relevant elements are confined in a single Member State.⁷⁸ In *Koestler* the Court went far in finding that there is an interstate case when the person receiving the services has taken up residence in another Member State before the termination of the relations between the parties.⁷⁹ Article 59, therefore, is not excluded merely because

76. *Id.* at 3323, ¶ 10, Common Mkt. Rep. (CCH) ¶ 8784, at 7331.

77. *Commission v. Germany*, Case 205/84, 1986 E.C.R. —, ¶ 23, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,157.

78. *Debauve*, 1980 E.C.R. at 855, ¶ 9, Common Mkt. Rep. (CCH) ¶ 8661, at 7827-28.

79. *Koestler*, 1978 E.C.R. at 1980, ¶ 3, Common Mkt. Rep. (CCH) ¶ 8514, at 7310.

both parties are residents of the same country at the time when a contract is concluded.

2. Concentration of Supply to One Country

The German insurance case has confirmed a rule of *van Binsbergen*, excluding Article 59 in cases where the supplier directs the services entirely or principally towards the territory of one other Member State and invokes Article 59 so as to avoid the professional rules of conduct of the latter state.⁸⁰ The Court indicated that the rules on freedom of establishment may then apply. This application will have to be discussed when the relation between Articles 52 and 59 is treated.⁸¹ One should keep in mind from the very outset that the Court excludes Article 59 in those cases, though its conditions are fulfilled: provider and receiver resident in different countries.

3. Three Types of Services

There was never any doubt that services are within the reach of Article 59(1) if they are supplied in any one of three ways: first, the provider may come to the country of the receiver; second, the receiver may come to the supplier, such as a doctor or possibly to a hotel in another country; or third, services can be provided without receiver or supplier physically moving.⁸² This is the case, for instance, where a customer calls a bank in another country and asks it to carry out a transaction. Yet problems have arisen when free movement of persons has been questioned.

4. Free Movement of Persons

Freedom of movement is necessary for two types of services just described.

a. Directives

It will have to be shown later how the Community, by enacting directives, implemented free movement of persons. Here it must be stressed that in the field of services, free move-

80. *Commission v. Germany*, 1986 E.C.R. at —, ¶ 22, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,132.

81. See *infra* notes 94-104 and accompanying text.

82. Vignes, *Etablissement et Services*, in 3 J. MÉGRET, *supra* note 11, at 110.

ment has been granted not only to suppliers, but also to receivers of services.⁸³

b. *Treaty provisions*

Problems have arisen because Article 60(3) expressly authorizes suppliers of services to pursue their activities in the state where the service is rendered. But there is no equivalent authorization in the Treaty for free movement of the receiver. The Court has considered this disparity in *Luisi and Carbone*.⁸⁴ In that case, two Italians were involved, both moving into other EEC countries, carrying currency in contravention of Italian law. They invoked Articles 59 and 106, the latter granting freedom of payments, amongst others, for services. The decision hinged on the question whether the receivers were entitled by the Treaty to move into other countries as receivers of services. Advocate General Trabucchi had expressed doubts in another case.⁸⁵ The Court referred to the directives and the programs and concluded: "It follows that the freedom to provide services includes the freedom, for the recipients of the services, to go to another Member State in order to receive a service there"⁸⁶

A commentary would be appropriate with respect to the reference that the Court makes to the program.⁸⁷ The Court's statement, as quoted here, refers to the Treaty itself. It does not derive the right of the recipients from the program. This thinking is correct, because, once again, this program has no direct effect. Yet the program has been used by the Court as an argument for the interpretation of the Treaty. This argument is certainly permissible within the rules governing the interpretation of the Treaty. However, there remains the question of whether freedom of services constitutes a right for recipients of services as well.

83. Council Directive No. 73/148, art. 1(1), O.J. L 172/14 (1973).

84. *Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 and 26/83, 1984 E.C.R. 377, Common Mkt. Rep. (CCH) ¶ 14,038.

85. *Watson and Belmann*, 1976 E.C.R. at 1203, ¶ 2, Common Mkt. Rep. (CCH) ¶ 8368, at 7683.

86. *Luisi and Carbone*, 1984 E.C.R. at 403, ¶ 16, Common Mkt. Rep. (CCH) ¶ 14,038, at 14,606.

87. *Id.* at 401, ¶ 12, Common Mkt. Rep. (CCH) ¶ 14,038, at 14,605.

5. Right of Receivers

a. *Doubts as to Receivers' Rights*

Article 59(1) mentions only the right to provide services, and Advocate General Lenz, in *Haug-Adrion*, has denied rights of receivers.⁸⁸ In *Luisi and Carbone*, Advocate General Mancini argued to the contrary.⁸⁹ This question involves problems that are of major importance for the Community.

b. *Community Law Before National Courts*

Direct effect of Community law was devised by the Court in cases pending before national courts; Community law would take precedence over state law and create rights for the benefit of individuals.⁹⁰ This formula does not indicate anything as to the substance of such rights. *Luisi and Carbone* implies that the receiver of services can rely on Community law before national courts, if he wants to have access to the services provided in other EEC countries. This brings us to the question of free choice.

c. *Free Choice*

Luisi and Carbone may imply that, by granting freedoms, the EEC Treaty will enable producers and suppliers to make delivery or provide services in other states. The Treaty may envision also that consumers have a right to choose between different offers from different countries. The question is far from theoretical. It comes up whenever importing states impose quality standards on goods or, in the form of compulsory conditions, on insurance contracts. Do not buyers of goods or receivers of services have a right of their own to choose among different standards and qualities from different countries?

Here, as with restrictions imposed on buyers and receivers, we come to the substance of Community law. According to Mr. Justice Everling, the Court's judgment on German quality standards for beer, in which the Court largely condemned

88. *Haug-Adrion*, 1984 E.C.R. at 4294, ¶ 8 (Opinion of Advocate General Lenz).

89. 1984 E.C.R. at 415, ¶ 5 (Opinion of Advocate General Mancini).

90. *van Binsbergen* repeats the question submitted to the Court "whether the first paragraph of Article 59 and the third paragraph of Article 60 of the EEC Treaty are directly applicable and create individual rights which national courts must protect." 1974 E.C.R. at 1310, ¶ 18, Common Mkt. Rep. (CCH) ¶ 8282, at 7212.

compulsory standards, may benefit consumers by opening the door for a choice between beers from different countries.⁹¹ The case law with respect to free movement of goods permits imposition of quality standards by importing states only within strict limits. The case law does not permit such application where sufficient protection of consumers can be achieved, for instance, by information. This is a way in which consumer protection can be combined with a freedom of choice. Under Article 30, one is therefore tempted to conclude that the law includes a right of buyers to choose. *Luisi and Carbone* could be a first step toward recognizing an equivalent right of receivers in the field of services.

However, the *Gravier* judgment⁹² may cause one to hesitate in concluding that there is a right to choose. In that case, a French student had applied for admission to a Belgian university, where she was charged an enrollment fee that Belgian students were not required to pay. The Court applied Article 7, condemning discrimination on the ground of nationality. It did not even mention Articles 59-66. Did the Court thereby deny the existence of receivers' rights? The non-application of Article 59 may, however, be explained otherwise. The Court could have been in doubt whether there is a service normally provided for remuneration when only foreigners have to pay fees.⁹³ This could have induced the Court to rely on Article 7 instead of Article 59.

D. *Freedoms of Establishment and of Services*

1. Services Through Establishment

In two cases, the Court has indicated that services may be supplied via an establishment that the provider has created in the country *ad quem*. In one case, an antitrust action concern-

91. The lecture, given at Bitburg on April 24, 1987, will be published soon [hereinafter Everling Lecture].

92. *Gravier v. City of Liège*, Case 293/83, 1985 E.C.R. 593, Common Mkt. Rep. (CCH) ¶ 14,152.

93. *Id.* at 607, ¶ 2, Common Mkt. Rep. (CCH) ¶ 14,152, at 15,865. General Advocate Sir Gordon Slynn has made the point in his conclusions that plaintiff as well as the Commission invoked Article 59, but that the Court could evade the question because it could rely on Article 128. The General Advocate himself expresses doubts as to Article 59. *Id.* at 597-98 (Opinion of Advocate General Slynn). It could also be inferred that Article 59 does not include the receiver's right not to be discriminated against by one and the same supplier of services.

ing fire insurance in Germany, an association had addressed recommendations to all members, including subsidiaries of foreign insurers.⁹⁴ Under Article 85(1) the question arose whether such recommendations could bear on trade between Member States. The Court accepted that they could, assuming that activities of the subsidiaries would affect the mother companies.

The next case dealt with different French taxes for different forms of establishment.⁹⁵ The Court relied on Article 52(1), according to which freedom of establishment applies also to the setting up of agencies, branches, or subsidiaries. The Court deduced that each enterprise has the freedom to choose between these forms of establishment in order to do business in another country. Imposing different taxes could impair this freedom. One can conclude that the Court understands establishments to be instruments of providing services in another state.

2. Reasons for Delimitation

There is, however, an important reason to distinguish between freedom of establishment and freedom of services. In its judgment in *Bullo and Bonivento*,⁹⁶ the Court confirmed, even if only by interpreting a directive, what normally is deduced from Article 52(2): that the establishment as well as its activities may be subjected to all rules of the country where it is set up. Thus, insurers and banks must obey the rules of the state in which the subsidiary is set up concerning general conditions, financial status, and the like.

The situation is different for services. In *Webb*⁹⁷ and in the German insurance case⁹⁸ the Court was confronted with Article 60(3) which provides:

Without prejudice to the provisions of the Chapter relating

94. *Verband der Sachversicherer v. Commission*, Judgment of Jan. 27, 1987, Case 45/85, 1987 E.C.R. —.

95. *Commission v. France*, Case 270/83, 1986 E.C.R. 273, Common Mkt. Rep. (CCH) ¶ 14,282.

96. *Bullo and Bonivento*, Judgment of Jan. 22, 1987, Case 166/85, 1987 E.C.R. —.

97. *Webb*, 1981 E.C.R. at 3327, Common Mkt. Rep. (CCH) ¶ 8784, at 7333.

98. *Commission v. Germany*, Case 203/84, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,339.

to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.⁹⁹

Governments had contended that this rule implies a general principle according to which even services are subjected to the law of the state *ad quem*. This principle was refuted by the Court in the German insurance case, which found, as did the Commission, that Article 60(3) aims principally at facilitating the provision of services by granting a right to move temporarily into the state *ad quem*.

However, it does not follow from that paragraph that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States.¹⁰⁰

From this statement it follows that services are privileged because they are partially exempt from the law of the state *ad quem*. The provider can offer his product under home standards in competition with competitors domiciled in the state *ad quem*. The Court has yet to explain which rules of the state *ad quem* may be excluded, but an argument *a fortiori* leads to the conclusion that the state *ad quem* is even less justified in imposing all its rules on imported services, where the provider does remain in the state *a quo*. It is obvious that in this situation, much importance accrues to the delimitation of freedoms of establishment and of services.

3. Court v. Commission

In the insurance cases the Commission contended that freedoms of establishment and of services do not exclude each other.¹⁰¹ A bank or an insurer, having set up an establishment

99. *Id.* ¶ 26.

100. *Id.* ¶ 26.

101. See *Commission v. Germany*, Case 203/84, 1986 E.C.R. at —, Common Mkt. Rep. (CCH) ¶ 14,339. See also *supra* note 77 and accompanying text. There have been quite a number of comments on the insurance judgments. See, e.g., H.-P. SCHWINTOWSKI, *DER PRIVATE VERSICHERUNGSVERTRAG ZWISCHEN RECHT UND MARKT* 262, 288 (1987); Angerer, *Aufsichtsrechtliche Ausgangspunkte der Dienstleistungsfreiheit für Versicherungsunternehmen im Gemeinsamen Markt*, 38 *VERSICHERUNGSRECHT* 325 (1987);

in the state *ad quem*, should nevertheless be entitled to invoke freedom of services, if its service is provided from the state *a quo* and the establishment is acting only in other fields or only as an intermediary.

The Court seems to refute this idea, because it acknowledges

that an insurance undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency. . . . [s]uch an insurer could not avail itself of Articles 59 and 60 with regard to its activities¹⁰²

A narrow interpretation of this dictum could reduce freedom of services to a dead letter. A broadcasting station that maintains a permanent representation in another state for the purpose of collecting information could not avail itself of Articles 59 and 60 for its broadcasting activities. It is hard to believe that the Court wanted to exclude freedom of services for such cases after having granted it to providers of television, without even considering that normally broadcasting stations of some importance do maintain some representation in the country *ad quem*. And it would be hard to understand why the Court took pains to discuss quite a number of subtleties of freedom of services in its judgment if it were necessary to pre-

Bert & Groutel, *Droit européen des assurances: Liberté de prestation de Services et Coassurance*, 23 REV. TRIMESTRIELLE DE DROIT EUROPÉEN 83 (1987); Borgesius, *Het Verzekerings-Archief*, DEEL 64-1987-2, 109; Edwards, *Establishment and Services: An Analysis of the Insurance Cases*, 12 EUR. L. REV. 231 (1987); Goujet, *Europäischer Versicherungsmarkt*, 1987 DIE VERSICHERUNGSPRAXIS 17 (1987); Hübner, 42 JURISTENZEITUNG 330 (1987); Schmidt, *Europäische Gemeinschaft—Zur Dienstleistungsfreiheit der Versicherungsunternehmen*, 42 DIE VERSICHERUNGS-RUNDSCHAU 201 (1987).

102. *Commission v. Germany*, Case 203/84, 1986 E.C.R. at —, ¶ 21, Common Mkt. Rep. (CCH) ¶ 14,339, at —. Vignes had written: "Mais le prestataire de services ne doit pas avoir un établissement dans le pays où il opère, sinon son activité relèverait de l'établissement secondaire." Vignes, *Etablissement et Services*, in J. MÉGRET, *supra* note 11, at 111. ("But the provider of services need not have an establishment in the country in which he operates, otherwise his activity will be considered a secondary establishment.") He does not consider the case where de facto the services come from the State *a quo*. See *id.*

suppose that there are almost no occasions in which freedom of services could be invoked. An alternative interpretation, therefore, would be that freedom of services is excluded only insofar as services are provided by an establishment or any permanent representative in the state *ad quem*. Further alternatives could be imagined.

If, however, the narrow interpretation should prevail, freedom of services will mean very little. For an insurer, this freedom could remain relevant where he acts only by correspondence or modern ways of telecommunication or through independent brokers, who take care of the interests of their clients in choosing between competing insurers instead of working permanently for one specific insurer and representing his interests.

4. Other Limitations for Article 59

Even if the narrow interpretation were eliminated, the sky of services is not bright. There are two other limitations.

a. *Permanent activities excluded?*

We have quoted from the judgment with respect to Article 60(3). The Court speaks of permanent activities of undertakings established in the state *ad quem*, which are distinguished from services within the scope of Article 59. On the one hand, this formula may be in accordance with the alternative interpretation, which excludes Article 59 only where a service is provided by an establishment. On the other hand, it could indicate that freedom of services is for the benefit of those cases only where the provider temporarily supplies another country. This was the French position in the insurance cases. But such a narrow interpretation, again, must be questioned. The Single European Act, entered into force on July 1, 1987, has introduced a new Article, Article 8a, into the EEC Treaty, according to which the common market has to be an internal market without frontiers. Enterprises doing business in such a market may sell more intensively here than there. But it would seem to be a rather artificial delimitation if, in an internal market, legal consequences would depend on whether a provider acts permanently in a national part of that market.

b. *Concentration on a National Market*

In confirming its *van Binsbergen* judgment, the Court found in the German insurance case that an insurer cannot avail itself of freedom of services, if its activity is entirely or principally directed towards the territory of one other Member State *and* if it acts from outside for the purpose of avoiding the professional rules of conduct of the state *ad quem*.¹⁰³ This could be questioned again, because the future existence of separate markets is assumed. No matter whether this argument is accepted, such dictum will probably be relevant only in rare cases. Perhaps it could be an argument in broadcasting cases, where a French or Dutch station broadcasts specifically in the German language to penetrate the German market. If the European Court would follow the approach of the United States Supreme Court in *New Hampshire v. Piper*,¹⁰⁴ the dictum could become meaningless because it seems that according to this case, the purpose—avoiding the laws of the state *ad quem*—may not be presumed. One must ask, however, whether European judges are less prepared to accept that professionals as well as businessmen are normally law-abiding people. Comparative research should undertake such questions.

5. Single Market and Legal Psychology

The Court may in the future decide on the basis of specific arguments that have been developed. The gist of the problem, however, is to be found elsewhere. If the scope of freedom of services is interpreted narrowly, providers of services will have to set up establishments in all the states in which they want to provide services. There is a freedom of establishment that may, in the field of banking, go further than American law. Yet freedom of establishment under European law implies that services have to be subjected to the law of the state of the establishment. A provider of services could not offer a product, such as insurance, construed under the law of his home state. Also, consumers would be deprived of what a single market should grant them: the choice between different products, each obeying the rules of the state *a quo*. If the Court wants to

103. *Commission v. Germany*, 1986 E.C.R. at —, ¶ 22, Common Mkt. Rep. (CCH) ¶ 14,339 at 17,132.

104. 470 U.S. 274, 285-86 (1985).

open the door for such a choice to consumers, then the scope for freedom of services must be widened and not interpreted narrowly.

One is tempted to point to a psychological problem of the Court. The Justices come from all the Member States, and one could imagine that each Justice is convinced that the legal system of his home state guarantees sufficient quality of goods and services, and that the system of education of his home state permits him to rely on the professional qualifications of his countrymen. That could induce the Justices to broaden the scope of freedom of services in asking each state *ad quem* to have confidence in services provided from other states or their nationals. It would not be necessary any more to impose all the law of the state *ad quem*, as it would be the case if the Court insists that, for instance, each permanent representative of a foreign provider exclude the provider's possibility to avail himself of freedom of services.

Instead, it may be said with all due respect that the Justices of the Court seem to form an alliance of mistrust, each insisting that for imported services the law of the state *ad quem* should govern and that, for that purpose, freedom of services should be construed narrowly in favor of a broader recurrence to freedom of establishment.

E. *The Substance of Freedom of Services*

1. Introduction

The cases in this part can be divided into two groups. The first group includes cases from 1974 to 1984, which have two things in common: they were decided under the procedure of Article 177, and therefore give an interpretation of freedom of services in answering questions referred to the Court by national courts. The finding of facts and the final decision were within the jurisdiction of national courts, and their judgments are accessible only exceptionally and with difficulties. These cases also used formulas that have been bypassed by the second group, and may therefore be neglected.

The second group comprises the four insurance cases decided at the end of 1986.¹⁰⁵ In these cases, the Commission

105. *See supra* note 74.

brought action under article 169.¹⁰⁶ These decisions made a step forward in the law of services.

2. 1974 - 1984

a. *Monopolies*

Two judgments permit the conclusion that state monopolies of certain services, such as broadcasting and artificial insemination of cattle, are compatible with Article 59.¹⁰⁷

b. *Payment and Movement*

Freedom of payment and of movement for the purpose of supplying services has been confirmed by the Court.¹⁰⁸ Certain regulations of the state *ad quem* are permitted by the Court.

c. *Discriminations*

Debauve decided that Articles 59 and 60

do not preclude national rules prohibiting the transmission of advertisements by cable television—as they prohibit the broadcasting of advertisements by television—if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established.¹⁰⁹

This is the law in the absence of any harmonization of the relevant rules. And the Court starts from the premise that the “strict requirements [of Article 59] . . . involve the abolition of discrimination against a provider of services on the grounds of his nationality or of the fact that he is established in a Member State other than that where the service is provided.”¹¹⁰ Article 59 is used in these cases only against discrimination directed

106. EEC Treaty, *supra* note 1, art. 169, 1973 Gr. Brit. T.S. No. 1, at 56-57, 298 U.N.T.S. at 75.

107. *Société Coopérative d'Amélioration de l'Élevage et d'Insémination Artificielle du Béarn v. Mialocq*, Case 271/81, 1983 E.C.R. 2057, Common Mkt. Rep. (CCH) ¶ 14,035; *Sacchi*, Case 155/73, 1974 E.C.R. 409, Common Mkt. Rep. (CCH) ¶ 8267.

108. *Luisi and Carbone v. Ministero del Tesoro*, 1984 E.C.R. 377, Common Mkt. Rep. (CCH) ¶ 14,038.

109. *Debauve*, 1980 E.C.R. at 857, ¶ 16, Common Mkt. Rep. (CCH) ¶ 8661, at 7829.

110. *Id.* at 856, ¶ 11, Common Mkt. Rep. (CCH) ¶ 8661, at 7828.

against foreign providers of services. Under these rules, insurance for kidnapping could be forbidden and insurance contracts for kidnapping could be declared void. The *Koestler* case¹¹¹ fits in this paradigm. In that case the Court upheld a rule of German law, according to which specific contracts, including speculative contracts, are unenforceable against parties who are not businessmen. This rule may be applied against a foreign bank as long as it does not discriminate, even though the law obviously creates an obstacle for the business of brokers or banks. But Article 59 could be violated if the German rule were applied in a discriminatory way, for example, only to bargains with foreign banks or brokers. The sports cases show that exclusion of foreigners, such as by discrimination on grounds of nationality, cannot be permitted under Article 59.¹¹²

d. *Establishment and Authorization*

The majority of cases deals with the question whether Article 59 excludes national provisions that impose on foreigners the duty to have an establishment or residence in the state *ad quem* or to have an authorization to do business there. The Court accepts that this requirement is a burden for the providers within the scope of Article 59. Above all, freedom of services could be reduced to zero, because the necessity of an establishment would create a situation where only freedom of establishment is available.¹¹³ The Court states no per se rule, but demands a weighing of all interests involved. In rare instances, the Court may demand an establishment when a legal (or other) representative must always be available for contact with the Courts.¹¹⁴ A license may be needed in the state *ad quem* where it is necessary in sensitive areas to allow the exercise of administrative control over the provider,¹¹⁵ but only in-

111. *Soci te G n rale Alsacienne de Banque v. Koestler*, 1978 E.C.R. 1971, Common Mkt. Rep. (CCH) ¶ 8514.

112. See *D na v. Mantero*, Case 13/76, 1976 E.C.R. 1333, Common Mkt. Rep. (CCH) ¶ 8290; *Walrave v. Union Cycliste Internationale*, Case 36/74, 1974 E.C.R. 1405, Common Mkt. Rep. (CCH) ¶ 8290.

113. See *Transporoute*, 1982 E.C.R. at 427-28, ¶ 14, Common Mkt. Rep. (CCH) ¶ 8812, at 7650.

114. *van Binsbergen*, 1974 E.C.R. at 1310, ¶ 14, Common Mkt. Rep. (CCH) ¶ 8282, at 7211.

115. See *Webb*, 1981 E.C.R. at 3325, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8784, at

sofar as the state *a quo* does not wield an equivalent control, and there do exist specific laws in the state *ad quem*, the enforcement of which must be secured. This situation is the European equivalent of *New Hampshire v. Piper*. One detail should be considered: when the Court refers to equivalent control in other States, it does so in procedures where it sends the case back to the national court for fact-finding. It does not discuss how, for example, a court or tribunal in Belgium or the Netherlands could find out how effective controls are exercised in Greece or Portugal.

For the most part, we have to deal here with cases where there is no clear discrimination. Those cases, however, do concern obstacles for interstate services because the providers of services involved who attempted to extend their activities, had first to create establishments and procure a license in all states concerned, without success. Their start was made more difficult, especially for smaller enterprises and professions, because the creation of an establishment in another country and application for an authorization there forces them to incur costs that they may be unable to recover. One must acknowledge that the Court finds a restriction of freedom of services here and demands that states must at least justify the necessity of the rules imposed on providers of services.

e. Restriction and Justification

We may be able to understand these cases if two questions are distinguished for the purposes of Article 59. First, we have to ascertain whether a rule of national law imposes burdens on interstate services. If so, the second question is whether such restrictions can be justified in order to escape Article 59. Discriminations can never be justified. Beyond discrimination, the criteria for answering the second question have already been indicated¹¹⁶ but will be explored fully below. Certainly, Community law cannot demand from Member States a justification of all their law. It is necessary, therefore, to construe somewhat narrowly those restrictions within the meaning of

7332; *Van Wesemael*, 1979 E.C.R. at 52-53, ¶¶ 29-30, Common Mkt. Rep. (CCH) ¶ 8533, at 7657.

116. See *supra* notes 113-115 and accompanying text.

Article 59 that are forbidden, if not justified. The Court did so in *van Binsbergen*, where we read:

The restrictions to be abolished pursuant to Articles 59 and 60 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.¹¹⁷

The Court becomes more reluctant, however, when defining what direct effect of Article 59 means:

The provisions of that article [Article 59] abolish all discrimination against the person providing the service by reason of his nationality or of the fact that he is established in a Member State other than that in which the service is to be provided.¹¹⁸

This holding articulates a narrow delimitation of restrictions within the meaning of Article 59. Neither the Belgian prohibitions on advertising in television, nor the German rule discussed in *Koestler* is caught by this dictum, and it is therefore easy to understand why the Court did not deem it necessary for the governments to justify their respective law. The insurance cases may, however, have changed the picture.

3. *The Court's New Approach*

a. *Impact of Article 30*

The *van Binsbergen* case was decided before *Cassis de Dijon*,¹¹⁹ which has become the leading case for restrictions on the free movement of goods. This may provide an explanation for the fact that the Court, for purposes of Article 59, did not turn to formulas used in the interpretation of Article 30. In the insurance cases, for which the German case may be taken as example, the Commission, however, invited the Court to adapt the criteria of Article 59 to those used for Article 30. For this purpose, the Commission referred to *Rau v. de Smedt*,

117. 1974 E.C.R. at 1309, ¶ 10, Common Mkt. Rep. (CCH) ¶ 8282, at 7211.

118. *Id.* at 1311, ¶25, Common Mkt. Rep. (CCH) ¶ 8282, at 7212.

119. *Rewe v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, 1979 E.C.R. 649, Common Mkt. Rep. (CCH) ¶ 8543.

where the Court confirmed its jurisprudence as to Article 30.¹²⁰

First, Community law is already violated if there is no discrimination against foreign goods and if interstate trade is not excluded or barred but merely rendered more expensive or difficult. And second, the Court implicitly overruled *Commission v. Italy*,¹²¹ decided one year earlier, where different functions were attributed to the interdiction of restrictions contained in Article 30 and approximation of laws under Article 100.¹²² This second point will be discussed below. Here it is sufficient to emphasize that even the existence of differences among the laws of Member States can create a restriction on interstate trade, which must be evaluated under Article 30.

b. *The Court's New Rule as to Services*

It may be suggested that in the German insurance case,¹²³ the Court transferred some of the criteria of *Rau v. de Smedt* to Article 59 and thereby extended what Article 59 reaches as a restriction of services. The Court noted that:

[a]ccording to the well-established case-law of the Court,

120. The Court in *Rau v. de Smedt* noted that

... in the absence of common rules relating to the marketing of the products concerned, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and to imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements relating *inter alia* to consumer protection. It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods.

[T]he requirement that a particular form of packaging must also be used for imported goods is not an absolute barrier to the importation into the Member State concerned of products originating in other Member States, nevertheless it is of such a nature as to render the marketing of those products more difficult or more expensive"

Rau v. de Smedt, Case 261/81, 1982 E.C.R. 3961, 3972-73, ¶¶ 12-13, Common Mkt. Rep. (CCH) ¶ 8879, at 8352; *see also* Robertson, Case 220/81, 1982 E.C.R. 2349, 2360, ¶9, Common Mkt. Rep. (CCH) ¶ 8851, at 8027.

121. *Commission v. Italy*, Case 193/80, 1981 E.C.R. 3019, Common Mkt. Rep. (CCH) ¶ 8788. The *Robertson* judgment may be interpreted as having overruled *Commission v. Italy*.

122. EEC Treaty, *supra* note 1, art. 100, 1973 Gr. Brit. T.S. No. 1, at 37-38, 298 U.N.T.S. at 54.

123. *Commission v. Germany*, Case 205/84, 1986 E.C.R. —, —, ¶ 25, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,158.

Articles 59 and 60 . . . became directly applicable . . . and their applicability was not conditional on the harmonization or the coordination of the laws of the Member States. Those articles require the removal not only of all discrimination against a provider of a service on the grounds of his nationality but also all restrictions on his freedom to provide services means he is established in a Member State other than that in which the service is to be provided.¹²⁴

As to restrictions, the Court resumes its *van Binsbergen* formula but it extends direct effect beyond *van Binsbergen* to State measures or rules that are imposed because the provider of services is not established in the State *ad quem*. The Court then deals with the German requirement that a foreign insurer authorized by and under the supervision of the authority of the State *a quo* must have a permanent establishment and dispose of a separate authorization in the state *ad quem*. These requirements, according to the Court,

constitute restrictions on the freedom to provide services inasmuch as they increase the cost of such services in the State in which they are provided, in particular where the insurer conducts business in that State only occasionally.¹²⁵

By referring to the costs imposed on the foreign provider, the Court approaches even more the dictum in *Rau v. de Smedt* and opens the door for inclusion into the restrictions within the meaning of Article 59 of all State measures influencing the costs of the provider. I suggest that in this respect the definition as well as the delimitation of "restrictions" within the scope of Article 59 is open. While the old cases barred discrimination only, the reach of Article 59 has been immensely broadened, making it necessary for the Court to ask for justification of such state measures which may be necessary for the public good.

With a view to potential justification, the Court rules that the requirement of a permanent establishment cannot be justified because this would exclude freedom of services completely and must not be allowed for purposes of administrative control. The requirement of a prior authorization was, on the other hand, approved insofar as necessary for consumer pro-

124. *Id.*

125. *Id.* at —, ¶ 28, Common Mkt. Rep. (CCH) ¶ 14,339 at 17,158.

tection. The Court holds that state law on supervision has not yet been sufficiently harmonized and that the Commission has not yet shown that less restrictive means of safeguarding consumer interests are available for the states. The Court rules out, however, every possibility of justifying a requirement of prior authorization for leading insurers in cases of co-insurance. A directive has already provided that the non leading co-insurers need be neither established, nor authorized in the state *ad quem*.¹²⁶ Since the leading insurer can participate in co-insurance with a minimum quota, his subjection under the supervision of the state *ad quem* could not really contribute to the protection of the insured and, therefore, would not be proportionate. Beyond that, two particular problems must be highlighted.

In basing justification of a separate authorization on consumer protection, the Court deviated from insurance law in some Member States, where further reasons are given for insurance supervision. However, in safeguarding consumer interests, the Court again followed the cases dealing with free movement of goods. *Rau v. de Smedt*¹²⁷ had referred expressly to consumer protection. The Court has indicated¹²⁸ that the requirement of separate authorization is not, to quote *Rau v. de Smedt*, a mandatory requirement, where the insured are businessmen and not consumers. The Court could not yet decide so because the Commission had not submitted a proposal for the delimitation before the Court. There is no risk at this point in providing commercial insurance without prior authorization in the state *ad quem* if the insurer has no permanent representation in that country.

When dealing with the question of whether additional control in the state *ad quem* is necessary, the Court repeated its rule that there is no necessity where equivalent control exists in the state *a quo*. The Court was able to avoid the difficult question of whether control in other countries is equivalent to German law because the Commission had not raised that point. Had it been raised, the Court could have been forced to

126. Council Directive No. 73/239, O.J. L 228/3 (1973), 1 Common Mkt. Rep. (CCH) ¶ 1349.35.

127. *Rau v. de Smedt*, 1982 E.C.R. 3961, Common Mkt. Rep. (CCH) ¶ 8879.

128. See Lecture, *supra* note 91 for further discussion of this point.

assess not only the legal and administrative rules of the Member States, but also the effectiveness of their enforcement. New horizons for comparative research show up in that context.

The Commission may have hesitated to raise that point for a peculiar reason that has apparently not been considered in legal publications. If one follows the Court in not permitting additional control in the state *ad quem*, where there is sufficient control in the states *a quo*, the result would be a situation where equivalent control exists in some Member States and is lacking in others. This disparity would lead to a split of control: providers from some countries would have to suffer control in the state *ad quem*, while others would not. This question was never raised in the cases discussed above. Caution will be necessary to avoid such a split.

c. Conclusion

First, the range of restrictions to be evaluated under Article 59 has been widened. All state measures that create costs for the provider of services, as well as those that discriminate against the provider, thereby burdening interstate services, are now included. Still, provisions such as those in *Debauve* or *Koestler* are not to be treated as restrictions as long as there is no discrimination. No justification is necessary here. It cannot be ruled out that future case law, following the interpretation of Article 30, will extend Article 59 even further. This extension would create new difficulties for the delimitation of such cases, where there is no need of justification.

Second, the justification formula of the insurance case has roots in *van Binsbergen*, *Webb*, and *van Wesemael*. The Court spoke of professional rules "justified by the general good" with regard to the "particular nature of" a service¹²⁹ or of "particularly sensitive matters," where it amounts for the state *ad quem* to a legitimate choice of policy, if it controls imported services.¹³⁰ In the insurance case the Court referred in particular to *van Wesemael* and concluded that requirements by the

129. *Van Wesemael*, 1979 E.C.R. at 52, ¶ 28, Common Mkt. Rep. (CCH) ¶ 8533, at 7666; *Van Binsbergen*, 1974 E.C.R. at 1310, ¶ 12, Common Mkt. Rep. (CCH) ¶ 8282, at 7211.

130. *Webb*, 1981 E.C.R. at 3323, ¶¶ 11-12, Common Mkt. Rep. (CCH) ¶ 8784, at 7331.

state *ad quem* are justified only "if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions."¹³¹ This is a general formula that includes protection of consumers as well as, for example, employed people or all those who are protected by the enforcement of professional rules.

By relying on the particular nature of a service or the imperative needs the Court may deny justifications, where it is of the opinion that protective measures are not necessary, such as for commercial insurance. This would be a judgment following policy considerations. Legal considerations are decisive, where the Court, with regard to the fundamental character of Article 59,¹³² admits restrictive state measures only, if there is no discrimination, if they are necessary for their purpose, proportionate,¹³³ and above all, if the public interest is not already protected by rules of the state of establishment.

These are the yardsticks also used by the Court for the purposes of Article 30. There remains one question: what is the influence of coordination and approximation on direct effect?

F. Direct Effect in Its Relation to Approximation and Coordination

1. The Problems

The Court has said that direct effect of Article 59 is independent of the measures provided for in Article 63.¹³⁴ On the other hand, the German insurance case shows that direct effect is restricted where prior approximation of law is not sufficient, that is, in the fields of technical reserves of the insurers or conditions of insurance.¹³⁵ From the cases applying Article 30 it is clear that justification of restrictive measures is ex-

131. *Commission v. Germany*, 1986 E.C.R. at —, ¶ 29, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,158.

132. *Id.* at —, ¶ 27, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,158 ("fundamental principle").

133. *Id.* at —, ¶ 29, Common Mkt. Rep. (CCH) ¶ 14,339 at 17,158 ("if no less restrictive means are available").

134. With respect to the essential requirements of Article 59, see *Van Wesemael*, 1979 E.C.R. at 52, ¶ 27, Common Mkt. Rep. (CCH) ¶ 8533, at 7657; see also *Commission v. Italy*, 1981 E.C.R. at 3033, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8788, at 7364 (discussing purpose of Article 30 as compared with Article 100).

135. *Commission v. Germany*, 1986 E.C.R. at —, ¶¶ 38, 40, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,159-60.

cluded where the Community has regulated by directives or in another way has occupied the field.¹³⁶ Two questions have to be answered here: is there just a limitation or an extension of direct effect? Or may there be a distinction between restrictions in the sense of Article 59 and other obstacles, which can be overcome only by approximation and coordination of laws?

2. No Clear Distinction Between Cases of Restriction and Approximation or Coordination of Laws

a. Movement of Goods

Rau v. de Smedt overruled *Commission v. Italy* with respect to the movement of goods.¹³⁷ In that latter case the Court explained that Articles 30 and 100 have different purposes:

The purpose of Article 30 is, save for certain specific exceptions, to abolish in the immediate future all quantitative restrictions on the imports of goods and all measures having an equivalent effect, whereas the general purpose of Article 100 is, by approximating the laws, regulations and administrative provisions of the Member States, to enable obstacles of whatever kind arising from disparities between them to be reduced.¹³⁸

By overruling this distinction, the Court in *Rau v. de Smedt* has definitely opened the door for extending Article 30 to almost all state laws and practices that may be a burden on interstate commerce, for the sole reason that there are disparities among the laws of the Member States.¹³⁹

b. Services

For services, *van Binsbergen* created a distinction, not between Article 59 and approximation of laws, but among direc-

136. *Rau*, 1982 E.C.R. at 3971, ¶ 8, Common Mkt. Rep. (CCH) ¶ 8879 at 8352 (discussing the absence of common rules and obstacles to free movement).

137. See *supra* note 121 and accompanying text.

138. *Commission v. Italy*, 1981 E.C.R. at 3033, ¶ 17, Common Mkt. Rep. (CCH) ¶ 8788, at 7364.

139. This corresponds to the evaluation by Masclet, *Les articles 30, 36 et 100 du traité C.E.E. à la lumière de l'arrêt "cassis de Dijon"*, 16 REV. TRIMESTRIELLE DE DROIT EUR. 611, 626, 630 (1980). But see Matthies, *Beseitigung der mengenmässigen Baschränkungen zwischen den Mitgliedstaaten art. 30, no. 25*, in KOMMENTAR ZUM EWG-VERTRAG (E. Grabitz looseleaf ed. 1986).

tives that aim at coordination.¹⁴⁰ According to the Court, such directives have different functions:

the first [purpose] being to abolish, during the transitional period, restrictions on freedom to provide services, the second being to introduce into the law of Member States a set of provisions intended to facilitate the effective exercise of this freedom, in particular by the mutual recognition of professional qualifications and the coordination of laws with regard to the pursuit of activities as self-employed persons.¹⁴¹

If one takes into account that the first function today is performed by the direct effect of Article 59, this dictum could be translated into the Court's statement in *Commission v. Italy*, drawing a distinction between direct effect abolishing all restrictions from the end of the transitory period on, and the functions to be performed by coordination.

c. Proposition

It is my proposition that the distinctions in *Commission v. Italy* as well as those in *van Binsbergen* are purely academic. The Court was therefore well advised to neglect them in *Rau v. de Smedt* and to open the door for application of Article 30 in situations where an obstacle for interstate trade exists only in the form of disparities between national laws. The insurance decisions should be understood as following this analysis in the field of services. Therefore, we are forced to look for an adequate instrument to delimit Article 59 as well as Article 30. This instrument consists of policy considerations.¹⁴²

3. The Policies

a. No Restrictions

There are cases where no restrictions are found. *Koestler* and *Debauve* may be mentioned as examples.¹⁴³ There are cases with the same result under Article 30.¹⁴⁴ The major reasons for excluding state measures from the grip of either Arti-

140. *van Binsbergen*, 1974 E.C.R. at 1311, ¶ 21, Common Mkt. Rep. (CCH) ¶ 8282, at 7212.

141. *Id.*

142. See *supra* note 140 and accompanying text.

143. *Debauve*, 1980 E.C.R. at 855, ¶ 8, Common Mkt. Rep. (CCH) ¶ 8514 at 7311; *Koestler*, 1978 E.C.R. at 1981, ¶ 6, Common Mkt. Rep. (CCH) ¶ 8514, at 7311.

144. Steindorff, *Gemeinsamer Markt als Binnenmarkt*, 150 ZEITSCHRIFT FÜR DAS

cle 30 or Article 59 are first, that regulation of an activity has only minor adverse effect on interstate trade, and second, that the existence of legal rules is self-evident and needs no justification. This evaluation starts from the premise that it is the Member States who have to decide on legal policies as long as no harmonization or coordination has been effectuated by the Community.¹⁴⁵ This does not exclude that the Community decided on approximation of laws in such cases, as will be discussed later with respect to commercial agents and the law of insurance contracts, and as has been the case with product liability.¹⁴⁶ In such cases, it is argued simply that a uniform law contributes to the functioning of an internal market.

b. *No Direct Effect*

There are other cases where state law introduces or maintains obstacles to interstate trade and where policy interests of the state are involved. The German insurance case is a patent example. The Court quite openly accepts consumer protection as a justification for a restriction, in the concrete case for the requirement of prior authorization. Protection of such state interests is achieved by denying direct effect of Article 59 or by limiting it. The *Casati* judgment,¹⁴⁷ denying direct effect to Article 67 (free movement of capital),¹⁴⁸ is mainly based on artificial grounds. Obviously these grounds serve to camouflage policy interests of the Member States.

c. *Recognition of Qualifications*

It is impossible to develop here all real or potential policy influences. Recognition of foreign diplomas and qualifications

GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 687, 694 (1986) (relying on Mathies, *supra* note 139).

145. See Steindorff, *Problems des Art. 30 EWG-Vertrag*, 148 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 338 (1984).

146. See Commission Directive No. 85/374, O.J. L 210/29 (1985), 2 Common Mkt. Rep. (CCH) ¶ 3330.

147. *Casati*, Case 203/80, 1981 E.C.R. 2595, 2615, ¶ 13, Common Mkt. Rep. (CCH) ¶ 8779, at 7289; see Oliver, *Free Movement of Capital Between Member States: Article 67(1) EEC and the Implementing Directives*, 9 EUR. L. REV. 401 (1984); Steindorff, *Kapitalverkehrsfreiheit in der EG nach Casati*, FESTSCHRIFT FÜR WINFRIED WERNER 877 (W. Hadding, U. Immenga, H.-J. Mertens, K. Pleyer & U. Schneider eds. 1984).

148. EEC Treaty, *supra* note 1, art. 67, 1973 Gr. Brit. T.S. No. 1, at 89, 298 U.N.T.S. at 42.

may be mentioned. Until now it is reserved for coordination of laws.

With the exception of the *Thieffry* case,¹⁴⁹ decided under Article 52, the requirement of domestic diplomas and qualification by the state *ad quem* has not been attacked as contravening the direct effect of Article 59. This implies a policy decision that a state *ad quem* may impose its law as to the prerequisites of certain activities, such as in the professions, banking, or in insurance, as long as there is no coordination pursuant to Article 57.¹⁵⁰ But any court could find that such a requirement is, for example, not proportionate, because of the demand of a specific education or qualification. Then the policy considerations could lead to another result. Three ways of arriving at a judgment may be considered.

First, if one restricts Article 59 to cases of discrimination, a requirement of qualification along the rules and standards of the state *ad quem* cannot be an offense. But since the insurance judgments, it is obvious that Article 59 reaches beyond discrimination, so that the requirement of domestic qualification cannot be *per se* legal.

Second, one may argue that the requirement of qualification is self-evident for certain activities and that, therefore, it must be tolerated unless the requirement imposes an undue burden on the providers of services. Above all, providers who intend to supply services into more than one other state will find that the qualification requirements of every state *ad quem* constitute real barriers, which can hardly be overcome, to transient trade.

This forces us to choose a third approach, following the insurance judgments, under which Article 59 is directly applicable to qualification requirements. This implies that such requirements are not *per se* compatible with Article 59, but must be justified. Amongst others, equivalent qualification in the state *a quo* excludes justification. This is one of the main points where the law of services, influenced by the insurance decisions, may deviate from the law of establishment in the future.

149. *Thieffry v. Conseil de l'ordre des avocats à la Cour de Paris*, Case 71/76, 1977 E.C.R. 765, Common Mkt. Rep. (CCH) ¶ 8396.

150. EEC Treaty, *supra* note 1, art. 57, 1973 Gr. Brit. T.S. No. 1, at 25, 298 U.N.T.S. at 39-40.

4. Conclusion

It has become obvious that the direct effect of Article 59 is not limited by any clear-cut rule, according to which, one sort of restriction is within the scope of Article 59, while other restrictions can be dealt with only by coordination or approximation of laws. Rather, direct effect of Article 59 depends on policy considerations. Some state laws or measures may be evaluated as not being restrictive, while with respect to others, direct effect of Article 59 may be restricted. This has nothing to do with the question of whether obstacles are caused by disparities of national laws or just specific rules of national law.

There remains the question whether justification of state rules within Article 59 is excluded where the Community has occupied the field by enacting measures of approximation or coordination.

G. Providers from Third Countries

1. Nationals

Article 59(1) accords freedom of services only to nationals of the Member States. This rule may be extended to nationals of third states by measures provided for in Article 59(2). No such measure has been enacted.

2. Companies and Firms

Article 58(1), which applies to services according to Article 66, provides that companies and firms complying with the rules of this article are treated in the same way as nationals of Member States. By establishing (or buying) such a "company or firm," nationals of third countries can make use of freedom of services. There is one limit, however. According to the law of professions, some activities cannot be exercised by companies. We cannot discuss here whether such state law could meet with objections.

IV. *OTHER FREEDOMS*

A. Freedom of Movement for Persons

According to Article 3(c), the activities of the Community shall include the abolition, as between Member States, of obstacles to freedom of movement for persons. This includes,

besides services, movement for workers (Article 48) and for those who want to start or maintain an establishment in another country. This broad impact of freedom of movement makes it impossible to deal with such a freedom under the auspices of services only. An exhaustive exploration is beyond the scope of this article.

1. Specific Treaty Provisions

It has been demonstrated above that Article 60(3), in order to implement freedom of movement, authorizes providers of services to pursue their activity temporarily in the country *ad quem*.

2. Jurisprudence

We have learned from the cases that an analogous freedom to move for receivers of services must be deduced from Article 59, though not mentioned expressly. The *Watson and Belmann* case teaches a further lesson: The state *ad quem* may still demand some formalities from providers or receivers of services, but not such formalities that would constitute a real obstacle to freedom of movement for persons.¹⁵¹ The Court said that the rules on free movement for persons implement a fundamental principle and take precedence over any national rule that might conflict with them. They include the right of residence.¹⁵²

If translated into the three categories mentioned above, rules of control may be self-evident and as such justified *ipso*

151. Case 118/75, 1976 E.C.R. at 1185, 1197, ¶¶ 11-12, Common Mkt. Rep. (CCH) ¶ 8368, at 7679.

152. Beyond that the Court said:

Community law has not excluded the power of Member States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory.

. . . the competent authorities . . . may require nationals of the other Member States to report their presence to the authorities of the State concerned.

Such an obligation could not in itself be regarded as an infringement of the rules concerning freedom of movement for persons.

However, such an infringement might result from the legal formalities in question if the control procedures to which they refer were such as to restrict the freedom of movement . . . or to limit the right . . . to enter and reside . . . for the purposes intended by Community law.

Id. at 198, ¶¶ 17-18, Common Mkt. Rep. (CCH) ¶ 8368, at 7680.

iure, if they do not create undue obstacles. In the latter case, if these rules of control create undue obstacles, they are incompatible with freedom of movement for persons, and no justification seems to be accepted by the Court within Article 59. There might be a presumption that they are not proportionate.

3. Community Legislation

Council directives 64/221¹⁵³ and 73/148¹⁵⁴ have implemented freedom of movement for persons. They expressly mention freedom of receivers. They provide, *inter alia*, for rights of family members. They also define and strictly limit public policy issues that might be used as a justification for refusing a right of free movement to some persons. This refusal can be based on Articles 66 and 56(1)¹⁵⁵ of the Treaty, where a special treatment of foreign nationals on grounds of public policy, public security, or public health is permitted. Such permission is construed narrowly by the Court.

B. Freedom of Payments

Freedom of payments is to be derived from Article 106.¹⁵⁶ The problems arising in this context have been demonstrated above, together with *Luisi and Carbone*.

C. Free Movement of Capital

According to Article 61(2), liberalization of banking and insurance is linked to free movement of capital.¹⁵⁷ In *Casati*, the Court denied direct effect to Article 67, which provides for free movement of capital. The Council has, however, enacted directives for the implementation of free movement of capital.¹⁵⁸ The Court could rely on this fact in its insurance judgment and could therefore accord direct effect to Article 59 to insurance

153. Council Directive No. 64/221, O.J. L 64/850 (1964)

154. Council Directive No. 73/148, O.J. L 172/14 (1973).

155. EEC Treaty, *supra* note 1, art. 56(1), 1973 Gr. Brit. T.S. No. 1, at 24, 298 U.N.T.S. at 39.

156. EEC Treaty, *supra* note 1, art. 106, 1973 Gr. Brit. T.S. No. 1, at 39-40, 298 U.N.T.S. at 56.

157. EEC Treaty, *supra* note 1, art. 61(2), 1973 Gr. Brit. T.S. No. 1, at 26, 298 U.N.T.S. at 41.

158. See Council Directive No. 63/21, O.J. 62/63 (1963); Council Directive of May 11, 1960, O.J. Eng. Spec. Ed. 1959-62, at 49.

because free movement of capital has been secured by a directive.¹⁵⁹

D. *Freedom of Establishment*

When discussing the delimitation of freedoms of services and of establishment, we objected to a narrow interpretation of Article 59. However, the more a narrow interpretation prevails, the more it will be necessary to rely on freedom of establishment for the purpose of transient trade in services.

1. The Scope of Article 52

In the German insurance case, the Commission drew the Court's attention to the fact that according to German law, the establishment of foreign insurers can be authorized only if they are capable of handling insurance business independent of the insurer's main establishment.¹⁶⁰ Such capacity presupposes a minimum amount of equipment, including qualified personnel. This may amount to minimum costs per year that the Commission evaluated as one million German marks. Obviously such a requirement creates a heavy burden on the freedom of establishment. It also limits transient trade in services insofar as they are performed with the help of establishments.

There is a French insurance case dealing with French taxes¹⁶¹ that implicitly broadened freedom of establishment. The Court held that those who want to set up an establishment in another country are entitled by Article 52(1) to make use of all forms of establishment that are mentioned therein, including agencies. This prohibition bars discriminatory tax regulations that make access to one form of establishment more expensive than to the other. One must conclude that the German requirement, with respect to establishment, is in conflict with Article 52, because it would de facto exclude the right to establish mere agencies. Establishment and supply of services from an establishment are hereby facilitated.

159. Commission v. Germany, 1986 E.C.R. —, —, ¶ 19, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,157.

160. 6 GOLDBERG & MÜLLER, VERSICHERUNGSAUFSICHTSGESETZ § 106 (1980).

161. Commission v. France, Case 270/83, 1986 E.C.R. 273, Common Mkt. Rep. (CCH) ¶ 14,282.

2. Discrimination and Other Obstacles

Once again, Article 52 is principally limited to abolishing only discrimination, while other burdens on free establishment caused by the law of the state *ad quem* are tolerated by Community law. Equal treatment is all that could be derived from Article 52.

The French case just mentioned shows, however, that freedom of establishment may include more than mere equal treatment. A state may not deny to foreigners the right to make use of all forms of establishment provided for in Article 52, even if it does so with regard to its own nationals. The *Klopp* judgment¹⁶² goes into the same direction by obliging France to issue a permit to a German lawyer to have a second establishment within France, even if French lawyers must have only one establishment.

These judgments come close to what the Court has decided under Article 60(3), which, like Article 52, grants equal treatment. The Court has said that under this rule, the state *ad quem* may possibly not be permitted to apply all its law on providers of services.¹⁶³ The question arises whether the Court would follow this line if a similar question should arise under Article 52. This would be no more an encroachment upon mere equal treatment than the Court has created in the French insurance case and in *Klopp*.

Again we must consider a policy argument: if future jurisprudence should reduce freedom of services to cases where no one is acting as a representative of the provider in the state *ad quem*, most transient trade in services will depend on freedom of establishment. Subjecting the provider completely under the law of the state *ad quem* would exclude access of receivers to services construed under the law of the state *a quo*. The gist of the question is whether the Court wishes to be so restrictive and thereby reduce the common market to a coexistence of national markets, or whether the Court will opt for a more open market that benefits receivers by giving them a choice of providers. The answer cannot be derived from any case or scholarly interpretation of the Treaty because the policy question at

162. *Ordre des Avocats au Barreau de Paris v. Klopp*, Case 107/83, 1984 E.C.R. 2971, *Common Mkt. Rep.* (CCH) ¶ 14,116.

163. See text accompanying *supra* notes 97-100.

issue here has not been decided or discussed. Rather, we are confronted with a new problem, whose solution will depend on future policy considerations.

V. COORDINATION AND APPROXIMATION

A. Introduction

1. What Is Envisioned?

The Treaty, in Articles 63, 100, and 100(a), provides for approximation of laws and for further Community acts known as coordination. Typical coordination can comprise recognition of foreign diplomas as well as the cooperation of state authorities aiming at control over professions or certain industries.

2. Present Discussion

Problems of approximation and coordination, as well as other projects in the field of services, have been explored recently by Wulf-Henning Roth.¹⁶⁴ This frees us to concentrate in this Part on some principal points. I shall discuss commercial agents as examples of industrial or commercial activities, and doctors as examples of professional activities. I will try to show that policies have undergone considerable changes.

B. Commercial Agents

1. The Directives

Three directives are decisive: No. 64/222¹⁶⁵ and No. 64/224,¹⁶⁶ both from February 25, 1964, and more recently No. 86/853, from December 18, 1986.¹⁶⁷

a. *The Permanent Provisional Solution*

The directives of 1964 are representative insofar as they proposed a provisional solution that became a permanent approach. The directives try to solve two problems. The second directive strives for liberalization and therefore interdicts re-

164. Roth, *Die Harmonisierung des Dienstleistungsrechts in der EWG*, 21 *EUROPARECHT* 340 (1986) [hereinafter Roth I]; 22 *EUROPARECHT* 7 (1987) [hereinafter Roth II].

165. Council Directive No. 64/222, O.J. L 64/56 (1964).

166. Council Directive No. 64/224, O.J. L 64/56 (1964).

167. Council Directive No. 86/653, O.J. L 382/17 (1986).

strictions. This approach aims more or less at non-discriminatory treatment. If the state *ad quem* normally makes the activity depend on whether the agent is a reliable person and has not been bankrupt, a certificate of the state *a quo* or a specific assurance under oath will have to be accepted. The first provisional directive dealt with professional qualifications. Special problems arose because not all states demand a specific qualification for commercial agents. This situation led to the (provisional) provision that three years of activity in the state *a quo* must be recognized by the other states as sufficient qualification. A safeguard clause protects states against any incommensurable influx of unqualified nationals of other Member States.

b. *The 1986 Directive*

Long discussions preceded a further directive that provided for the approximation of national laws insofar as they govern the contracts between undertakings and their agents. The details are not important here. What counts is the explanation for this directive, given in its preamble. There are two main reasons for the directive.

First, the disparities of national laws are said to influence conditions of reasonable competition. The disparities also create difficulties for contracts between agents and undertakings established in different countries.

Second, while the foregoing reason may give rise only to a question whether contract law really bears on the conditions of competition, the second reason in the preamble gives rise to questions concerning the competence of the Community. The preamble explains that the common market shall be a single market and that in such a market, uniform law is necessary. In other fields such as consumer protection, documents rely on Article 2 and contend that the Community has the task of safeguarding consumer interests and, thereby, standard of living and the fulfillment of expectations of all concerned.¹⁶⁸ This may be questioned for a Community to which the states have transferred limited sovereign rights only. The American experience could teach the Community a lesson as to the necessity

168. Council Resolution, O.J. C 92/1 (1975). For commentary, see Common Mkt. Rep. (CCH) ¶ 10,397.

of uniform rules on commercial agents, consumer credit, product liability, and the like.

2. The Legislative History

The legislative history of the 1986 directive depicts the difficulties the Community confronts in liberalizing all professions and commercial activities. The plan of the directive was mentioned first in 1969,¹⁶⁹ and the directive was enacted in 1986. Debates started with conflict of laws and arrived at a first conclusion that approximation of conflict of laws rules would not satisfy the needs of a single market.¹⁷⁰ No research on this behalf was performed, and those who know conflict of laws specialists, will hardly believe that they are accustomed to evaluating the influence of their patrimony on the functioning of a common market. Then came a draft of the Commission¹⁷¹ that was most ambitious in introducing strict law for contracts between undertakings and their commercial agents. A long period of discussion followed in the European Parliament,¹⁷² in the Economic and Social Council,¹⁷³ and, finally, in the Council of Ministers, which had to reach a unanimous vote. One of the major changes was that the directive, as enacted, leaves more freedom of contract to the parties.

3. Conclusion

It is not difficult to imagine that the Community is under pressure to look for other devices to create the legal framework for the common market. Following the pattern of the commercial agents for all other activities would be a Herculean task for a Community barely resembling Hercules.

C. Medicine

The directives for general practitioners, as well as special-

169. COMMISSION, THIRD GENERAL REPORT 101, ¶ 69 (1969).

170. *Equality of Rights for Commercial Agents*, E.C. BULL., Supp. 1/77, at 5 (1977).

171. Proposed Council Directive, O.J. C 13/2 (1977).

172. Opinion on the Proposal for a Council Directive to Coordinate the Laws of the Member States Relating to (Self-Employed) Commercial Agents, O.J. C 239/17 (1978).

173. Opinion on the Proposal for a Council Directive to Coordinate the Laws of the Member States Relating to (Self-Employed) Commercial Agents, O.J. C 59/31 (1978).

ists, may be used as a model for liberalizing the professions. They represent a type of legislative work that serves freedoms of establishment and of services at the same time.

1. Recognition of Diploma and Freedom of Services

There is a directive of June 16, 1975, on recognition of diplomas and qualifications.¹⁷⁴ The states are obliged to recognize this directive enabling doctors to practice in other countries. It must have been terribly difficult to agree on the great number of diplomas that are covered by the directive.

The directive goes on to deal with further problems of services, in Articles 16. The state *ad quem* has to accord equality of treatment to foreign doctors. When the doctors act in the country *ad quem* without being established there, they may not be subject to a duty to be a member of any professional organization in the state *ad quem*, though they are subjected to its professional rules. They need no authorization but may be obliged to inform the state *ad quem* of their intention to provide services. The directive aims at a certain cooperation of state authorities.

This chapter of freedom of services may be of no great de facto importance for doctors, but it can be said to be a model for services regulation.

2. Education

Two directives above all, enacted in 1975¹⁷⁵ and 1986,¹⁷⁶ aim at an approximation of law as a prerequisite for recognition of diplomas and freedom of services. Contrary to the case of commercial agents and of industry, there is no question of dealing with the law of contracts or responsibility of doctors, as compared with product liability. Obviously, legal conditions of competition and uniformity of law are dispensable for a "common market of medicine," which is governed by other rules.

All efforts have been concentrated on education, the standards of which should be equivalent. In this field, a change of

174. Council Directive No. 75/362, O.J. L 167/1 (1975). For commentary, see 1 Common Mkt. Rep. (CCH) ¶ 1486.23.

175. Council Directive No. 75/363, O.J. L 167/14 (1975). For commentary, see 1 Common Mkt. Rep. (CCH) ¶ 1486.23.

176. Council Directive No. 86/457, O.J. L 267/26 (1986).

policies cannot be overlooked. A first draft¹⁷⁷ provided for quantitative criteria, by envisioning a minimum education of six years, including 5500 hours of teaching. This idea had to be dropped because no quality could be guaranteed by this method, and the independence of universities and the Member States would be endangered by such an approach. Therefore, the directive of 1975 was restricted to fixing the aims of medical education, leaving it to the states, on one hand to comply with these provisions, and on the other hand to rely on the efficiency of the systems in other states. This dependence on reliance is an important element of recent policies in the field of approximation of laws.

The directive of 1986 tries to improve medical education by having regard to practical experience. It corresponds to Article 100a(3), as introduced into the EEC Treaty by the Single European Act, according to which approximation of laws shall attain a high level of protection.

3. Conclusion

Though there can be found some legislative restraint, deliberation on the directives has proved to be most cumbersome. One danger must be taken into consideration: if future developments make it necessary to amend the law, states remain bound by the directives. Only the complicated EEC procedure is available for improving the law. In areas like medicine, where research and experience, the availability of new methods, instruments, or social policies require a change in education, the Community procedure could prove to be too slow.

D. *Legislative Restraint*

The Commission in 1985 presented to the Council a proposal for a new directive on recognition of all university diplomas without prior approximation of laws and without distinction between the professions.¹⁷⁸ Specific legislation for some professions is not excluded because Article 2(2) of the draft provides that the directive shall not apply where specific direc-

177. Proposed Council Directive, J.O. C 54/17 (1969).

178. Proposal for a Council Directive on a General System for the Recognition of Higher Education Diplomas, COM(85) 355 final.

tives on the recognition of diplomas exist. Within the scope of the new directive the states will just have to rely on qualifications and education obtained in other states. The directive enables them only to subject foreigners to an adaptation program of not more than four years. The Commission is to be applauded for the principle, because a single market demands that everybody can supply services with the qualifications that he has obtained in this market. The preamble mentions in this context that as a citizen, everybody has the right to choose where he gets his education and where he wants to practice. The adaptation period could, however, make the directive an ill-fitting instrument for freedom of services.

Any prognosis on the future of the draft is impossible. It had to be mentioned, because it makes us realize how Community measures would have to look if the Community, with its limited resources, is to arrive at a single market. It would reduce its efforts in the fields of approximation and coordination and refer to a sort of European full faith and credit clause,¹⁷⁹ ordering the states to rely on qualifications and qualities provided for in the law of other Member States and accept services from outside, qualified pursuant to the law of the state *a quo*. This includes a tendency to bypass what the Court has decided on direct effect of Articles 30 and 59, where it leaves regulatory power to the state *ad quem* for the protection of the commonweal.

The question whether legislative power of the Community reaches so far will be discussed in the context of insurance and television, below.

E. *Single European Act*

The Single European Act, entered into force on July 1, 1987, has amended the Treaty. Approximation and coordination of laws shall contribute to complete what is now called the internal market by the end of 1992. A declaration of the Conference, added to the Single European Act, states that such

179. In an article published in 1971, the author refuted ideas that would include a certain full faith and credit clause. The case law since *Van Binsbergen* does not permit one to maintain this position. See Steindorff, *Dienstleistungsfreiheit und ordre public*, in M. LAGRANGE, W. MÖLLER, K. SIEG & E. STEINDORFF, *DIENSTLEISTUNGSFREIHEIT UND VERSICHERUNGS AUFSICHT IM GEMEINSAMEN MARKT* 79 (1971).

tasks have to be completed, which are foreseen in the Commission's White Paper of June 14, 1985, on the completion of the internal market.¹⁸⁰

VI. TELEVISION AND INSURANCE: WHERE COMMUNITY POWER ENDS

A. Purpose of this Chapter

This chapter is not designed to present all the problems of the television and insurance industries within the common market. Those industries will be used, rather, to demonstrate, where Community powers end, as compared to the powers of Congress, which was able to enact the McCarran-Ferguson Act and which has the power to repeal or to revise it.¹⁸¹

The proposals of the Community deal with all broadcasting, but are mainly relevant to television. It is for this reason that we take the liberty to speak of television only.

B. Exclusion of Freedom of Services

According to Articles 66 and 55(2), the Council, acting by a qualified majority on a proposal from the Commission, may rule that the provisions as to freedom of establishment and of services shall not apply to certain services. No such rule has been enacted. Some scholars suggest that these provisions have become obsolete.¹⁸²

C. The Regulatory Problems

1. Television

On the basis of the Court decisions qualifying broadcasting and transmission of television as services within Article 60, the Commission has published a Greenbook on the common market for television¹⁸³ together with other proposals, and it has presented to the Council the draft of a directive for the

180. Commission, Completing the Internal Market, White Papers from the Commission to the European Council, COM(85) 310 final (June 14, 1985).

181. For the case law, see Kimball & Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 UTAH L. REV. 1 (1985).

182. Randelzhofer, *Das Niederlassungsrecht*, in KOMMENTAR ZUM EWG-VERTRAG, *supra* note 140.

183. COM(84) 300 final (June 14, 1984).

approximation of the law regarding television.¹⁸⁴ The Federal Republic of Germany and its Länder (states) deny the competence of the Community to legislate in this field, because within Germany it belongs to the exclusive jurisdiction of the Länder. If we accept that regulatory power exists, a further question becomes relevant: the draft of the Commission provides for approximation of the laws mainly as to protection of youth and as to advertising, thereby taking into account that in *Debauve* the Court had no objections to state legislation excluding advertising from television.¹⁸⁵ A uniform law, in this respect, would abolish a restriction on freedom of services. But we are confronted with another problem: German law, even German constitutional law, has some strict rules as to the substance of television programs in other respects.¹⁸⁶ Could these rules still be applied to transmission of television, above all by cable? The draft of the directive seems to permit that, while the Commission, in its explanation of the draft, comes to the opposite conclusion. Could an article be added to the draft providing that, after implementation of the directive and approximation of the law as to advertising and protection of youth, no other state regulations must be opposed to the broadcasting and transmission of television? Here the question of Community powers is at issue. When discussing the recognition of foreign diplomas, we learned that the 1985 draft aims at obliging the states to recognize foreign diplomas without prior approximation of the law. It does, however, reserve to the states the right to subject foreign providers of services to an adaptation process and thus protect the state *ad quem* against the intrusion of services, the standards of which seem to be too low to the state *ad quem*. Could the Community rule, by legislative act, that not even such a period of adaptation could be required by the state *ad quem*?

184. COM(86) 146 final, E.C. BULL. Supp. 5/86 (1986). A survey of the preceding documents is given in a resolution of the European Parliament of October 10, 1985, O.J. C 288/113 (1985).

185. Procureur du Roi v. Debauve, 1980 E.C.R. 833, 859, Common Mkt. Rep. (CCH) ¶ 8661, at 7829-30.

186. See Kübler, *Die Neue Rundfunkordnung: Marktstruktur und Wettbewerbsbedingungen*, 40 NEUE JURISTISCHE WOCHENSCHRIFT 2961 (1987) (recent overview on German law on the subject).

2. Insurance

Under the impact of the insurance judgment, the Community has resumed deliberations on a directive liberalizing services. According to the Court's judgment in the case of *Commission v. Germany*, two points must be regulated, above all, technical reserves of insurers and the control of insurers' conditions.¹⁸⁷ The Court did not mention the private law of the insurance contract or the conflict of laws rules pertaining to these contracts. Contrary to commercial agents, approximation of laws in these fields may be deemed to be superfluous, though many efforts have already been made to achieve uniform law.¹⁸⁸ But let us suppose that the Community should achieve approximation as to technical reserves and conditions of insurers, after more than a decade of frustration. Would the Community have to accept the German law, which imposes uniform conditions on insurers by not authorizing an insurer to do business without applying the standard conditions, approved by the competent authority? German law does so to achieve transparency of the market for the benefit of the insured.¹⁸⁹ However, the law burdens interstate trade by hampering foreign insurers in their use of their domestic conditions. Could such a German provision, designed for consumer protection, simply be outlawed by a Community directive?

D. *The Answers*

1. Direct Effect and Regulatory Power

Pursuant to quite a series of cases, direct effect of Articles 30 and 59 does not exclude measures of the state *ad quem*, protecting non-economic general interest such as consumer protection. But this power of the states comes to an end where the Community has regulated—perhaps one could say where it has occupied—the field. This follows from the law as to free movement of goods. In *Cassis de Dijon* and in *Rau v. de Smedt*,

187. Case 205/84, 1986 E.C.R. —, —, Common Mkt. Rep. (CCH) ¶ 14,339, at 17,164.

188. See UNIV. CATHOLIQUE DE LOUVAIN, L'HARMONISATION DU DROIT DU CONTRAT D'ASSURANCE DANS LA C.E.E. (1981).

189. For the most recent surveys and discussion, see W.-H. ROTH, INTERNATIONALES VERSICHERUNGSVERTRAGSRECHT 650-761 (1985); Chapatte, *Freedom to Provide Insurance Services in the European Community*, 9 EUR. L. REV. 3 (1984).

the Court held that under Article 30, restrictive measures of the states could be justified only "in absence of common rules."¹⁹⁰ This implies, first, that state law can conflict with Article 30, because Community rules exist. Second, directives, by themselves, have a binding effect for the states within Article 189(3),¹⁹¹ and once directives for the approximation of law have been enacted, the states cannot deviate from these directives for the purpose of protecting the general interest. Germany, therefore, could not enact stricter rules against pollution by automobiles, because Community law had regulated.¹⁹² Mr. Braun, General Director of the Commission, has explained in a discussion that this was the reason why the Single European Act introduced an exception in favor of the states. This brings us to the question whether there are limits for the binding effect of Community directives, excluding regulatory power of the states.

The Single European Act has introduced Article 100a into the EEC Treaty, as of July 1, 1987. On one hand, this Article facilitates Community action, in that approximation of laws may be passed by a majority of the Council, in forms not limited to directives. On the other hand, Article 100a(4)-(5) gives a sort of a countervailing power to the states: the Member States may, for limited purposes, still impose their law against imports, under the control of the Commission. These provisions will not play an important role in the field of services.

2. Limits of Direct Effect and of Regulatory Power

For the second limit, we must start from a proposition. We suppose that there could be a Court decision confirming direct effect of Article 59 with respect to television, but confirming also that, according to the insurance cases, the state *ad quem* is still entitled to enforce public policy insofar as the Community has not regulated, and, in order to protect vital constitutional interests, exclude foreign broadcasts from trans-

190. *Rau v. De Smedt*, 1982 E.C.R. at 3972, ¶ 12, Common Mkt. Rep. (CCH) ¶ 8879, at 8352. It is also necessary for such rules to be proportionate to the aim in view. *Id.*, Common Mkt. Rep. (CCH) ¶ 8879, at 8352.

191. EEC Treaty, *supra* note 1, art. 189(3), 1973 Gr. Brit. T.S. No. 1, at 60, 298 U.N.T.S. at 179.

192. See generally Steindorff, *Umweltschutz in Gemeinschaftshand?*, 30 RECHT DER INTERNATIONALEN WIRTSCHAFT 767 (1984).

mission via cable.¹⁹³ We thereby refer to the German argument that important constitutional issues are at stake in this field. Could the Community enact any measure that dictates, as the Commission seems to envision, that these state interests are incompatible with Community law and that, therefore, the state *ad quem* (in the potential case, Germany) is under a duty to permit transmission of foreign broadcasts by cable, if only questions of advertising or protection of youth have been solved by a directive? Could the Member State then still regulate the service to protect other, perhaps constitutional interests, if those interests were unaddressed by any directive? If the Member State were barred in such a situation, then direct effect of Article 59, as construed by the Court, could be enlarged by way of Community directives.

The question, as raised here, has not yet been decided. It was hardly ever raised. This is easy to understand, because no opposition to a Community measure could be expected, while most directives had to be voted unanimously. Now that majority votes have been provided for in Article 100a and that, in Germany, the interests not of the federation but of the Länder are involved, the question could soon become relevant. We cannot solve it here. Many arguments could be made for a rule, according to which the limits of direct effect, as expounded by the Court in its jurisprudence as to freedom of services, may limit also the legislative power of the Community; where the limits of direct effect have to do with important state interests, it is the task of the Community to abolish restrictions by approximation and coordination of laws, and thereby extend the freedoms or facilitate the exercise of such freedoms. However, state law cannot just be suppressed, and approximation as well as coordination must not disregard vital state interests. Article 6(2) is an expression of a more far-reaching principle, according to which the Community itself must protect such interests. Community measures would, according to our suggestion, be valid only if, by approximating or coordinating the law of the Member States, they arrive at some balance between Community and state interests. The

193. As this Article went to press, it was reported that the Commission has brought an action against the Netherlands for violation of Article 59, for not allowing cable transmission of foreign broadcasts including advertising created for the Dutch Market. O.J. C 85/3 (1988).

1985 project on diplomas corresponds to this suggestion, by providing for an adaptation period and by leaving the door open for special state regulations with respect to sensible professions. A directive simply excluding state measures, which are proportionate, may violate constitutional rules of the Community and could, eventually, be attacked before the Court. Only the Court can, by granting direct effect to Article 59, decide where state powers have come to an end.

CONCLUSION

The limits of Community power could be explained only in the form of questions. But such questions may suffice to demonstrate what a Community is, to which the Member States have transferred only limited sovereign rights.

All details that have been explained here may contribute to form a mosaic of what was indicated in the introduction: the EEC Treaty, by establishing a common market, has become the starting point for developing fundamental freedoms, freedom of services being one of them. Judge Everling, who participated in the drafting of the EEC Treaty on the German side, has broadened the picture in a recent article on freedoms of establishment and of services.¹⁹⁴ There is a permanent struggle between, on the one hand, the strive for preservation of state powers, and, on the other hand, the implementation of freedoms to trade within the EEC.

Community legislation has proved to be too cumbersome a process to achieve uniform law and thereby abolish restrictions on trade in services. This is the reason why the judiciary has stepped in and has outlawed quite a number of state acts and measures as being incompatible with freedom of services. One must refrain from dogmatizing the case law, because the European Community will be confronted, for years to come, with new problems in the field of services and will be forced to reshape the balance between freedoms to trade and such public goals that are still protected by state law. The Single European Act envisions the common market as an internal market where services may be provided across state borders if they are

194. Everling, *Vertragsverhandlungen 1957 und Vertragspraxis 1987*, in *EINE ORDNUNGSPOLITIK FÜR EUROPA* (E.-J. Mestäcker, H. Möller & H.-P. Schwarz eds. 1987).

in conformity with the rules of the states *a quo*. There will be interaction between Community legislation and the judiciary. This interaction can be shown in the field of insurance. As this Article was going to press, the Council, under the guiding influence of the insurance judgments and under the imperative mandate of the Single European Act, tentatively accepted the Commission's revised bill facilitating interstate insurance in the field of commercial insurance. The bill now awaits the Parliament's opinion and then final council acceptance. Future case law may extend freedom of services beyond this piece of legislation. Freedom of services in general and insurance in particular may be understood to be a part of Community law, which creates a process of permanent integration without fixing its final result.

An evaluation of the progress that has taken place so far must take into consideration some basic problems. Services, whether in banking, insurance, medical treatment, or telecommunications, are goods of a sensitive nature, and in many states are regulated by law for the benefit of both consumers and functioning systems of medical care, insurance, etc. Regulation cannot just be suppressed, if the Community does not wish to sacrifice consumer protection and other aims for freedom of services. This trade-off may explain why a country such as the Federal Republic of Germany, which aims at free markets for its exports, tends at the same time to safeguard quite a number of its acts regulating services. Such regulation inevitably creates a burden for interstate trade in services. As long as each Member State regulates its own market, including services coming from other states, the Community will be no more than a conglomerate of state markets open to some extent to each other.

To achieve a single or internal market, several questions must be answered: are there restrictive state regulations that should be abandoned completely because they restrain interstate services to an unreasonable extent and possibly camouflage an intention to protect domestic providers of services? And who is to answer this question: the European Court or Community legislation? And if regulation is indeed justified for the commonweal, by which means should the level of legal protection accorded consumers be balanced against burdens on interstate trade—Community legislation, enacted by the

Council with a minor contribution by the European Parliament, or by state legislation? Even though the European Parliament is chosen by general elections, the political power in Europe remains with the states. It is the state governments that bear the responsibility for any mischief resulting from insufficient legislation. They will have to respond to the public. Which members of state parliaments can afford to neglect their constituency and allow state legislative power to be dismantled in favor of a single European market? Even if state powers are defended by the pressure of lobbying, as is often the case, or even if state legislation restrains interstate services for outdated reasons, such resistance to change has its roots in history. And history may weigh more in politics than does the rationality of a single market. If an evaluation of freedom of services starts from these premises, then it must be said that within barely three decades of the European Community quite some progress has been achieved. As far as law can, the Community has not only designed but applied rules that, if applied and adapted to new problems in the future, may contribute to freedom of services in Europe as if there were only one internal market.