Common Market Law Review **40:** 537–543, 2003.

EDITORIAL COMMENTS

Freedoms unlimited? Reflections on Mary Carpenter v. Secretary of State[1]

It is common knowledge that the case law of the Court of Justice concerning the fundamental freedoms of the EC Treaty has had an enormous, not to say unforeseen, impact on the law of the Member States. The freedoms, forming constituent elements of the European economic constitution,[2] have gained their importance by two basic policy decisions taken by the Court already decades ago: firstly, the attribution of supremacy and direct effect to some of the freedoms, which had as result that for the last thirty years also the national courts have become increasingly involved in the application of Community law, thereby supervising national measures with regard to their compliance with the freedoms. The enormous importance of the principle of direct effect becomes apparent when the impact of those freedoms which were attributed direct effect from 1970 on[3] is compared with those freedoms that have become directly effective only in recent years.[4] And secondly, the extension of the reach of the freedoms beyond a mere prohibition of discriminatory measures to a prohibition of measures which are applied without distinction but amount to a restriction of the cross-border movement of persons, services, goods and capital.

Whereas direct effect relates to the effectiveness of Community law as such, the interpretation as to the reach of the freedoms touches on the delicate issue of the competences of the Member States and the extent to which they

1. Case C-60/00, *Mary Carpenter* v. *Secretary of State for the Home Department*, [2002] ECR I-6279. This case is also discussed – in a different context – in this *Review* in Reich and Harbacevica, "Citizenship and family on trial: A fairly optimistic overview of recent court practice with regard to free movement of persons", 615–638.

2. For the concept of an *economic constitution* based on the fundamental freedoms, the principle of an open economy with undistorted competition and the general principles of European law see e.g. Barents, "The Community and the unity of the Common Market", 33 *German Yearbook of International Law* (1990), 9; Basedow, *Von der deutschen zur europäischen Wirtschaftsverfassung* (1992); Mussler, *Die Wirtschaftsverfassung der Europäischen Gemeinschaft im Wandel* (1998); Poiares Maduro, *We the Court* (1998).

3. Free movement of goods; freedom to provide services; free movement of workers; freedom of establishment for natural persons; freedom of payments.

4. Free movement of capital; freedom of (primary) establishment for companies.

may still be exercised: the determination of the scope of the freedoms *ratione materiae* and the appropriate control standards to be applied – discrimination test v. strict scrutiny over restrictive measures – have a direct impact on the structure and balance of decentralized decision-making in the Union and the respective role of the Court of Justice as federal umpire, dealing with hard choices between the promotion of free trade and free movement on the one hand and social choices pursued by the Member States on the other.

Regarding the scope of *free movement of goods*, it is an often told story that the Court started out with a far-reaching formula in *Dassonville*,[5] which was meant to institute judicial control over all State measures potentially or actually hindering the import of goods. And in *Cassis* [6] the Court made it finally clear that its control would not only embrace discriminatory measures but also measures applied without distinction. This case law has had the effect that the Member States are put under pressure to justify their regulations by the so-called mandatory requirements of the general good, based on the standards of necessity, appropriateness, and proportionality. As a consequence, for some years and as a result of a number of judgments it was feared that the Court would overstretch its monitoring of Member State regulations in areas where the impact on interstate commerce was more speculative than real, coming close to a more or less "economic due process" jurisprudence. Advocate General Tesauro, in his *Hünermund* Opinion, rightly confronted the Court with the question: "Is Article 30 of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?"[7] The Court's answer to this question is well known: in its famous *Keck* judgment [8] the Court retreated from its rigorous scrutiny approach as far as selling modalities are concerned, reducing its control to discriminatory State regulations. With the same result but based on a somewhat different approach, the Court has consistently held that Member States will not have to justify their policies in those cases in which the influence of measures (which are applied without distinction) on the trade between the Member States is "too remote "and "uncertain".[9] Moreover, with regard to export measures, ever since its *Groenveld* judgment[10] the Court has always restricted its review of State regulations to a discrimination test. All in all, the case law of the Court

5. Case 8/74, *Procureur du Roi* v. *Benoit and Gustave Dassonville,* [1974] ECR 837.
6. Case 120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.
7. Opinion delivered on 27 Oct. 1993, [1993] ECR I-6800.
8. Joined Cases C-267 & 268/91, *Criminal proceedings against Bernard Keck and Damiel Mithouard*, [1993] ECR I-6097.
9. Case C-93/92, *CMC Motorradcenter*, [1993] ECR I-5009, 5021 para. 12.
10. Case 15/79, *P.B.Groenveld B.V.* v. *Produktschap voor Vee en Vlees*, [1979] ECR 3409.

concerning the free movement of goods seems to be based on a reasonable compromise between the exigencies of free trade and open access to the market of the Member States on the one hand, and the ability of the Member States to pursue their social policies (in the widest sense) on the other: State measures which inherently restrict market access for products are put under strict scrutiny, whereas all other measures are covered by a mere discrimination test, and the refore do not have to be justified at all as long as they are not discriminatory in law or in effect.

With regard to *freedom to provide services* (Art. 49 (ex 59) EC), the Court service-provider has applied a strict scrutiny approach to non-discriminatory rules of the State of destination since the 1980s.[11] Whether and to what extent an analogy with *Keck* may and should be drawn is a question which is still undecided and subject to intense academic debate.[12] But the Court has acknowledged the necessity to practice a limited review in certain areas of law, such as labour legislation, where as a general rule it has applied just a discrimination test.[13] With regard to regulations of the State of origin, the Court has – in contrast to its case law concerning the export of goods – gone beyond the review of merely discriminatory measures: e.g. in *Alpine Investments,*[14] the Court applied its strict scrutiny approach to those regulations of the State of origin which directly affect access to the market in services in the State of destination.

Most recently, in *Mary Carpenter*, a judgment of 11 July 2002, the Court assumes that a State interference into the family life of a service-provider could amount to an obstruction of the freedom to provide services, calling for strict scrutiny. Apparently, the Court has adopted the view that any (non-discriminatory) regulation or measure of the State of origin which may have a negative effect on the interstate provision of services has to be justified by mandatory requirements of the general good. Thereby, the Court has dramatically extended its control over non-discriminatory measures of the State of origin to all conditions under which the service-provider exercises his fundamental freedom. The Immigration Appeal Tribunal asked the Court

11. Case 205/84, *Commission* v. *Germany*, [1986] ECR 3755; Case C-76/90, *Manfred Säger* v. *Dennemeyer & Co Ltd*, [1991] ECR I-4221.

12. See a number of contributions in Andenas and Roth (Eds.), *Services and Free Movement in EU Law* (OUP, 2002).

13. Case C-113/89, *Rush Portuguesa Lda* v. *Office national d'immigration*, [1990] ECR I-1417; Joined Cases C-369 & 376/96, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and against Bernard Leloup and Others*, [1999] ECR I-8453. But see for an exception Case C-165/98, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL*, [2001] ECR I-2189.

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

of Justice whether, in the circumstances of the case, [15] a non-national spouse could rely on freedom to provide services (Art. 49 EC). In its answer, the Court (rightly) assumes that Article 49 EC covers the activities of *Mr* (and not *Mrs*) Carpenter as far as services are provided to recipients in other Member States and within those States. As for the required "restriction" in the sense of Article 49 EC, the Court holds that

> "(i)t is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse."[16]

Having thus accepted that freedom to provide services has been infringed, the Court applies the strict scrutiny approach, allowing the required justification of the State measure by the general good only when applied in conformity with Article 8 of the European Human Rights Convention. In the present case, the Court concludes that the decision to deport Mrs Carpenter has not struck a fair balance between the right of Mr Carpenter to respect for his family life and the maintenance of public order and public safety.

The approach taken by the Court is striking (to say the least) for more than one reason. At the outset, it may be admitted that the Court's argument using Article 8 of the European Human Rights Convention is a forceful one, and that, had the European Human Rights Convention been binding on the Secretary of State (who issued the deportation order) and the Immigration Adjudicator (who dismissed the appeal against that order) at the time when the relevant decisions were taken,[17] the deportation order against Mrs Carpenter would probably not have been issued. However, it is, of course, not the function of the Court of Justice to intervene in all cases where the human rights protection in a Member State does not meet the minimum standards. As long as the Court of Justice has not been attributed the competence to act as a general human rights court overseeing not only Community acts but also acts of the Member States that are unrelated to Community law, the Court is bound to observe the limits of its competence strictly, and to refrain from overstretching the scope of the freedoms in order to reach an admittedly just solution in the individual case.

15. The facts of the case can be found in this *Review*, in Reich and Harbacevica, *supra* note 1.

16. Cited *supra* note 1, I-6320 para 39.

17. Although the UK was party to the ECHR, the Convention was not at the time incorporated into UK law.

Having said that, it is submitted that the Court's interpretation of Article 49 EC in view of the facts of the case raises more (methodological) questions than it answers. It is, of course, settled law that freedom to provide services not only extends to regulations of the State of destination, but also to regulations of the Member State where the service-provider has his or her seat. Moreover, it is also settled law that the service-provider may call on Article 49 EC *vis-à-vis* regulations of the State of origin. The decisive issue that is raised by the *Carpenter* judgment is, however, whether *all* regulations (and measures) that actually or potentially burden or restrict the export of services to other Member States have to be justified by the mandatory requirements of the general good. It is suggested that the Court, in *Carpenter*, being strongly influenced by the circumstances of the case, extends the scope of the freedom to provide services too far: taken seriously, the *Carpenter* judgment opens up the strict scrutiny approach of the Court to the whole mass of legislation that may have an effect on the provision of services. Again the Court seems to be in danger of misconceiving the freedoms – this time as an instrument to review State measures on the basis of human rights – and giving freedom to provide services *vis-à-vis* the regulations of State of origin a scope of application without any discernable limits.

It is worth noting that the Court in *Carpenter* does not set forth a principled definition of what amounts to a restriction of the freedom to provide services as far as measures of the State of origin are concerned. Instead, the Court points to the fact that the deportation of Mrs Carpenter would obstruct the family life of the couple, and as a result of that would deter Mr Carpenter from exercising his right to provide interstate services. The Court does not claim either that access to the market of the other Member States is impinged upon, or that the deportation measure was taken in view of the fact that Mr Carpenter was engaged in the provision of interstate services. Indeed, the fact that Mr Carpenter was also engaged in the interstate provision of services was merely incidental to the issue of deportation.

If the Court is ready to take its approach seriously and to classify non-discriminatory intrusions of the State of origin into family life as obstructions of freedom to provide services, we will have to expect that in the future jail sentences for spouses of service-providers will be scrutinized by the Court for their justification and their proportionality: the effects on family life (taking care of children etc.) are no different from a deportation order if a spouse has to go to jail. If such cases with an indirect effect on freedom to provide services are covered by the strict scrutiny approach, we have to assume as well that in principle all regulations which are applied without distinction and measures that are addressed to a provider of interstate services will in the future be strictly scrutinized: e.g. any jail sentence for a service-provider will have to be considered as a restriction of that freedom, as the service-provider

will be prevented from exercising his or her right. It becomes evident that freedom to provide services will then turn into a freedom without limits *vis-à-vis* all non-discriminatory regulations and measures of the State of origin which may have a burdening effect on the interstate provision of services. In effect, the approach taken by the Court will lead to a question comparable to the one posed by Advocate General Tesauro in the *Hünermund* proceedings[18]: whether freedom to provide services is to be considered as a general right of a service-provider encouraging the pursuit of economic activities within the Member State of origin, or whether it is restricted to those regulations and measures of the State of origin that specifically hinder the access to the markets of the other Member States.

It is suggested that the answer the Court ought to give should clearly correspond with the second alternative: it is the function of the freedoms to control and set limits to regulations that hinder the integration of the markets of the Member States, and not to guarantee economic and non-economic due process as such. Viewed in this perspective, the Court should refrain from the temptation (?) to stretch freedom to provide services to all kind of regulations and measures that have some effect also on the interstate provision of services, and should restrict the application of Article 49 EC to those cases in which the integration of the national markets is at stake, and develop the case law in a principled fashion that gives the national courts and the traders secure guidelines for the future.

Way back in 1986, it was self-evident for the Court that a non-discriminatory regulation (of the State of origin), such as the Danish law on the supervision of insurance undertakings – though also a burden on the interstate provision of insurance services – nevertheless should escape the scope of ex Article 59 EC.[19] Today, it should still be self-evident that all provisions and measures of the State of origin that relate to the production of services – regulations on labour law, on social security, on police matters etc. etc. – should be regarded as not impinging on freedom to provide services as long as they do not discriminate (in law or in fact) against the interstate provision of services. It is the task of the Court to identify, on the basis of principles, those cases in which non-discriminatory regulations of the State of origin run counter to the idea of market integration and therefore need a justification by the mandatory requirements of the general good. These may be, for instance, cases in which the State of origin accords an extraterritorial effect to its marketing regulations (such as in *Alpine Investments*) or, perhaps, in which a service is regulated

18. Cf. also Snell and Andenas, "How Far? The Internal Market and Restrictions on the Free Movement of Goods and Services: Part 2", 2 Int. Comp. Corp. J., 361, 380.

19. Case 252/83, *Commission* v. *Denmark*, [1986] ECR 3715, 3751 para 28.

(or its production even prohibited[20]), despite the purpose of the provider to offer the service to recipients in another Member States. It is submitted that only if the Court is ready to develop its jurisprudence in this direction, will a reasonable balance between the exigencies of free trade and free movement on the one hand and decentralized decision-making on social policies (in the widest sense) on the other, be upheld.

20. Case C-405/98, *Konsumentombudsmannen (KO)* v. *Gourmet International Products AB (GIP)*, [2001] ECR 1795, 1828 para 39.