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GUEST EDITORIAL: WILL THERE BE HONEY STILL FOR TEA?

Homesick in Berlin in 1912, Rupert Brooke evoked memories of lazy summer afternoons at the Old Vicarage at Grantchester:

> Stands the Church clock at ten to three?
> And is there honey still for tea?

Those who read the editorial comment in the April issue of this Review may be forgiven for similar pangs of nostalgia. Community lawyers have been brought up to believe that the case law of the Court forms the basis of the *acquis communautaire*. But the April commentator, writing about the Services Directive, observed that there is a real danger that the proposed texts of the European Parliament will undermine the case law of the Court of Justice. If the political institutions no longer feel bound by the case law on the Four Freedoms, for how long will there be "common market law" for us to review?

Some will argue that the history of the Services Directive is a sign of healthy progress from technocratic legalism to democratic choice. Perhaps in times gone by the Court had to provide the glue to hold the system together when the political institutions failed. But we cannot complain of a "democratic deficit" and then protest when the political institutions, and especially the Parliament, exercise their right to make democratic decisions. Why should past decisions of the Court stand in their way? After all, the Court itself is not bound by them.

Partisans of a settlement of the constitutional debate along conventional lines are likely to welcome the emergence of the Parliament as the dominant player, and those who see the economic provisions of the Treaties as an Anglo-Saxon plot will welcome the assertion of competing values. There will be those, too, who will be glad to see the power of the Court diminished and its wings clipped.

So, stimulated by the April commentator, it is time for us to ask whether there is, or should be, a legal limit to the freedom of democratic choice – an irreducible minimum of settled law that acts as a restraint on what the political institutions can do? Specifically, if the EU is an organization exercising conferred (as opposed to sovereign) powers – powers conferred *by* the Treaties – does the democratic mandate stop where the Treaties stop? Even more specifically, do the Four Freedoms, as interpreted by the Court, have a "constitutional" validity with which the political institutions are not entitled to interfere *au gré*?

We might begin by remembering that, when the Member States agreed in 1957 to create the common market, the terms of their contract were not entirely a matter of free choice. The GATT of 1947 limited the extent to which groups of States could enter into preferential trading arrangements between themselves. States that did so were bound to make them effective within a reasonable time. It was on this point, amongst others, that Pierre Pescatore argued that the assumptions underlying the Single European Act were fundamentally flawed.[1]

The Member States were not free to decide whether, or how fast, they would complete the common market, and their freedom to extend preferential treatment to each other was conditional on eliminating internal discrimination and protectionism. Compliance with the non-discrimination provisions of the Treaty was not an option but a necessary condition of the right of the Member States, as parties to the GATT, to create a common market limited to themselves.

This was the context of public international law within which the Court developed its case law on Articles 30 and 36 EEC, and on the direct effect of Articles 52 and 59 after the end of the transitional period. The fact that the Court did not make this explicit and, in particular, did not accept the direct effect of the GATT for individual legal relationships, did not affect its character as a source of international obligations for the Community and the Member States. Those obligations have not changed. If anything, they have become more compelling and more extensive.[2]

Next, the EEC Treaty characterized the basic economic provisions of the Treaties – the Four Freedoms – as the "Foundations of the Community". For unexplained reasons this was eliminated by the Maastricht Treaty, and the Four Freedoms became mere "Policies". But Maastricht prescribed, as one of the "activities" of the Community, "an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital", and affirmed the right of every citizen of the Union, albeit subject to limitations, "to move and reside freely within the territory of the Member States". This was reaffirmed in the Charter of Fundamental Rights which also asserts the freedom of every citizen "to seek employment, to work, to exercise the right of establishment and to provide services in any Member State".

It is hardly controversial (on the basis of these texts alone without reference to the case law) to say that the right of *personal* free movement, at least,

1. "Some Critical Remarks on the Single European Act", 24 CML Rev. (1987), 9–18.
2. See GATS 1994, Art. V and especially V bis.

has acquired constitutional status going to the core of what the EU is about. While the Court has adapted the law on free movement of goods to take account of competing priorities that were hardly on the horizon in 1957 (environmental protection, consumer protection, etc.), the law on free movement of persons has been strengthened, the exceptions diminished and the protections reinforced.

In that context, neither the Treaties nor the Charter distinguishes between the rights of natural and of legal persons. Corporations, however large or economically powerful, have the same rights of free movement as the individual citizen, provided that they come within the terms of Article 48 EC. (That is the point of the decision in *Centros*,[3] which is criticized on grounds that confuse the conditions for incorporation under the law of a Member State with the rights that flow from it.)

There may be social or economic arguments for saying that the freedom of corporations should be viewed in a different light from that of individuals. But the Treaty does not say so and it is important to remember that, for fiscal and administrative reasons and without any taint of fraud or dishonesty, the sole trader or professional may find it simpler or more attractive to pursue his or her economic activities in corporate form. One law for the individual and another for the corporation is a seductive but ultimately unsatisfactory solution.

In the particular case of Services, there is an underlying problem of terminology that muddies the waters. It is worth taking a moment to examine it because it leads on to wider considerations. While the Treaty envisages a common market characterized by free movement of goods, persons, services and capital, the detailed provisions do not follow this four-fold classification. In particular, the Treaty does not make it clear whether "free movement of services" is to be seen as an aspect of free movement of persons or, more abstractly, as free movement of an intangible commodity.

The text of the Chapter on Services suggests that the former approach is correct, both because that Chapter is so closely linked to the Chapter on Establishment and also because it reflects the economic conditions of the 1950s, when cross-frontier provision of services almost inevitably required the physical displacement of the service provider or, in some cases, the recipient. On the other hand, in these days services can "move" across frontiers without any physical displacement of the provider or the recipient. Should services be treated as intangible commodities, so that "free movement of services" becomes more analogous to "free movement of goods" than to "free movement of persons"? On that view, restrictions on free movement of ser-

3. Case C-212/97, *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459.

vices on grounds of *exigences impératives* might more readily be justified since they do not interfere with free movement of persons.

This approach, while it may explain some of the political thinking about the Directive, overlooks the fact that the Chapters on Workers, Establishment and Services all involve, at least potentially, an element of "persons" and an element of "services". The right of an employer to provide services in another Member State cannot be dissociated from the right of his employees to work there, bearing in mind that the individual's right to work in another Member State is not conditional on his/her being employed by a national of the host State, or even of a person established there.[4]

Put another way, where provision of services involves physical displacement of those who do the work, "market access" for the employer is "employment access" for the employee. Correspondingly, where the host State imposes restrictive conditions on the service provider, the effect is also to diminish the work opportunities of the service provider's employees. This is particularly so in the case of the first contract, carried out *à titre temporaire*, which enables the service provider to find out whether a sufficient market exists to justify the investment involved in a permanent establishment.

The Court has recognized these complexities and has brought them within the compass of its general approach to interpretation of the Treaty. It has refused to draw a hard and fast line between establishment and services, or to lay down hard and fast criteria for determining on which side of the line a particular activity will fall. The duration, regularity, periodical nature (*périodicité*) and continuity of the activity must all be taken into account, and the fact that the activity is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State.[5]

Similarly, the Court has said that national restrictions on freedom of movement must fulfil four conditions: that they be applied in a non-discriminatory manner; that they be justified by imperative requirements in the general interest; that they be suitable for securing the attainment of the objective they pursue; and that they do not go beyond what is necessary for that purpose.[6] It is in this context that the safeguards offered by home country rules become important. If those safeguards are adequate – and the principle of mutual trust and recognition requires us to start from the presumption that

4. The close relationship between free movement of persons, including employees, and the supply of services is recognized by Art. XXIX of GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement.

5. Case C-55/94, *Gebhard,* [1995] ECR I-4165, para 27; Case C-215/01, *Schnitzer,* [2003] ECR I-14847, para 28.

6. *Gebhard, supra* note 5, para 37 and para 6 of operative part of the judgment.

they are – then a requirement to comply with additional and different safeguards in the host country becomes disproportionate. This applies over the range of the Four Freedoms.

The significance of the Court's case law is not that it lays down legal rules that are open to the democratic legislator to overturn, but rather that it sets out *the approach required by the Treaty* to the application of national law and administrative practice. This approach starts from a presumption in favour of individual freedom and requires that restrictions of that freedom be objectively justified and proportionate. That is the hard core of the Court's case law that the political institutions and the Member States have a legal obligation to respect – not just because the Court says so, but because the Treaty, read as a whole in the context of public international law, requires it.

Ultimately, as so often, the legal issue comes back to one of powers. If, as everyone now seems to agree, the European Union (and within it the European Community) is an organization with conferred powers only, the mandate of its institutions, democratic or not, cannot go beyond the limits of the powers conferred by the instruments that confer them. It is the power and duty of the Court to interpret the Treaty in accordance with internationally recognized canons of interpretation[7] in order to "ensure that the law is observed".[8] It is the obligation of the political institutions, including the Parliament, to work within the bounds of that interpretation unless and until the Treaty itself is amended by those who have power to amend it.

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7. See the second sentence (the second *attendu* in the French version) under II.B of the Court's judgment in Case 26/62, *Van Gend en Loos,* [1963] ECR 1 ("… it is necessary to consider the spirit, the general scheme and the wording of those provisions") and Art. 31 of the Vienna Convention on the Law of Treaties.

8. Art. 22 EC.

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