Case C–76/05 Schwarz and Gootjes–Schwarz v. Finanzamt Bergisch Gladbach, Judgment of the Grand Chamber of 11 September 2007, not yet reported; Case C–318/05, Commission v.Germany, Judgment of the Grand Chamber of 11 September 2007, not yet reported; Joined Cases C–11/06 & C–12/06 Morgan v. Bezirksregierung Köln; Bucher v. Landrat des Kreises Düren Judgment of the Grand Chamber of 23 October 2007, not yet reported

Case comment
Case C-76/05 *Schwarz and Gootjes-Schwarz* v *Finanzamt Bergisch Gladbach*[1]
Case C-318/05 *Commission* v *Germany*[2]
Joined Cases C-11/06 and C-12/06 *Morgan* v *Bezirksregierung Köln*; *Bucher* v *Landrat des Kreises Düren*[3]

> [T]he question to be examined…lies at the meeting point between direct taxation and education policy. As Community law stands at present, both areas fall within the competence of the Member States. However….[4]

In the autumn of 2007, the Court of Justice delivered judgment in (originally) four cases that challenged aspects of German law against EC free movement rights, primarily those grounded in services (Article 49 EC) and EU citizenship (Article 18 EC). If the history of free movement within Europe is traced through the story of the migrant scholar, then the origins of the Union could be said to lie in Classical Greece.[5] Crossing State borders for education also illustrates the nature of most inter-State movement by EU citizens today – it is not fixed, permanent and driven by economic or political necessity; but more typically functional, temporary and by choice. Interestingly, in the present cases, all of the applicants were German nationals relying on Community law against their home State.

The judgments primarily consolidate and enhance citizenship-infused case law on Member State financial support for education,[6] and cement the Court's powerfully liberal restriction-based approach to the law of the internal market. This means too, of course, that questions about unwarranted Community interference in sensitive State competences inescapably – but rightfully – follow.

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[1] Judgment of 11 September 2007, not yet reported.
[2] Judgment of 11 September 2007, not yet reported.
[3] Judgment of 23 October 2007, not yet reported.
[4] Opinion of Advocate-General Stix-Hackl in *Schwarz* and *Commission* v *Germany*, delivered on 21 September 2006, para. 2.
[5] See Advocate-General Ruiz-Jarabo Colomer's historical overview in his Opinion in *Morgan and Bucher*, delivered on 20 March 2007, para. 37 *et seq*.
[6] See especially, Case C-184/99 *Grzelczyk* v *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 and Case C-209/03 *Bidar* v *London Borough of Ealing; Secretary of State for Education and Skills* [2005] ECR I-2119; and against a home State, Case C-224/98 *D'Hoop* v *Office national de l'emploi* [2002] ECR I-6191.

The Cases: Factual Background

All of the proceedings related to different means of support available under German law for persons participating in education either directly (financial grants for students undertaking third-level courses in *Morgan and Bucher*) or indirectly (tax relief for parents paying private school fees in *Schwarz* and *Commission* v *Germany*); but the relevant legal provisions either restricted or prohibited these benefits for anyone claiming them in relation to educational institutions established abroad.

Turning first to *Morgan and Bucher*, German Federal Law[7] made the award of education or training grants to students who wished to attend education or training establishments abroad conditional on a number of criteria, including (1) a continuation proviso[8] i.e. completion first of at least one year in Germany of the same studies that would then be pursued abroad and (2) a permanent residence criterion,[9] applied to German students who lived close to the borders of, and travelled back and forth for the purposes education to, other States. Without having undertaken related studies in Germany, Ms Morgan commenced the first year of a course in applied genetics at the University of the West of England in Bristol in September 2004. Her application for an education or training grant was rejected on the grounds that she did not fulfil the continuation criterion. In addition to having the same 'continuation' problem, Ms Bucher's grant application was also rejected on the basis that she had moved from Bonn to Düren (close to the Netherlands) only in July 2003, prior to commencing her studies in ergotherapy in Heerlen in September of the same year. In both cases, joined for the purposes of an Article 234 EC reference by the Administrative Court in Aachen, the applicants argued that since courses in neither applied genetics nor ergotherapy were available in Germany, they were losing out financially simply because they wished to follow their chosen fields of study. They therefore submitted that the restrictions imposed on them by the German legislation contravened the free movement rights guaranteed by Article 18 EC.

Under German income tax law,[10] the possibility of offsetting against taxable income the fees (and some other specified expenses) paid for private schooling was precluded in respect of fees paid to educational institutions established outwith Germany. This limitation was challenged in *Schwarz* by parents who opted to send their children to a private school in

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[7] Federal Law on the encouragement of education and training (BAföG).
[8] § 5(2) of the BAföG.
[9] § 5(1) of the BAföG.
[10] Conferred through § 10(1)(9) of the Law on Income Tax (EStG)

Scotland,[11] and under Article 226 EC infringement proceedings in *Commission* v *Germany*. In both actions, the arguments sought to demonstrate that by conferring an advantage only in respect of schools established in Germany, the income tax law was discriminatory and thus infringed Articles 39 (workers), 43 (establishment), 49 (services) and 18 (citizenship) of the EC Treaty.[12] As a preliminary yet fundamental point, the German Government argued against the application of Article 49 EC at all, contesting the character of education as a service 'normally provided for remuneration' in accordance with Article 50 EC.[13]

The Judgments

Primarily, the three Court of Justice decisions pull together strands of legal principle already established in the case law; but they also build further on the Community legal canon. The Court and the Advocates-General were distinctly in agreement in their elaboration of the core principles outlined in the following paragraphs – essentially, the existence of restrictions on free movement in all three cases and the inadequacy of the State arguments submitted as justifications. The Opinions, as would be expected, review in more depth the evolution of these legal principles over time, tracing their origins and development in the Court's jurisprudence. Beyond this, however, the Opinions particularly contribute significant insights about the contextual tensions within which the principles are embedded; these observations are picked up throughout this note where relevant.

The Court first confirmed that the pursuit of studies in other Member States generates a sufficient cross-border element so that nationals may rely on the principles of equal treatment protected by Community law against their own States.[14] Recalling the dictum cited at the beginning of this comment, it was also made clear that while competence for the content and organisation of education systems and for matters relating to direct taxation lie

[11] Cademuir International School, a specialist school for children demonstrating exceptional potential.

[12] The relevance of Articles 39 and 43 EC was ruled out in *Schwarz* since the applicants were neither migrant workers nor established in another State; in *Commission* v *Germany*, the judgment concentrated primarily on services and citizenship (as discussed below) but analogous effects relating to workers and establishment were acknowledged (see paras. 112-123 of the judgment).

[13] Relying on Case 263/86 *Belgium* v *Humbel and Edel* [1988] ECR 5365 and Case C-109/92 *Wirth* v *Landeshauptstadt Hannover* [1993] ECR I-6447; the Commission cited the same judgments to make the opposite argument i.e. as authority that privately-funded education fell *within* the scope of Community law on services (cf. paras. 52 and 41 of the judgment in *Commission* v *Germany*).

[14] *Morgan and Bucher*, paras. 22-23; see also *Schwarz*, para. 88, *Commission* v *Germany*, para. 127.

with the Member States, 'it is none the less the case that [these competences] must be exercised in compliance with Community law'.[15]

A comprehensive hindrance/deterrence approach to restrictions (both actual and possible) on freedom of movement comes through very strongly in all of the judgments. This enables a broad reading of the Treaty freedoms, especially for present purposes of both Article 18 and Article 49 EC. As an interpretative formula, the hindrance/deterrence method confirms that the fundamental objectives which underpin free movement are, first, the avoidance of any obstacle or disadvantage that has been or might be suffered by a Community national who engages in cross-border activity (hindrance) as well as, second, ensuring that he or she is in no way deterred or discouraged from availing of the free movement opportunities created by the EC Treaty or penalised purely for having exercised those opportunities (deterrence).[16]

In *Schwarz* and *Commission* v *Germany*, the Court reaffirmed the interpretative principle that provisions like Article 49 EC constitute specific expressions of the rights guaranteed by Article 18 EC, and so recourse to the protection offered by EU citizenship should remain a secondary exercise. This means that the substantive rights unique to citizenship should be considered only when the situation at hand can not be resolved by the application of the classic four freedoms.[17] The breadth of the hindrance/deterrence formula applies across the board, however, so that Article 49 similarly proscribes 'the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State'.[18] In keeping with the intention of drawing the parameters of free movement restrictions as widely and loosely as possible, the 'more difficult' test could not really be said to represent an unduly high threshold.

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[15] *Morgan and Bucher*, para. 24 (education); S*chwarz*, paras. 69 (tax) and 70 (education), similarly *Commission* v *Germany*, paras. 85 and 86. In *Morgan and Bucher*, Advocate-General Ruiz-Jarabo Colomer sought to distinguish the legal approach relevant to study grants from the case law on direct taxation, since the latter field is more problematic for persons who transfer their residence (see paras. 76-78 of the Opinion). Avoiding the problematic implications of taxation seems to be a current challenge for the Court more broadly, thinking also of recent judgments like Case C-446/03 *Marks & Spencer plc* v *Halsley (Her Majesty Inspector of Taxes)* [2005] ECR I-10837, where resolution of the case using freedom of establishment enabled the Court to avoid the more complicated influence of Article 58 EC.

[16] See *Morgan and Bucher*, para. 25-26; *Schwarz*, para. 89, *Commission* v *Germany*, para. 128.

[17] *Schwarz*, paras. 34-35, *Commission* v *Germany*, paras. 32-37.

[18] *Schwarz*, para. 61, *Commission* v *Germany*, para. 81, arguably a less complicated version of the *Keck* test developed for Article 28 EC (Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097, paras. 16 and 17).

The combined effect of this methodology was that all the contested provisions of German law were found to contravene Article 18 EC (in all three judgments) and Article 49 EC (in *Schwarz* and *Commission* v *Germany*). In *Morgan and Bucher*, the 'personal inconvenience, additional costs and possible delays' associated with compelling students to commence their university studies in Germany for at least one year were found liable to restrict the movement of EU citizens who wished to study abroad.[19] The Court was not persuaded by the German Government's attempts to justify the continuation of studies proviso and therefore rejected arguments based on, first, trying to establish and ensure the student's commitment and adherence to their chosen field of studies; second, an excessive financial burden that supporting studies abroad might cause, thus leading to a reduction in the overall level of grants awarded; and, third, avoiding unfair duplication of benefits that might be awarded by host States. As might be expected, particular scepticism was directed at the *necessity* of a continuation requirement *per se* to meet any of these needs, reflecting once again the profound importance of a proportionality analysis.

In light of the Court's answer on this aspect of the reference, the national court had indicated that Ms Bucher's application would be upheld and so it was not necessary to examine the permanent residence condition.[20]

In *Schwarz* and *Commission* v *Germany*, the Court agreed with the Commission rather than with the German Government on the interpretation of *Humbel* and *Wirth*, finding that 'courses given by educational establishments essentially financed by private funds' did constitute services within the meaning of Article 50 EC.[21] The differential tax rules under review were then found to infringe the free movement of services since they had the effect of 'deterring taxpayers resident in Germany from sending their children to schools established in another Member State'.[22] Again, attempts were made by the German Government to justify

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[19] *Morgan and Bucher*, para. 30.

[20] This seems a little odd, as the issues raised with regard to defining permanent residence for border students are quite different from the continuation question. Advocate-General Ruiz-Jarabo Colomer did briefly address the second question; even though the primary 'movement' in Ms Bucher's case was within Germany, he suggested that the permanent residence criterion also infringed Article 18 EC and that if limitations on the award of grants needed to be imposed, other conditions (e.g. standards of academic performance) would be fairer and more compatible with equal treatment requirements (see paras. 121-122 of the Opinion).

[21] *Schwarz*, paras. 39-40; see also *Commission* v *Germany*, paras. 67-72. The implications of this finding and its interrelationship with citizenship rights are discussed further below.

[22] *Schwarz*, para. 66. In *Schwarz*, this finding was confined to the factual scope of the case itself i.e. the rights of the applicants as service recipients (although, to describe the receipt of services, the Commission uses the needlessly complicating language of 'passive provision').

its income tax legislation. Its reasoning was anchored in the burdens placed on public finances in general, but also in particular financial and administrative arrangements which meant that the State subsidised, regulated and controlled many aspects of the governance private schools in Germany (as compared to the often wholly different character of private schools in other States). These arguments failed to convince the Court. Again, a clear emphasis on proportionality was used to decouple the public interest arguments submitted from the effectiveness of a tax-relief differential actually to achieve those aims. Should the national court find subsequently that Article 49 did not apply in this case (for example, if it were to find that the Scottish school in question was *not* 'essentially financed by private funds'[23]), the Court of Justice confirmed in the alternative that its hindrance/deterrence analysis applied similarly in respect of Article 18 EC and so the differential tax rule would disadvantage EU citizens resident in Germany whose children were educated in private schools established in other States.[24]

Comment

Whether in the context of an internal market in balder trade terms or a more constitutionally complex and ambitious polity that can properly lay claim to the language and rights of citizenship, it is hard to find fault in principle with the realisation the themes outlined above. But when reading these three recent judgments, I could not shake off a sense of something approaching unease, coalescing around, first, the interpretation of restrictions and related market/citizenship tensions; and, second, the erosion of the State justification rationale. It is fair to state at the outset that the three judgments annotated here do not, in themselves, raise particularly grave concerns. It is difficult to sympathise with continuation conditions or tax relief divergences that constrain the cross-border choices made by students or their parents so blatantly. Moreover, the particular nature of those conditions could not be objectively linked to public interest arguments underpinning education and taxation policy more broadly. It is rather that the interpretative structure employed by the Court in all of the cases illustrates

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The restrictive impact on schools established in other States as ('active') providers of services was addressed in *Commission* v *Germany*, however (see para. 80).

[23] The Advocate-General suggested that this might apply also to parents who had moved for 'purely private reasons…relying on their general right to free movement' (para. 90 of the Opinion); even in such circumstances, however, payment for cross-border school fees would still surely bring the matter within the scope of services.

[24] *Schwarz*, paras. 86-92; *Commission* v *Germany*, paras. 127-132. In both cases, the Court went on to dismiss in subsequent paragraphs the same justification arguments that had been rejected in respect of Article 49 EC.

plainly how Community law can impinge on the most profound examples of sovereign State choices. And when they do, the question that remains is how best to balance competing State/free movement interests.

This section will address in more depth both of the themes outlined above, as they cut across all three of the judgments: first, the Court's evolving conception of free movement law; and second, the complex nature of economically motivated restrictions on free movement.

Citizenship, services and free movement law

The legal content of these decisions is unlikely to startle anyone familiar with Community jurisprudence on freedom of movement. The judgments reflect two basic theses firmly established in the case law. First, an expansive commitment to effecting free movement rights is plain to see since the early days of *Dassonville*[25] and *van Binsbergen*[26]. We do not even need to reopen the difficult discrimination/market access debate as an aid to conceptualising the factual situations involved in the three cases or the Court's response to them, since the legislative provisions under review were all distinctly applicable i.e. all of the provisions sought very expressly to apply different rules in respect of education services provided in other States. The permanent residence requirement challenged in *Morgan and Bucher* was perhaps a bit more interesting from the perspective of legal analysis, raising the challenge of resolving reverse discrimination.[27] But even here using a straightforward hindrance/deterrence interpretation, reinforced by the *Singh/Akrich* principle that behaving or acting so as intentionally to exploit Community rights is entirely acceptable,[28] that requirement too would surely have to fall.

Second, the contribution of Article 18 EC to free movement is by now unassailable. As the body of case law on EU citizenship continues to grow, it is clear that national courts

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

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

[27] Advocate-General Sharpston addressed some of these issues recently in Case C-212/06 *Government of the French Community and Walloon Government* v *Flemish Community*, case pending; Opinion delivered on 28 June 2007 (see paras. 112 onwards, noting at para. 133 the suggestion that EU citizenship perhaps provides an 'additional impetus' for confronting the purely internal conundrum.

[28] See Case C-370/90 *R* v *Immigration Appeal Tribunal and Singh*, ex parte *Secretary of State for the Home Department* [1992] ECR I-4265, para. 24 and Case C-109/01 *Secretary of State for the Home Department* v *Akrich* [2003] ECR I-9607, paras. 56 and 57. As to when that line might actually be crossed, Advocate-General Geelhoed in *Akrich* traces the existence of a doctrine of abuse of Community law across various market freedoms (see paras. 169-185 of his Opinion).

(and lawyers) know its potential. As the Court continues incrementally to fashion increasingly de-economised rights to movement and residence, the Member States know it too.[29] The judgment in *Martínez Sala* might have surprised those States who saw (and/or intended) nothing but words in the EC Treaty citizenship provisions.[30] But the intensifying independence of citizenship rights in a substantive sense is the most striking and consistent feature of case law on the free movement of persons in the decade since then. In *Morgan and Bucher*, Advocate-General Ruiz-Jarabo Colomer traced the severance of Article 18 EC from even Article 12 EC, making the 'original' judgment in *Martínez Sala* seem almost backward already.[31] Furthermore, the functional step taken in that case to locate child-raising allowances within the material scope of Community law has also been progressively consigned to legal history.[32] Both of these legal advances considerably reduce the need for more rigorous comparative assessment of the applicant's situation vis-à-vis purely internal situations. In *Schwarz*, for example, the Court rejected an approach that would have made it necessary to compare the nature of private schools in Germany and the UK.[33]

Before looking in more depth at the justification side of the equation (below), the character of free movement and of restrictions on free movement need to be located in a broader debate that looks beyond just results in individual cases. For example, what does the realisation of an internal market demand *from law*, and what do rights grounded in citizenship add to that? The 1985 White Paper[34] is perhaps the only serious and holistic reflection on the first part of that question that a Community institution has ever produced. Though the language and tenor were workmanlike, the Paper nonetheless mapped the most ambitious legal adventure attempted since the drafting of the Treaty itself. The 2007 Single Market Review[35] is an altogether different exercise. The use of a legislative programme is expressly excluded, reflecting the evolution of the market over time and the wider range of regulatory methods (of which legislation is just one) that the Commission now feels is suited

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[29] The dwindling relevance of economic self-sufficiency is well illustrated by Case C-456/02 *Trojani* v *Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573.
[30] Case C-85/96 *Martínez Sala* v *Freistaat Bayern* [1998] ECR I-2691.
[31] *Morgan and Bucher*, Opinion of Advocate-General Ruiz-Jarabo Colomer, para. 43.
[32] See, for example, the Opinion of Advocate-General Kokott in *Tas-Hagen and Tas*, where she remarks that 'Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law' (para. 33 of her Opinion in Case C-192/05 *Tas-Hagen and Tas* v *Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451, citing Case C-148/02 *García Avello* v *Belgian State* [2003] ECR I-11613, para. 25 in support).
[33] See *Schwarz*, paras. 44-47.
[34] European Commission, *Completing the Internal Market*, COM (85) 310.
[35] European Commission, *A single market for 21st century Europe*, COM(2007) 724 final.

'to foster[ing] flexibility and adaptability while maintaining the legal and regulatory certainty necessary to preserve a well-functioning single market'.[36] This is rather different from the Court's vision of things. All three of the 2007 judgments exemplify the Court's longstanding and powerful free movement ideology, which assumes as a default position that the rules challenged are most likely to constitute restrictions. When this philosophy of the nature of restrictions is applied in conjunction with the 'however' formula outlined earlier then really, no aspect of Member State competence is immune from Community scrutiny in theory, so long as each individual challenge is hooked on a factual situation attracting the necessary cross-border link. This is an extremely forceful tactic. In *Schwarz*, Advocate-General Stix-Hackl observed in this context that '[t]here will therefore be doubts as to the extent to which a balance can be achieved between the exercise of national competences and the requirements of the internal market.'[37] Taking a straight view of the analysis applied by the Court, and remembering the limiting factual circumstances that these cases expose, that the balance achieved falls on the side of the requirements of the internal market and its free movement rationale seems fair and logical: 'Germany, like all of the other Member States, is not obliged by Community law to award grants for education or training abroad, since it has a wide discretion to award them and to settle any relevant conditions of the award. However, if it does so, it must respect Union law.'[38]

But there are two potential problems with that approach that merit further thinking. First, especially in relation to the permanent residence condition in *Morgan and Bucher*, it is arguable that the effect of the judgments is sited closer to inducing or even rewarding cross-border movement than merely facilitating it (anti-hindrance) or not discouraging it (anti-deterrence). Second, the 'particular respect' the Advocate-General nonetheless felt should be accorded to direct taxation and education policy does not seem deeply in evidence in the outcome of any of the cases. In support of its internal market preference, it is not really surprising to find that the Court in *Schwarz* and *Commission* v *Germany* made numerous references to comparable developments relating to health services.[39] The case law on access to cross-border healthcare cuts similarly into sensitive Member State policy fields, complicated

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[36] *Ibid*., p. 4.

[37] Opinion of Advocate-General Stix-Hackl in *Schwarz* and *Commission* v *Germany*, para. 4. She later referred in support to the Opinion of Advocate-General Maduro in Case C-446/03 *Marks & Spencer plc* v *David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837, see especially paras. 21-24 of the Opinion.

[38] Advocate-General Ruiz-Jarabo Colomer in *Morgan and Bucher*, para. 123 of the Opinion (author's translation from French).

[39] See, for example, *Schwarz*, paras. 45-46; *Commission* v *Germany*, paras. 73-76.

by the parallel intrinsic relationship of the subject-matter with taxation and questions of social solidarity.[40] The application of Article 50 EC to questions about remuneration for healthcare, and the source of that remuneration (often from public funds), has stretched the parameters of the Treaty provisions on services to the limit. But the recent trilogy of judgments on education possibly takes things even further. A right of access to medical treatment in other Member States is made dependent on a range of criteria that first assesses the availability of the same or equally effective treatment in the home State.[41] This suggests a willingness to delve into comparative assessments in a substantive way. In *Schwarz*, the Court did not discuss or rely in *any* way on whether 'equally effective' private schools for gifted children were or were not available in Germany, nor was anything made of the fact that Ms Morgan and Ms Bucher could not have studied their chosen courses in Germany.

On the face of it, at least, the three recent judgments did preserve publicly-funded education from the impact of EC services law.[42] But the final paragraphs in both *Schwarz* and *Commission* v *Germany* push the alternate door of citizenship ajar. While the factual circumstances here involved tax relief in respect of *private* education, surely the principle developed under Article 18 EC relates more broadly to (any?) schools that do not provide services in accordance with Article 50 EC. The judgment in *Morgan and Bucher*, a 'pure' exercise in citizenship rights, supports the notion that the public/private education distinction is irrelevant in the context of home State financial support for education pursued by EU citizens abroad. So one wonders whether continued cross-fertilisation with the healthcare case law might lead ultimately to a more citizen- or choice- than treatment-oriented test in that sphere too. All of this resonates strongly with the market rights/human rights debate illustrated so well by the decision in *Carpenter* and by the robust (and, to be fair, divided) academic response, not least the deeply critical Editorial Comments in this journal.[43] The author of that comment objected forcefully to the Court's 'overstretching the scope of the

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[40] There is a wealth of academic comment on the healthcare case law and on questions of transnational solidarity more generally, exemplified by the essays in M. Dougan and E. Spaventa (eds.) *Social Welfare and EU Law* (London, Hart, 2005); more recently see for example, G. Davies, 'The Community's internal market-based competence to regulate healthcare: Scope, strategies and consequences', (2007) 14 *MJ* 215-238 and A. Somek, 'Solidarity decomposed: Being and time in European citizenship', (2007) 32 *ELRev* 787-818.

[41] See for example, Case C-372/04 *The Queen, on the application of Yvonne Watts* v *Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325, paras. 61-67.

[42] An understanding of the limits to the law on services that is expressly incorporated in Recital 34 of the Preamble to Directive 2006/123/EC on services in the internal market, 2006 OJ L376/36.

[43] Case C-60/00 *Carpenter* v *Secretary of State for the Home Department* [2002] ECR I-6279; and see 'Freedoms unlimited?', (2003) 40 *CMLRev* 537-543.

freedoms in order to reach an admittedly just solution in the individual case'.[44] The express use of Article 18 EC in *Schwarz* and *Commission* v *Germany* in order to deliver what Article 49 EC could not shows that an interpretative shift has been made since *Carpenter*. In *Morgan and Bucher*, the Advocate-General attached strong significance to the distinctiveness of the market-citizenship legal compound, suggesting that citizenship represents 'a considerable qualitative step forward in that it separates that freedom [of movement] from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.'[45] The application of citizenship can still be accommodated in functional or instrumental internal market and movement concepts, however; citizens are 'persons' after all. But it does not entail that the scope of services (or other freedoms) needs to be strained improperly. The liberal legal result is the same, but perhaps the mode of getting there is more palatable?

Economically grounded restrictions on free movement rights

Looking at the other side of the restriction question, whether the Member States (or their finances) are prepared for the consequences of services-beyond-citizenship is another matter. Even if we can accept an internal market (free movement) framework armoured by citizenship rights, a latent problem may be simmering in the Court's often light-touch review of justification arguments. It is a long established principle of Community law that the generous interpretation applied to restrictions on free movement rights is inversely comparable to the strict interpretation of justifications and proportionality assessments. This technique results in a scalping of Member State discretion, which can in turn be defended through a variety of rationales – the nature of rights, the crusade against protectionism, the gelling of the new legal order, to name but a few. Thus, notwithstanding some of the problems identified above, we can probably be persuaded to live with a preference for the widest interpretation possible of 'restrictions' on free movement; but whether restrictions are *actually* undue or improper deserves a closer look.

Recent empirical work completed by Catherine Barnard demonstrates evidentially that over the past two decades (at least), there is a clear trend showing that an increasing number of 'types' of justification argument are raised by the Member States (and that these, in

[44] *Ibid*. p. 541.
[45] Opinion of Advocate-General Ruiz-Jarabo Colomer in *Morgan and Bucher*, para. 82.

turn, are listened to by the Court).[46] But the success rate for States i.e. having those arguments override actual or potential obstacles to free movement, has in fact has fallen, even more so in combination with toughening proportionality assessments. These trends may illustrate a finding where evidence and instinct converge, where we might agree that we 'felt' this to be the case. But the critical feature of Barnard's work for present purposes is the application of evidence-based methods to test and ultimately confirm that instinctive hypothesis.

Where do evidence-based methods fit in the assessment of restrictions and justifications? We know that the 'actual or potential, direct or indirect' test established for free movement restrictions in *Dassonville* was developed initially for the purposes of competition law.[47] In the competition law sphere, however, that test was attached to other criteria grounded firmly in empirical economic analysis, such as the *de minimis* threshold.[48] But when it was transposed to free movement via *Dassonville*, the qualitative restriction analysis was divorced from the counterpart requirements of quantitative scrutiny. Even in questions of competition policy, however, there are concerns that economic analysis has become sidelined, and it has been suggested that 'juridification involves the increased subjection of economic activities to European law.'[49]

In some aspects of free movement law, there is an acknowledged space for objectively assessed corroboration. In respect of food law, for example, primary responsibility for the analysis of risk assessment and the veracity of scientific claims has been assigned to the European Food Safety Authority.[50] Similarly, in its development of EC consumer protection jurisprudence, the Court eventually reached a stage where it felt that its (centralised) guidance on the characteristics of the 'European' consumer was sufficiently well-established. It then redistributed more (localised) responsibility to national courts for the purpose of assessing specificities of consumer behaviour in a given State, backed up where necessary by empirical studies that the national court deemed necessary to assist it in reaching judgment.[51]

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[46] C. Barnard, 'Justifications, Proportionality and the Four Freedoms: Do they Really Protect State Interest?', in C. Barnard and O. Odudu (eds) *The Outer Limits of EU Law* (Oxford: Hart Publishing, forthcoming); the empirical dimension of this work involved analysis of the entire case law output of the Court in three selected years (a decade apart from one another).

[47] See Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, p. 249.

[48] See Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295.

[49] S. Wilks, 'Agency escape: Decentralization or dominance of the European Commission in the modernization of competition policy?', (2005) 18 *Governance: An International Journal of Policy, Administration and Institutions*, 431-452 at 452.

[50] I am grateful to Alastair Sutton for this point.

[51] Cf. the classic judgments that illustrate the centralised/localised approaches, Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratoires and Estée Lauder* [1994] ECR I-397 and Case C-220/98 *Estée Lauder* v *Lancaster* [2000] ECR I-117.

By contrast, in the overwhelming majority of free movement judgments the Court is working on a legal instinct, on a pragmatic sense of logic, maybe even on something as amorphous as a gut-feeling. It seems predisposed to assuming that restrictions are improper restrictions, not so much because the evidence presented to it objectively proves this to be the case but, conversely, because the argumentation of the Member States failed properly to use evidence to support or prove their claims. In that context, it should be emphasised that therein the problem may even lie, as State submissions are often presented without any supporting data or projections at all. This is demonstrated very plainly in *Commission* v *Austria*, for example; when rejecting justification arguments which suggested that revision of university entrance requirements to satisfy EC non-discrimination requirements would 'pose a risk to the financial equilibrium of the Austrian higher education system and, consequently, to its very existence'),[52] the Court answered very sparsely that 'no estimates relating to other courses have been submitted to the Court and that the Republic of Austria has conceded that it does not have any figures in that connection.'[53] That is not the Court's fault. It made the judgment it made on the basis of the (absence of) evidence before it, which failed to substantiate the Austrian Governments deeply serious claims.

The Member States are playing dangerously in failing to pick up this very clear message from the Court. If they had been listening, then surely the arguments in the 2007 cases would have been approached, even proven, quite differently. While a basic principle long underpinning the interpretation of free movement restrictions is that arguments based on economic grounds are not acceptable justifications, it would be misleading to describe this as an enduring or hard and fast rule. It is clear that the Court always has seen (and continues to see) economic protectionism as the antithesis of the internal market rationale. But it is also clear that as the subject matter of internal market law evolved, Member State concerns could not be written off purely because the associated arguments were economically rooted. What we are left with is not altogether coherent. There are three key points here. First, it is still fair to say that economically centred arguments tend not succeed. Second, this still casts the Court as an advocate against economic protectionism, with 'aims of a purely economic nature' usually getting short shrift.[54] But third, the reasons behind these outcomes can sometimes be

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[52] Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, para. 64.

[53] *Ibid*., para. 65.

[54] See, for example, Case C-120/95 *Decker* v *Caisse de Maladie des Employes Prives* [1998] ECR I-1831 (para. 31; free movement of goods); Case C-35/98 *Staatssecretaris van Financiën* v *BGM Verkooijen* [2000] ECR I-4071 (para. 48, free movement of capital); Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509 (para. 72, free movement of services). And beyond the freedoms, see Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others* v *Minister van*

a bit more complex than 'no economic justifications please'. The Court does *listen* to the arguments sometimes, since the judgments sometimes proceed to refute them rather than simply dismiss them. And this is where the States' light-touch engagement with serious questions about budgetary priorities and balance lets them down. If the Court's dismissal of the justification seems light-touch in turn, it should not seem surprising but be seen instead within a structure of cause and effect. It is also striking that relatively few cases are referred back to the national court in these circumstances. In *Morgan and Bucher*, in response to arguments made by the Dutch and Finnish Governments that decisions about the lawfulness of the objectives behind German legislation could best be decided back in Aachen, the Advocate-General made a counter-plea for the cases to be resolved in Luxembourg. He rationalised this on the grounds of avoiding an otherwise likely stream of references on similar matters in the future.[55] Is this a sufficiently persuasive reason to sanction delving into the details of the references? The phraseology usually adopted at these points in opinions and judgments is that the 'information' before the Court is 'sufficient' to enable it to give judgment in a substantive sense rather than to recall the services of referring courts. But 'information' is no substitute for evidence.

As noted earlier, it is not that the three education judgments present particularly acute problems in isolation. Rather, that stacking them on top of their predecessors in the fields of education, citizenship and healthcare endorses a value-judgment approach to the dismissal of justification arguments even in cases where public interest claims could be empirically tested. In her Opinion on *Schwarz* and *Commission* v *Germany*, Advocate-General Stix-Hackl stated very plainly that 'shortfalls in tax revenue are [not] to be taken into consideration as matters of overriding general interest'.[56] Well, says who, and *why*? This is not just a question about States preferring to maintain an ideal or even optimum financial balance. It cuts right to the heart of competence to set and carry through national budgetary priorities, prescribed in accordance with nationally rationalised choices. And national choices are grounded in all kinds of reasons. A rare example of hands-off decision-making seems to arise when the Court must tread the murky waters of morals. This is seen implicitly in its

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Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer [1998] ECR I-4075 (para. 44, protection of the environment); Case C-361/98 *Italy* v *Commission* (para. 48, transport).

[55] See paras. 111-113, including footnote 70 where he uses the gambling case law to illustrate his point.

[56] Opinion of Advocate-General Stix-Hackl in *Schwarz* and *Commission* v *Germany*, para. 60; citing in support, Case C-436/00 *X and Y* [2002] ECR I-10829, para. 50; Case C-136/00 *Danner* [2002] ECR I- 8147, para. 56; and Case C-35/98 *Verkooijen* [2000] ECR I-4071, para. 59

ultimately cautious judgment in *Grogan*,[57] but more expressly in *Omega*,[58] the 'playing at killing' case in which the Court's reasoning displayed an unusual degree of deference to the German Constitution's expression of the right to human dignity (found in turn to override and justify restrictions on the competing rights of service providers). Some may argue, however, that the recent judgment in *Laval* marks a return to form (this isolating the *Omega* strand of case law), with economic concerns outweighing economic (national) rights.[59]

The *Omega* case also shows that not every justification argument *can* furnish empirical back-up, of course; but arguments rooted in public finances, which covers the majority of those put forward in the present cases, certainly should. It is especially problematic that the Court does not act *consistently* in its rejection/acceptance of State arguments rooted in economic considerations. Taking the general framework outlined above but looking at it more specifically through the lens of persons, Article 27(1) of Directive 2004/38 confirms that while public policy, public security and public health arguments can be invoked to restrict the movement and residence rights of EU citizens, '[t]hese grounds shall not be invoked to serve economic ends'.[60] This provision contains the essence of a presumption against economically-grounded justifications which has rippled outwards from the derogations listed in the Treaty itself to the open-ended category of public interest concerns which the Court will also consider in most cases. Again, this is the basic rule. But as we also saw, economic arguments have nonetheless crept into the case law on access to cross-border healthcare and education; while they have not been argued successfully, they have been accepted in principle.[61] Denying that this has happened only adds to a sense of frustration. Is it any wonder that the States who intervened in support of Germany in *Morgan and Bucher* included Austria and the UK, recently stung by judgments on university

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

[58] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, see especially para. 31 *et seq*.

[59] Case C-341/05 *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Eyggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, judgment of 18 December 2007, not yet reported.

[60] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L229/35.

[61] For example, in healthcare, see Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] I-ECR 1931, para. 41; in education, Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969. In the latter case, Advocate-General Jacobs did look more deeply at the substance of the arguments than the Court, but he stressed that economic arguments are very much the exception to the rules on justifications and urged that the healthcare case law be confined as a 'departure from the orthodox' (para. 31 onwards of the Opinion).

admissions and student financial support respectively?[62] It would be more beneficial if the Court were to define the strict limits of economic justifications and to make it clear to the Member States that any economic arguments submitted should be accompanied by relevant empirical evidence.

As a final point, it must be stressed that these observations in no way call for a return to rampant protectionism. They seek instead to provoke a real debate on the extent of freedom actually needed for the proper 'establishment and functioning of the internal market' and, related to this, on the limitations to free movement that are *truly* necessary from the perspective of States. This would necessitate an acceptance in turn of the maturity of the Union as a no-longer-new legal order, and a trust that the whole project will not actually implode if a more objective approach to justification was embraced. Confronting the complexities of justification arguments, and of the translation of economic and other empirical evidence into legal reasoning and legal outcomes, presents real challenges. But not all national rules are inherently damaging, not even where a consequential restriction on cross-border activity is experienced. Exploring this proposition would not mean that all Member State arguments should win the day; far from it. But it would, at least, enhance the legal and economic sophistication of *trying* to win the day.

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[62] Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969; Case C-209/03 *Bidar* v *London Borough of Ealing; Secretary of State for Education and Skills* [2005] ECR I-2119.

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