# Interstatelijkhied; de aard en de intensiteit van de grensoverschrijdende element in de rechtspraak van het hof van justitie van de eg met betrekking tot de vier vrijheden.

Voogsgeerd, Herman Hendrik

# Summary

The object of this study is the importance of the so-called 'cross-border element' in the case law of the EC Court of Justice in Luxembourg concerning free movement. The fundamental freedoms of the EC Treaty are free movement of goods, persons, services and capital. The question is whether the case law will change in relation to the intensity of the mentioned element. In what way does a weak cross border element influence the case law of the Court? At first face there are three different categories of case law. First there is a category in which the Court decides that Community law is not at stake. Literally the judges use here the word 'purely internal situations'. On the facts the situation is completely within the borders of one and the same member state. Therefore the freedoms are not jeopardized. Secondly the Court can limit its testing to a criterium of discrimination. This criterium returns in case law in diverse forms. There is the obligation of national treatment, there are also wider concepts like indirect of substantive discrimination. In the third place there is case law where all obstacles to free movement are forbidden by the Court. Does the choice of one of these three categories relate to the nature or the intensity of the cross-border element?

In this study the word cross border element is not only seen in its geographical meaning. A wider view of this element in the sense of point of rattachment to one of the fundamental freedoms is added. A geographical cross border element is a factual question and the Court prefers to leave the weighing of the facts to the national courts, that have asked preliminary questions to the European Court. Understanding the concept of cross border element only in its geographical meaning would have limited the scope of the research in this book too much.

The underlying motive for this research is the distinction in three different meanings of the word freedom in 'free movement of goods, persons etc.', made by Kapteyn and VerLoren van Themaat in their manual of European Law, *Inleiding tot het recht van de Europese Gemeenschappen*. According to these authors 'free movement of...' has three possible meanings in the context of the regulation of interstate trade and movements. The first concept of freedom prohibits any measure, which hinders interstate trade. This is a very wide concept of freedom indeed. The second concept prohibits measures, which exclusively concern importation, exportation, immigration or emigration. The third and last concept is generally known in international law and concerns a discrimination concept, mostly in the form of an obligation of national treatment. In the chapters on the specific freedoms these freedom concepts are used as points of de-

parture. In the large amount of case law that has been studied the Court does not always separate in a clear way the different freedom concepts. The question is whether there is any sort of explanation for the use of a particular concept and whether a cross-border element is of importance in this context. Such an element is used by the Court to determine the 'relevance' or 'pertinence' of the effect or nature of a national measure in the light of the specific freedom at stake. This 'relevance' test is in my opinion essential. When all 'relevant' points of rattachment are contained within one and the same Member-State, then there is not a cross-border element and 'a pure internal situation' within one Member-State. This means that the EC and the Court are not competent to deal with the situation. It is up to the Member-State concerned to change its laws or not. In my view the dividing line between 'a pure internal situation' and the situation where a certain freedom concept is used is very thin indeed.

In fact, this test is one test. There are essentially two steps in free movement law. The first step is the *prima facie* 'relevance' test. At first sight the Court decides whether a national measure has some effects that are detrimental to the goals these freedoms try to realise. This 'relevance' also refers to a sufficient cross-border element in the geographical sense. The 'effet utile' of the specific freedom is of interest here. The necessary relation with the freedom is not so much a factual relationship as well as a functional relationship.

The second test is a reasonability or justificatory test. This test takes into account the goals the national government wants to realise with its measure. In European Law this test is called the *rule of reason*. This two step test has been strongly recommended in this study. It is indeed a 'test of compatibility' for all freedoms. The second test can only follow when the first test has been passed, e.g. when there is a *prima facie* case of relevance. The first test can be seen as an outer limit, the second test as an inner limit. The second test has to be passed before a measure can be declared as contrary to the Treaty. This two step test represents better most case law concerning the four freedoms than a rule-exception approach. The first *prima facie* test, especially when the first broad concept of freedom is used, makes possible a large control of national measures by the Court. But the national measure is only contrary to the Treaty, when there is no justificatory ground or when the *rule of reason* applies. National regulatory competences have to be treated carefully, even when *prima facie* a freedom is touched upon.

In the chapters 4 – 7 the question is asked whether the use of a freedom concept can be related to the nature and intensity of the cross-border element present in a case. Case law concerning the 'internal situation' is also analysed for each freedom.

Most freedoms fit into the two step test. The exception is customs duties and levies of equivalent effect. Financial burdens or levies are against the principle of the customs union. The freedom concept is very strict here. The duties or levies are *per se* prohibited. It is here only, that the old rule-exception approach should be upheld. Even 'internal' burdens or levies are caught by the Treaty

dispositions on the customs union. For all other freedoms the two step test should apply. Diverse pieces of national legislation are under close scrutiny of the Court. Any measure relevant for the specific freedom at stake should be tested under the *prima facie* test. It is submitted that the first freedom concept is preferred to a discrimination concept. Discrimination is not what free movement is about. Broad definitions like those in *Dassonville* and *Säger* and also *Gebhard* are excellent in defining the scope of the freedoms.

The case law concerning the so-called 'internal situation' will in my opinion be more and more replaced by a remoteness test. Some situations are too indirect or too hypothetical to be of interest for a specific freedom. These situations can but need not be geographical internal situations. And this is exactly what the *prima facie* test is about, a test concerning the relevance of a national measure from the perspective of a specific freedom. The cross-border element is of great importance to this test.