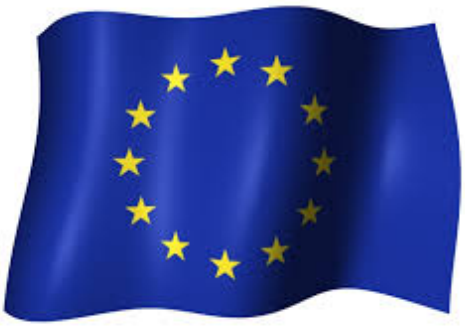
Introduction to European Business Law



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Module 2 (the Economic Freedoms)

A glossary of key terms and a summary of case notes from week 2

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These notes were prepared by Penny Parker for personal private use only by others who took this MOOC course. Please feel free to comment or submit corrections to pennyparker@me.com.

29th regime – this term is sometimes used to refer to the special EU statutes dealing with some types of company forms. These supplement the national legislation of the 28 states, not replace them (sort of like a semi-detached house). In other words, in addition to the 28 member states' national legislation on company forms, there are also these limited additional forms that might come into play. There are four principal EU statutes in this "29th regime", namely:

- The EU company statute – SE
- The statute for the European Cooperative Society – SCE
- The statute for the European Economic Interest Grouping – EEIG
- The private company statute – SPE

Balancing test – this refers to the test established in the Cassis de Dijon case when a member state seeks to ban some types of imported goods because they don't comply with local legislation. In Cassis de Dijon the French liqueur did not satisfy the German minimum alcoholic content. Courts must balance the EU principle of free movement of goods against the objectives of the local legislation.

Capital – free movement of capital is one of the four economic freedoms of the EU regime. "Capital" for these purposes means any one of the following when carried out on a cross-border basis (i.e. between an investor in one Member State and a financial institution in another):

- Foreign direct investment (FDI), including investments which establish or maintain lasting links between a provider of capital (investor) and an enterprise (in effect setting up, taking-over, or acquiring an important stake in a company or institution);
- Real estate investments or purchases; Securities investments (e.g. in shares, bonds, bills, unit trusts);
- Granting of loans and credits; and
- Other operations with financial institutions, including personal capital operations such as dowries, legacies, endowments, etc. In the absence of a definition in the Treaty of 'movement of capital' the CJEU has recognised the nomenclature annexed to the Council Directive 88/361/EEC as having indicative value.

[note: I copied the above from the Banking & Finance page of the Commission website]

Cross border element – anything that has an impact on cross border movement of goods, services, workers, etc. The point to be made is that some types of national legislation which may make perfect

sense when applied domestically, create hardships to foreign persons and companies, rendering it a barrier to free movement in the internal market. Many of the cases reviewed this week turned on whether this cross border element was unduly limited by the nature of the domestic legislation.

Cross border transfer of seat – this refers to a company transferring its principal place of business from one member state to another. Most of the cases this week under the right to establishment topic concerned different variations on this cross border transfer issue. The court decisions were complex and seemingly inconsistent. Each decision tried to articulate why it was different than the prior ones. Commentators argued the rules are not clear and there is a need for an EU Directive harmonizing these rules. See, e.g, Daily Mail, Cartesio, Centros, Uberseering, Marks & Spencer, National Grid Indus and Vale cases.

Delaware effect – also called the race to the bottom, the tendency of some governments to deregulate their business environment or create other favorable business conditions in order to attract companies to their state, often at the expense of lower wages, worse working conditions and fewer environmental protections. The concern is that this type of behavior can be rewarded in a system like the EU regime, although some bad motives for establishing a business in one member state as opposed to another, can become part of the criteria for upholding a particular national law or regulation.

Derogation – an exemption from or relaxation of a rule or law. This term is used sometimes instead of exemption or permitted restriction. It refers to an area which is not governed by the usual rule and is permitted to go in a different direction. The term "derogation" is used in several articles of the TEU and TFEU. For example, article 19, paragraph 1 of the TFEU provides that the Council may take appropriate action to combat discrimination based on sex, racial or ethnic origin, etc. But paragraph 2 says "by way of derogation from paragraph 1", the Parliament and Council may pursue certain types of incentive measures to contribute to the non-discrimination objectives of paragraph 1.

Direct applicability – we learned this week that much of the law on the four economic freedoms are directly applicable from the TFEU itself and do not require any Directive or Regulation to bring them into force. For example, the Van Binsbergen case establishes the direct applicability of the prohibition on discrimination in the provision of legal services. This is important because there are several areas of the four freedoms where EU Directives are thought to be eventually coming and are needed in order to resolve gaps and overlaps, but they are not in place yet. The court makes it clear that litigants need not wait; that the underlying freedoms are effective from the TEU and TFEU themselves.

Directive 2004/38 – this is the principle Directive on the movement of persons (EU citizens) within the Union (replacing prior Directive 73/148/EEC). This Directive figured prominently in several of the ungraded quiz questions for this week, even though it was not mentioned by name or number in the lecture and reading materials. The formal title of the Directive is "Right of Union citizens and their family members to move and reside freely within the territory of the Member States." It covers jobseekers (art 14), the right of temporary residence up to 3 months without restriction and longer with some conditions; the right of permanent residence; the residence rights of self-employed persons; the definition of who is a family member for purposes of the protections of the Directive; and the nature of the exceptions for public policy, public security or public health reasons. Also, a member state is not required to grant social assistance during the first 3 months of residence. Furthermore article 6 states that citizens no longer have the right of residence in a member state for up to 3 months if they become an unreasonable burden on the social assistance system of the host member. Note also that Directive 2004/38 sets out the rights of EU citizens and their families but it does not apply to companies.

Directive 2006/123 – this Directive implements the freedom of establishment and free movement of services requirements of the TFEU. Also called the Citizens' Rights Directive or another reference I saw, called it the Services Directive. It is another Directive that figured prominently in one of the questions in the ungraded quiz for this week, although apparently it had not been formally mentioned

in the lectures or reading materials. Directive 2006/123 aims to facilitate the freedom of establishment and the free movement of services by removing legal and administrative barriers. It pursues four main objectives: 1) to ease freedom of establishment and the freedom to provide services; 2) to strengthen the rights of recipients of services; 3) to promote the quality of services; 4) to establish administrative cooperation between the Member States.

EEA – the European Economic Area, also sometimes referred to as EA. This area includes the 28 members of the EU plus Iceland, Liechtenstein and Norway. It allows free movement of goods, persons, services and capital throughout these countries.

Establishment -- The right of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, for a permanent activity of a stable and continuous nature, under the same conditions as those laid down by the law of the Member State of establishment for its own nationals. Articles 49 and 54 of the TFEU grant persons and companies the right to set up establishments and pursue economic activities within the member states. Directive 2006/123 provides additional important details on the nature of the right. [the identity of this Directive was the subject of one of the ungraded quiz questions for this week]

Estoppel – a legal doctrine preventing a person from benefiting by their own mistake or misstatement. For example, a creditor informs a debtor that he forgives the debt between them. Even if such forgiveness is not formally documented, the creditor will be estopped from changing his mind later and seeking to collect the debt, because that change would be unfair. In our materials in this course we learned that the doctrine of direct effects is based on the doctrine of estoppel – a member state can not avoid the legal requirements of an EU Directive against it, by claiming that it hasn't been implemented yet by national legislation. Since the member state is responsible for implementing the Directive, it is unfair to claim that failure to implement it excuses its obligation to be bound by it. This is why a Directive can have vertical direct effect (an individual can sue a member government), because the government is estopped from claiming the Directive doesn't apply yet, but a Directive does not have horizontal direct effect (an individual sues another individual or a company).

EU citizenship -- Any person who holds the nationality of an EU country is automatically also an EU citizen. EU citizenship is additional to and does not replace national citizenship. It is for each EU country to lay down the conditions for the acquisition and loss of nationality of that country. EU citizenship is described in Part Two, articles 20-25 of the TFEU. Much of the existing secondary legislation and case law was consolidated into the Citizens' Rights Directive 2004/38 on the right to move and reside freely within the EU.

Exportability – this is one of 4 main principles that apply to the coordination of social security benefits for persons whose work history involves more than one member state. These rules apply to the 28 EU member states, plus the EA states of Iceland, Liechtenstein, Norway and Switzerland. If you are entitled to a cash benefit from one country, you may generally receive it even if you are living in a different country. This is known as the principle of exportability. The other 3 principles relating to the coordination of social security are: 1. Pay contributions into only one country at a time, 2. Principle of non-discrimination and 3. Credit for previous contributions. There are also modernized coordination provisions in Regulations 883/2004 and 987/2009.

Family members – under the terms of article 45 TFEU family members qualify for the same residence and freedom of movement requirements as jobseekers and workers. A family member for these purposes is a spouse, child or parent. Some states recognize registered partners. When an EU national is working abroad in another EU country, family members also have the right to reside and work in that country, regardless of their nationality. Children also have the right to be educated there. Family members do not need a work permit to work, even if they are non-EU nationals and they have the right to equal treatment, including access to all social and tax advantages.

Four freedoms – the four economic freedoms of the EU system are the free movement of capital, the free movement of goods, the right of establishment and freedom to provide services, and the free movement of people.

Gebhard test – the Gebhard case provided that a national measure that creates an obstacle to the free movement of services may be permissible if it satisfies these 4 criteria: 1. It is applied in a non-discriminatory manner, 2. It is justified by imperative requirements in the general interest, 3. It is suitable for securing the attainment of the objective which it pursues (the principle of proportionality) and 4. It does not go beyond what is necessary in order to attain it.

General interests of the state -- certain types of public service posts can be reserved by Member States for their own nationals only. This is an exception to the general rule of free movement of workers and therefore is interpreted restrictively. It applies only to certain public service positions. Only to posts involving direct or indirect public authority and duties designed to safeguard general interests of the state. These criteria must be assessed on a case by case basis, taking into account the tasks and responsibilities covered by the post. In the SNCB case, the court held that these reserve posts must be "connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State…" Head technical supervisors and architects of a national public railway could be reserved for nationals but not office cleaners and painting assistants.

Goods – free movement of goods is one of the four economic freedoms. Article 34 FTEU prohibits quantitative restrictions on imports and all measures having equivalent effect. Articles 34 and 35 TFEU cover all types of imports and exports of goods and products. The range of goods covered is as wide as the range of goods in existence, so long as they have economic value: 'by goods, within the meaning of the ... Treaty, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions'. [from Free Movement of Goods Guide, European Commission, 2010, http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf]

Horizontal direct effect – we learned this week that the right of free movement of persons has both horizontal and vertical direct effect. This is because the right is provided for directly in the TFEU. In another words a private citizen can invoke this right against both government and non-government organizations. Horizontal direct effect means a lawsuit can be brought by a private individual against another private individual or company (vertical direct effect means a suit against a government authority).

Indistinctly applicable – rules that treat foreign and domestic products alike. In other words, trade barriers that may be justified must meet several tests, including that they be indistinctly applicable. For example, in the Cassis de Dijon case the 25% minimum alcohol content rule applied equally to German domestic and imported goods, but had the effect of restricting the French liqueur. This might make it valid provided other conditions are also met. From Wikipedia: Indistinctly applicable measures are ones that *prima facie* do not favour domestic producers over importers but have effects that are equal on both. The ECJ argued that indistinctly applicable measures that favoured domestic traders over importers were not necessarily in breach of Article 34 TFEU; they could be justified if they satisfied mandatory requirements: that the measure is necessary for protecting the public or the consumer.

Keck doctrine – the court decided in the Keck case that some types of local trading rules would be upheld even if they had the effect of restricting free movement of goods. This was the "selling arrangements" exception, for example the Sunday closing rule in for shops in the UK. From Wikipedia: Therefore, in Keck and the cases that followed it, the Court decided that only rules relating to product

requirements (shape, size, colour, etc.) should be illegal, while those relating to selling arrangements (opening hours, staff training requirements, etc.) will mostly not be. The division was an attempt to limit the number of cases to only those situations where, in the absence of discrimination, there is real danger of importer suffering the presence of dual burden.

Legal incorporation theory – one of two approaches that states take when dealing with companies who wish to transfer their establishment to a different state. The other approach is the "real seat theory." The legal incorporation theory provides that the law of the state where the company was incorporated and registered governs regardless of where that company moves its principal place of business or "seat". This approach is followed by the UK, Sweden, Ireland, Denmark and the Netherlands. The practical problems when there has been a cross border transfer of a company seat can be very different between the two systems.

Lex specialis – Wikipedia: ***Lex specialis***, in legal theory and practice, is a doctrine relating to the interpretation of laws, and can apply in both domestic and international law contexts. The doctrine states that where two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*). In the lecture this week on free movement of services we learned that the article 61 TFEU provision on non-discrimination in services has a lex speciales effect; in other words, it takes precedence over the more general provisions on non-discrimination in article 18 TFEU.

Lex superior – a legal principle that provides a law of higher rank takes precedence over a rules of lower rank where there is a conflict. This came up in this week's materials under the topic of EU company statutes, which offer a way to harmonise the rules applying to companies when member state rules are in conflict. When the EU steps in and legislates, it helps to resolve the conflicts because it is the superior law when there are conflicting provisions between national laws and EU laws.

Mandatory requirement – permitted exceptions to the general rule against discriminatory measures in the sale of goods in member states. Article 36 TFEU sets out the main mandatory requirements – public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. The Cassis de Dijon case established that there was a non-exhaustive list of other grounds, provided the restriction was indistinctly applicable, and satisfied the principle of proportionality. In the European Commission Guide on Free Movement of Goods (2010), available online, it also lists protection of the environment, consumer protection, improvement of working conditions, cultural aims, press diversity, financial balance of the social security system, road safety, fight against crime and protection of animal welfare as additional exceptions that qualify as mandatory requirements.

Measures having equivalent effect – article 34 TFEU forbids quantitative restrictions on imports as well as "all measures having equivalent effect." Most of the case law has involved this equivalent effect concept since quantitative restrictions are pretty easy to identify and don't tend to get litigated. The prohibition extends to all trading rules that affect intra community trade, even if only potentially. The Dassonville case stated that "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions." Trading rules for these purposes also includes technical regulations (according to the EC Guide on Free Movement, referenced above). Also from the EC Guide: "Therefore, it can be concluded that Article 34 TFEU will apply not only to national measures which discriminate against imported goods, but also to those which in law seem to apply equally to both domestic and imported goods, but in practice are more burdensome for imports (this particular burden stems from the fact that the imported goods are in fact required to comply with two sets of rules — one laid down by the Member State of manufacture, and the other by the Member State of importation)."

Modernized coordination – this refers to the recent efforts to further coordinate social security benefits between member states reflected in Regulations 883/2004 and 987/2009.

Mutual recognition – a principle stating that "a product lawfully sold in one national market shall also, as a presumption, be lawfully sold at all other markets within the internal market." This is to get around the problem of conflicting national laws on particular types of goods that have not yet been harmonized with appropriate EU legislation. It can be used when there is no public interest concern justifying the local law. It was used in the Cassis de Dijon case to permit French liqueur to be sold in the German market even though it didn't satisfy the alcohol content of local German law. The principle is not absolute. Only a presumption. If the case can be made that differences should be upheld, for example for consumer protection or environmental protection. Also this rule only applies to indistinctly applicable laws. In order not to give a carte blanche to discriminate, the Court made it clear that this balancing test is only applicable to "indistinctly applicable rules" – in other words rules that treat foreign and domestic products alike.

Mutual recognition of professional qualifications -- People working in some occupations may also be able to have their professional qualifications recognized abroad. E.g., lawyers. This is called the mutual recognition of professional qualifications.

Obiter dictum (dicta) – literally in Latin obiter dicta or obiter dictum means "by the way"; these are remarks or observations made by a court that, although included in the court's opinion, do not form a necessary part of the court's decision. (Wikipedia). Therefore these types of comments can not be relied upon as final and binding law; the court may change its mind by the time it encounters another case which more directly involves the facts commented on in the prior obiter dicta. In this week's materials we learned that obiter dicta in the Daily Mail case on conflict of laws issues was eventually picked up in later cases and ruled on, specifically in Cartesio and Uberseering.

One way street principle – this is the idea of steeper integration, that as a general rule the EU is to become more and more integrated, with some transition periods but no stepping back. But Article 64.3 TFEU contains a provision that represents a departure from the one way street principle toward steeper integration. The Council, in a special legislative procedure, after a hearing by the Parliament, may unanimously adopt measures which constitute a step backwards from liberalization on some of the free movement of capital rules.

Permissible restrictions – each of the four freedoms we examined this week have some permissible restrictions that can be imposed on the freedom. Restrictions on capital movement are set out in article 65 TFEU plus other court-created restrictions. The main restrictions permitted on freedom of services are in Articles 51 and 52 of TFEU but the Gebhard case and others established a number of other exceptions. Also article 62 which refers back to articles 51 to 54 concerning permitted restrictions to the right of establishment. The main restrictions on the freedom of goods are identified in article 36 TFEU but the Cassis de Dijon and other cases have added to this list. Permitted restrictions on the free movement of persons are set out in article 45 and include public security, public policy, public health and employment in the public sector.

Public interest – measures in the public interest can be used to restrict the free movement of capital, provided they are applied in a non-discriminatory way and respect the principle of proportionality. In the Binsbergen case on restrictions on services, these included consumer protection, fair trading, combating fraud, and protection of an official language. But there are many others.

Quantitative restrictions – this refers to quotas or quantity limits imposed on imported goods. It is prohibited by article 34 TFEU.

Race to the bottom – see Delaware effect in this glossary

Real seat theory -- one of two approaches that states take when dealing with companies who wish to transfer their establishment to a different state. The other approach is the "legal incorporation theory." The real seat theory provides that the place where the company has its real seat, its principle place of business, will determine which national laws are applicable to the company relationships. This approach is followed by the Portugal, Spain, Italy, Germany and France. It can result in some difficult situations where a company has moved and finds themselves suddenly bound by new rules or not recognized as a validly formed company with legal capacity to do business in the state, enter into contracts, enforce debts, etc.

Recipients of services – we learned this week (in the ungraded quiz, not otherwise covered in this week's materials) that recipients of services are protected by EU law too even though they are not expressly mentioned in article 56 TFEU on service providers. From the quiz explanation to Question 12: "Although Article 56 TFEU is silent on the recipients of services, secondary legislation gives them certain rights. Furthermore the Court of Justice has confirmed that Article 56 applies to both providers of services and recipients of services (e.g. Luisi and Carbone)." In additional Directive 2006/123 on the free movement of services lists as one of its four main objectives: 2) to strengthen the rights of recipients of services.

Regulation 883/2004 and 987/2009 – these are the regulations that modernized the coordination of social security benefits when a person's employment history involves more than one country.

Remuneration – one of the four elements required in the definition of a worker under applicable case law. While a wage is a necessary precondition for activity to constitute work, the amount is not important. The right to free movement applies whether or not the worker required additional financial assistance from the Member State to which he moves. Remuneration may be indirect quid pro quo, that is board and lodging, rather than strict consideration for work.

Reserved posts for public service functions -- Certain types of public service posts can be reserved by Member States for their own nationals only. This is an exception to the general rule of free movement of workers and therefore is interpreted restrictively. It applies only to certain public service positions. Only to posts involving direct or indirect public authority and duties designed to safeguard general interests of the state. These criteria must be assessed on a case by case basis, taking into account the tasks and responsibilities covered by the post. For example in the SNCB case, the court held that, in the case of Belgium, these reserve posts must be "connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State…" Head technical supervisors and architects of a national public railway could be reserved for nationals but not office cleaners and painting assistants.

Residual or residuary -- The notion of services is defined in article 57 TFEU. Services are normally provided for as a residual (catch all) clause in so far as they are not governed by the provisions relating to freedom of movement of, for goods, capital, and persons. The provision specifically lists activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions. Remuneration includes services provided free of charge if they are normally remunerated. Some aspects may be covered by another fundamental freedom due to the residual nature of the free movement of services. According to the third paragraph of article 57 TFEU, that person providing a service may temporarily provide a service in another member state on the same condition as those imposed by the state on its nationals.

Restrictions on freedom of worker movement -- Permitted restrictions on the free movement of persons are set out in article 45 and include public security, public policy, public health and employment in the public sector.

Seat – the principal place of business of a corporation.

Self employed persons – if a person is self employed he comes under the right to establishment, rather than the freedom of movement of workers. The difference between a self employed person and a worker has been established in a series of cases that have created a 4-criteria test – performance, remuneration, time commitment and under the direction of another. See the definition of worker in this glossary for more details.

Selling arrangement -- the court decided in the Keck case that some types of local trading rules would be upheld even if they had the effect of restricting free movement of goods. This was the "selling arrangements" exception, for example the Sunday closing rule in for shops in the UK. From Wikipedia: Therefore, in Keck and the cases that followed it, the Court decided that only rules relating to product requirements (shape, size, colour, etc.) should be illegal, while those relating to selling arrangements (opening hours, staff training requirements, etc.) will mostly not be. The division was an attempt to limit the number of cases to only those situations where, in the absence of discrimination, there is real danger of importer suffering the presence of dual burden.

Services – the definition of what constitutes a service is in Article 57 TFEU. Services are normally provided for as a residual (catch all) clause in so far as they are not governed by the provisions relating to freedom of movement of, for goods, capital, and persons. The provision specifically lists activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions. Remuneration includes services provided free of charge if they are normally remunerated. They do not have to be paid for by the person for whom they are performed. They have to be paid by private money. This leads to very difficult balancing acts when it concerns public services such as education, medical services, and public housing. Gambling is also considered a service, even if the proceeds would go straight to the government's pocket.

Social security – the coordination of social security for persons who work in more than one member state is governed by several EU laws. There are 4 main principles that apply to the coordination of social security benefits for persons whose work history involves more than one member state. These rules apply to the 28 EU member states, plus the EA states of Iceland, Liechtenstein, Norway and Switzerland. If you are entitled to a cash benefit from one country, you may generally receive it even if you are living in a different country. This is known as the principle of exportability. The other 3 principles relating to the coordination of social security are: 1. Pay contributions into only one country at a time, 2. Principle of non-discrimination and 3. Credit for previous contributions. There are also modernized coordination provisions in Regulations 883/2004 and 987/2009.

Step backwards – this is the idea that the Union will normally step forward in implementing more and more integration, with some transition periods but no stepping back. But Article 64.3 TFEU contains a provision that permits the Council, in a special legislative procedure, after a hearing by the Parliament, to adopt measures which constitute a step backwards from liberalization on some of the free movement of capital rules.

Sunday trading – this refers to the Sunday shop closing requirements in the UK. They were upheld as a valid "selling arrangement" in the Torfaen Borough Council case, C-145/88.

Temporary safeguard measures – these are temporary measures permitted to deal with severe economic or monetary difficulties, as an exception to the general rule of free movement of capital.

Provided for in article 66. These measures can only be put in place for 6 months. They can be taken by the Council on a proposal from the Commission, after consultation with the European Central Bank.

Transport services exception – transport services are exempted from the general articles on services in chapter 3. Instead Article 58 TFEU points to the separate provisions in the TFEU governing transport (Title VI, articles 90-100) as covering transport services. However, for some reason this covers rail, road and waterways but not air transport which falls under the general rules for services instead.

TRIPS Agreement -- During the World Trade Organisation (WTO) Uruguay Round multilateral negotiations (1986-1994), the European Union signed the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). TRIPS is administered by the WTO. It sets down minimum standards for many forms of intellectual property, including copyright, trademark, and patents. Many of its provisions on copyright were copied from the Berne Convention. I assume we will get into this subject area in more detail in future weeks but for now, it is enough to say that as an international agreement that has been signed by the EU, the TRIPS agreement governs EU intellectual property and is part of the relevant legal framework, being higher in authority than EU legislation.

Under direction of another – one of the four tests for whether a person is a worker/employee or a self-employed person. See also "worker" in this glossary.

Vertical direct effect -- we learned this week that the right of free movement of persons has both horizontal and vertical direct effect. This is because the right is provided for directly in the TFEU. In another words a private citizen can invoke this right against both government and non-government organizations. Horizontal direct effect means a lawsuit can be brought by a private individual against another private individual or company (vertical direct effect means a suit against a government authority).

Worker – no definition of worker appears in the TFEU but case law has established a 4-element test. Performance, time commitment (full time or part time), remuneration and under direction from another. Some of the cases distinguish a self employed person from a worker/employee by examining these criteria. For example, in Ayuntamiento de Sevilla vs. Recaudadores de Tributos de las Zonas primera y segunda, the question was whether local Spanish tax collectors were independent taxable persons who were subject to VAT under Directive 77/388/EEC or whether they were workers under a relationship of employer and employee, and therefore not separately taxable. The conclusion was that they were self employed because they did not receive a salary, established their own working environment, and were not technically under the direction of an employer in their activities.

Case notes from week 2:

Free movement of capital

- C-163/94 (1995)– **Sanz de Lera**. Capital movements - Non-member countries - National authorization for the transfer of banknotes. The case involves the illegal transfer of large amounts of cash in three different criminal proceedings in Spain. In the 1st case, Mr. Sanz de Lera was a Spanish national, residing in Spain, arrested in France while driving his car to Geneva. Though he stated he had nothing to declare, when his vehicle was searched they found PTA 19 600 000 in banknotes. In the 2nd case, Mr. Diaz Jimenez, a Spanish national was stopped in a security check at the airport in Madrid, about to board a flight to Zurich with a connecting flight to London. He was found to be carrying PTA 30 250 000 in banknotes in his hand baggage. In the 3rd case, Mrs. Kapanoglu, a Turkish national residing in Spain, was

arrested at the Madrid airport when boarding a flight to Istanbul. She had PTA 11 998 000 in banknotes in her possession. Under Spanish criminal law the export of cash in these amounts required advance authorization from the Spanish authorities.

The question for the court was whether this Spanish law, restricting the movement of capital between member states and non-member states, complied with the free movement of capital requirements of EU law. Also since the facts of the three cases occurred before 1 November 1993, they happened before the Maastricht version of the TEU had entered into force; so it is the prior treaty provisions that would be applicable. Both versions of the treaty prohibit as a general matter anything that restricts the free movement of capital between Member States and non-member states. The court concludes that member states are permitted to issue restrictions that are designed to prevent illegal activities such as tax evasion, money laundering, drug trafficking or terrorism. However, the restriction in this case goes further than necessary, requiring the obtaining of authorization to transport cash cross borders rather than a less intrusive measure like simply requiring a prior declaration from the individual, disclosing that he or she was carrying a large sum of cash.

Therefore the court decides that the Treaty precludes rules which make the export of coins, banknotes or bearer cheques conditional on prior authorization but the Treaty would not by contrast preclude a transaction of that nature being made conditional on a prior declaration.

- C-302/97 – **Konle** (1999). Austria had enacted several laws known as the Tyrol legislation on land transactions, aimed at preventing too many holiday residences in the region and not enough year-round residents. Mr. Konle, a German citizen, sued the Austrian government claiming losses he suffered as a result of the legislation, and claiming that the legislation violated Community law. The Austrian law required government authorization to purchase land in the Tyrol region of the country. Authorization could be refused "in particular where the acquirer fails to show that the planned acquisition will not be used to establish a secondary residence." In other words, the government did not want the land in the Tyrol region to be dominated by holiday residences. The Act of Accession when Austria joined/ratified the EU treaties says in Article 70 that "the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession." Mr. Konle was the successful bidder in an auction for a plot of land in the Tyrol in August 1994, on condition that he obtain the administrative authorization required under the Tyrol legislation then in force. The authorization was refused even though he had indicated that the new plot of land would become his primary residence.

  In its first question to the court, the national court of Austria asks whether the freedom of establishment and free movement of capital guaranteed by the Treaty are ensured by schemes, such as those under the two national laws at issue here, which make acquisition of land subject to prior administrative authorization and which, in the case of one of those laws, exempt only nationals of the Member State concerned from the authorization otherwise required. If the answer to this 1st question is no, then the national court also asks whether the derogating clause in Article 70 of the Act of Accession, exempting legislation on secondary residences for 5 years, permits the enforcement of the Austrian legislation in this case.

  The court concludes first that the movement of capital within the meaning of the EU Treaty clearly includes investments in real estate on the territory of a Member State by non-residents. Treating non-residents differently from nationals on authorization requirements is discrimination prohibited by the EU Treaty unless it can be justified on one of the grounds permitted in the Treaty. The only justification the government of Austria offers is the 5 year exemption for its secondary residence legislation set out in Article 70 of the Act of Accession. The court concludes article 70 would be a valid justification if the Tyrol legislation at issue was

"existing legislation" at the time of the Act of Accession. This is a factual question left to the national court to decide, since parts of the Tyrol legislation in question had been ruled unconstitutional at the time of the Act of Accession, and were later replaced with a modified version of the same legislation.

Regarding the portions of the legislation that apply to both nationals and non-nationals, the requirement for prior authorization entails by its very purpose a restriction on the free movement of capital in violation of the EU Treaty, and therefore can be permitted only if it meets one of the valid exemption conditions. In that regard, to the extent that a member State can justify its requirement by relying on a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions, the restrictive measure inherent in such a requirement can be accepted only if it is not applied in a discriminatory manner and if the same result cannot be achieved by other less restrictive procedures. Here the way the Austrian requirement is laid out, it is not possible for a person seeking authorization to provide incontrovertible proof of the future use of the land to be acquired. This leaves considerable discretion to the authorities. Explanatory memoranda in evidence reveal the intention of the authorities to use the authorization procedure to subject foreigners to more thorough checks than Austrian nationals. [other less restrictive means are discussed, such as a declaration procedure]. This particular requirement also does not qualify for the derogation exemption in Article 70, Act of Accession, because the legislation establishes new procedures that were not in the legislation existing at the time of the accession.

The court concludes that "given the risk of discrimination inherent in a system of prior authorisation for the acquisition of land as in this case and the other possibilities at the disposal of the Member State concerned for ensuring compliance with its town and country planning guidelines, the authorisation procedure at issue constitutes a restriction on capital movements which is not essential if infringements of the national legislation on secondary residences are to be prevented."

- C-370/05 (2007)– **Festersen.** Criminal proceedings were brought against Mr. Festersen for breach of the obligation to take up fixed residence on the agricultural property which he had acquired near Bov, a small town in southern Jutland, Denmark. The relevant law required that agricultural property be maintained as an independent business and provided with an appropriate residential building from which the land is to be farmed by the residents. Mr. Festerson, a German national, was notified in Sept 2000 that he either had to dispose of the property within six months since he did not satisfy the agricultural property requirements or obtain an exemption from the agricultural use obligation or fulfill the residence requirement. In July 2001, nine months later, he was given an extension, a new period of 6 months to remedy the situation. Two years later, in August 2003, he was fined by the local Danish court. He took residence at the property in June 2003 and has been listed at that address since September 2003.

  The question posed was whether the right of establishment and free movement of capital provisions of the EC Treaty precluded the requirement that a person acquiring agricultural property must take up fixed residence on the property. The court noted that it was well settled under prior case law that unpermitted restrictions on the movement of capital, included those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents to do so in other states. Such a measure may nevertheless be permitted provided that it pursues an objective in the public interest, that it is applied in a non-discriminatory way and that it respects the principle of proportionality, that is to say that it is appropriate for ensuring that the aim pursued is achieved and does not go beyond what is necessary for that purpose.

The court concludes for a number of reasons that the fixed residence requirement in this case is an unpermitted restriction of the free movement of capital. It went on to say that "Even supposing that that requirement is recognised as a measure necessary for meeting the objective sought on the ground that it would produce, by itself, positive effects on the property market (in the light of the constraints involved in any change of residence which in turn discourage property speculation), it must be pointed out that by coupling that requirement with a condition that residence be maintained for at least eight years, such an additional condition clearly goes beyond that which could be regarded as necessary, in particular as it implies a long-term suspension of the exercise of the fundamental freedom to choose one's place of residence." In addition a derogation provision in Protocol 16 to the Treaty exempting some Danish "second home" legislation from these requirements does not apply.

Free movement of services

- C-33/74 – **van Binsbergen** (1974). Establishes the direct applicability of the prohibition on discrimination in respect to the provision of services. Applies a rule of reason. Mr. Van Binsbergen had retained an attorney, Mr. Kortmann, to represent him in legal proceedings in a court in the Netherlands, dating from approximately July 1972. However in November 1973 the court informed him that Mr. Kortmann could no longer act as his legal representative because Mr. Kortmann was no longer a resident of the Netherlands. During the course of the proceedings Mr. Kormann had transferred his habitual residence from Zeist in the Netherlands to Neeroeteren in Belgium. Is the requirement that legal representatives be permanently established within the territory of the State where the service is to be provided permitted by the Treaty?

  The court says no, normally such a requirement would be prohibited by the freedom of movement of services provisions of the Treaty. "However, taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good — in particular rules relating to organization, qualifications, professional ethics, supervision and liability — which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member State." But further, this type of requirement is "incompatible with Articles 59 and 60 of the Treaty if the administration of justice can satisfactorily be ensured by measures which are less restrictive, such as the choosing of an address for service."

  Therefore, the court concludes that "a Member State cannot, by imposing a requirement as to habitual residence within that State, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable."

- C-55/94 – **Gebhard** (1995). Establishes the so called Gebhard test, which lays out the criteria that need to be fulfilled in order to permit a restriction of the freedom of movement of services. The facts involved the freedom of lawyers to provide services in another state. Mr. Gebhard, a German national, was charged with the unauthorized practice of law in Italy because he pursued a professional activity in Italy on a permanent basis in chambers set up by himself whilst using the title "avvocato". Directive 77/249 applies to the activities of lawyers in member states, permitting nationals of one state to represent a client in another, provided it follows the ethnical rules of both jurisdictions. The Directive also speaks of two categories – 1. Situations where a lawyer is going into another state to represent a client and 2. All other activities; it seems to imply that the first category is temporary in nature and the second might be subject to further restrictions if a person intends to practice law on a regular basis. Mr.

Gebhard brought this action on the basis of that Directive, claiming it entitled him to pursue his own professional activities from his own chambers in Milan. Italy's implementing law on the Directive permits nationals of other member states to pursue professional activities in Italy on a temporary basis, but permanent establishment is not permitted. Also the Italian law prohibits the establishment of either chambers or a principal or branch office, but the Directive is silent on this point.

Since the services provisions of the EU treaty are subordinate to the establishment provisions (articles 52 to 58), the Court determines that it must first consider the scope of the concept of establishment, and whether it applies here. Article 58 entitles all types of self-employed activity to be taken up and pursued on the territory of any other Member State, subject to certain exceptions and conditions. It follows that persons may be established in more than one state. "The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons."

"In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that he is to pursue his activity there on a temporary basis."

The temporary nature of the provision of services is to be determined in the light of its duration, regularity, periodicity and continuity. The provider of services may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question.

In Mr. Gebhard's case, however, he is a national of one State pursuing professional activities in another Member State, on a stable and continuous basis where he holds himself out from an established professional base to, amongst others, nationals of that state. His case therefore comes under the right of establishment provisions of the Treaty, not the chapter relating to services.

"However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability. Such provisions may stipulate in particular that pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be. They may also lay down the conditions for the use of professional titles, such as *avvocato."*

The Court concludes that rules which are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty must, in order to comply with EC law: (i) be applied in a non-discriminatory manner (that is, the rules must be indistinctly applicable); (ii) must be justified by imperative requirements in the general interest; (iii) must be suitable for securing the attainment of the objective which they pursue; and (iv) must not go beyond what is necessary in order to attain the objective which they pursue.

The temporary nature of the provision of services is to be determined in the light of its duration, regularity, periodicity and continuity. The provider of services may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question.

Free movement of goods

- C-120/78 – **Cassis de Dijon**. Establishes the principle of mutual recognition. The formal case name is Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein. It is known as the Cassis de Dijon case because it involves the sale of a type of French fruit cream liqueur known as cassis de Dijon. Germany prohibited it because it did not satisfy its 25% alcoholic content requirement.

  Cassis de Dijon case. Balancing test developed, to find a more efficient way to determine what should be allowed and not allowed. This test was first expressed in the Cassis de Dijon case. The French black currant liqueur could not be imported to Germany because its alcoholic content was too low. German requirement was at least 25%. The German authorities made several arguments attempting to justify the restriction. The court was not persuaded. The German rule was objective, treating investments alike. Many of these barriers to trade are based on differences.

  The principle of mutual recognition has been developed to deal with exceptions not involving the public interest. No such concerns were at stake in the Cassis de Dijon case. Harmonization also not an answer, because that is slowly being introduced through Directives. Instead this principle of mutual recognition was established, stating that a product lawfully sold in one national market shall also, as a presumption, be lawfully sold at all other markets within the internal market."

- C-8/74 – **Dassonville**. Establishes that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

  In the Dassonville case, the court defined the scope of article 34. Article 34 can apply to "all trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra Community trade"

- C-145/88 – **Torfaen Borough Council v. B & Q PLC** (Sunday trading case) (1989). [this case was mentioned in the video lecture but is not in our reading materials]. Article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind. The same consideration must apply as regards national rules governing the opening hours of retail premises. Such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the Member States. Furthermore, such rules are not designed to govern the patterns of trade between Member States.

- C-249/81 – **Buy Irish**. Establishes that state support for campaigns that urge purchasing of domestic goods can constitute an unlawful trade barrier, even though not involving actual legislation to that effect.

  Buy Irish case, C-249/81 – State's involvement was considered to be an equivalent measure. So it wasn't legislation per se, just involvement in a campaign. The state must be involved in some way to be liable. Private measures not covered. Involvement of the state does not have to be active however. A state can also be liable for failure to take action. In the Spanish strawberry

case, C-265/95, France was held liable for failing to take action against its farmers who were preventing fresh fruit lorries from entering into France.

- C-265/95 – **Spanish Strawberry Case.** Establishes that the failure of French authorities to act to protect Spanish lorry drivers from sabotage by local activists constitutes a failure to fulfil its obligations under Art 34 of the TFEU to ensure the free movement of goods.

- C-267/91 – **Keck**. Establishes the Keck Doctrine, ascertaining that certain nondiscriminatory actions, such as limiting opening hours of stores etc, should not fall within the scope of Art 34 TFEU.

  Confronted with these cases, the court found a way to draw a new demarcation line regarding the scope of article 34. This was the Keck case. The legislation in dispute had prohibited the sale of goods at a price lower than the actual purchase price. The court found that such a rule was not intended to restrict or regulate the trade of goods. It was instead a certain type of selling arrangement which was outside the scope of article 34, provided it applied to all traders in the same territory, and in the same manner. Therefore there was no need to justify it on the basis of a mandatory requirement, or to justify it on proportionality grounds.

Free movement of persons

- C-149/79 – **SNCB** (1982). Formal case name is Commission of the European Communities vs. Kingdom of Belgium. The claim was that Belgium had failed to comply with Article 48 of the EEC Treaty and Regulation 1612/68 of 15 Oct 1968 on the free movement of workers by making Belgian nationality a condition for certain public service posts in the national railway system (SNCB), the local railways, and certain municipal posts in Brussels and Auderghem, that did not come under the permitted categories of Article 48(4) of the EEC Treaty.

  The railway posts included jobs like shunters, loaders, drivers, signalmen, office cleaners, painter's assistants, night watchmen, etc. There were also jobs within the City of Brussels (hospital nurses, garden hands, inspectors, architects, etc) and the Commune of Auderghem (architects, children's nurses, joiners, electricians, etc). The Commission had claimed that only a few of the identified jobs, like architects, supervisors and night watchmen, were eligible since those types of positions may give "easy access to the secrets of the public authority concerned." The Belgian government said all of these jobs related to the public interest and therefore could be restricted to Belgian nationals only. The railway posts in particular "should be recruited having regard in particular to reasons of security which may arise in certain exceptional circumstances such as war or mobilization."

  The Court agreed with the Commission and ruled against the Kingdom of Belgium. It said that a job must first be "connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State…" It concluded that the only jobs on the Belgium list that could be restricted to Belgian nationals were head technical office supervisor, principal supervisor, works supervisor, stock controller, night watchman, and architect. The other positions are not "employment in the public service" within the meaning of Article 48(4) of the treaty. The argument that the railway positions might involve a security risk in an emergency can not be accepted as a valid exception under Article 48(4) – "such a line of argument is based on an hypothesis which has no connection with the legal context of that provision."

- C-202/90 - **Ayuntamiento de Sevilla vs. Recaudadores de Tributos de las Zonas primera y segunda** (1991). The question was whether local Spanish tax collectors were independent taxable persons who were subject to VAT under Directive 77/388/EEC or whether they were workers under a relationship of employer and employee, and therefore not separately taxable. Article 4(4) of the Directive excluded the tax on "employed or other persons … in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability."

  These particular tax collectors did not receive a salary and did not have a contract of employment with the local Commune that they were working for. Could they still be considered in an employer/employee relationship for purposes of Article 4(4) of the directive? The working conditions were also entirely up to the tax collector who procured his own supplies and organized his work context. "[T]he fact that in the performance of their functions tax collectors are tied to the local authority, which can give them instructions, and the fact that they are subject to disciplinary control by that authority are not decisive" for this purpose. With regard to remuneration there is also "no relationship of employer and employee since tax collectors bear the economic risk entailed in their activity in so far as their profit depends not only on the amount of taxes collected but also on the expenses incurred on staff and equipment in connection with their activity." Also, with regard to employer's liability "the fact that the Commune can be held liable for the conduct of tax collectors when they act as representatives of the public authority is not sufficient to establish the existence of a relationship of employer and employee."

  The court concludes that the tax collectors are working independently and are not workers within the meaning of the employer/employee relationship. "The decisive criterion for this purpose is the liability arising from the contractual relationships entered into by tax collectors in the course of their activity and their liability for any damage caused to third parties when they are not acting as representatives of the public authority." Therefore if a commune entrusts the activity of collecting taxes to an independent third party, the normal exclusion from VAT for such activities does not apply.

- C-405/01 - **Colegio de Oficiales de la Marina Marcante Española vs. Administración del Estado** (2003). The question was whether a Spanish law requiring that masters and chief mates of Spanish merchant ships must be Spanish nationals violated the free movement of workers requirement in Article 39 EC and applicable case law (and did not qualify for the public service exception in Article 39(4)). Persons in such roles occasionally perform public order duties which are usually entrusted to public officials (like birth and death certificates, marriages, and public order measures necessary to secure the safe progress of the vessel). For certain types of shipping these types of public service duties are extremely limited and occasional. The UN Convention on the Law of the Sea also requires ship captains to exercise duties relating to safety and police powers.

  "The fact that masters are employed by a private natural or legal person is not, as such, sufficient to exclude the application of Article 39(4) EC since it is established that, in order to perform the public functions which are delegated to them, masters act as representatives of public authority, at the service of the general interests of the flag State."

  "However, recourse to the derogation from the freedom of movement for workers provided by Article 39(4) EC cannot be justified solely on the ground that rights under powers conferred by public law are granted by national law to holders of the posts in question. It is still necessary that such rights are in fact exercised on a regular basis by those holders and do not represent a very minor part of their activities. Indeed, as has been pointed out in paragraph 41 of this

judgment, the scope of that derogation must be limited to what is strictly necessary for safeguarding the general interests of the Member State concerned, which cannot be imperiled if rights under powers conferred by public law are exercised only sporadically, even exceptionally, by nationals of other Member States."

The Court concludes that in this case the public service functions of a ship's captain and first mate are very limited ("only occasional") and do not permit restricting them to Spanish nationals only. Also the UN Convention on the Law of the Sea does not require that a ship's master be a national of the flag State. Nor do these roles fall under the restrictions permitted in Article 39(3) EC for public policy, public security or public health – since those justifications are not intended to exclude economic sectors such as merchant shipping, or occupations such as master or chief mate on the basis of nationality, but only to refuse access to persons whose access or residence would in itself constitute a danger for public policy, public security or public health. Therefore, such roles can be reserved for Spanish nationals only if the public law functions are actually exercised on a regular basis and do not represent "a very minor part of their activities".

It is also not permissible to limit these roles to nationals of other Member States on the basis of reciprocity – in other words only to states who accept Spanish nationals as captains and first mates of their merchant ships.

- C-47/02 - **Albert Anker, Klaas Ras and Albertus Snoek** (2003). Three Dutch nationals brought suit against Germany for restricting employment as master of fishing vessels flying the German flag to German nationals only. The question was whether this nationality requirement qualified for the public service exemption in Article 39(4) EC. The type of shipping in this case is described as "small-scale maritime shipping" or "deep sea fishing".

  "It is clear from the statements of the referring Court that posts of master of small-scale deep-sea fishing vessels, which consist, essentially, in skippering small boats, with a small crew, and in participating directly in fishing and in the processing of the fish products, are posts in which the duty of representing the flag State is, in practice, insignificant."

  Therefore the court concludes that restricting the post of master of vessels to German nationals only is not permitted by Article 39(4) EC unless "the rights under powers conferred by public law granted to masters of such vessels are in fact exercised on a regular basis and do not represent a very minor part of their activities." Other arguments are given regarding the UN Convention on the Law of the Sea and the inapplicability of article 39(3) grounds as were made in the Spanish case above.

The Right to Establishment

- C-81/87 – **Daily Mail** (1988). Establishes that the freedom of establishment does not give a company a right to transfer its central management and control to another Member State while retaining its incorporated status in the home Member State.

  Daily Mail was a tax law case. Daily Mail PLC wanted to move its de facto head office, the tax residence, to the Netherlands because of the more favorable tax regime there. While at the same time it planned to remain a company subject to UK company law. The UK Treasury Department refused permission for the transfer of seat which is necessary under UK law. The EU law implications of this, is that, because of this refusal of the UK Treasury Department, to allow the transfer of the de facto head office Daily Mail referred the question to the European Court of Justice, on whether or not the treaty, or the functioning of the EU preclude a member state from obstructing the transfer of the de facto head office from one member state to

another. The Court held in favor of the UK tax authority and concluded that this issue falls outside the scope of the treaty provisions on the freedom of establishment. Moreover, the Court added in obiter dictum some comments regarding some conflict of law questions. The Daily Mail judgement was also recently confirmed by the Cartesio decision, summarized below.

- C-212/97 – **Centros** (1999). Establishes that any barriers by the host Member State against companies incorporated in another state, requiring the setting up a secondary establishment there, are prohibited.

  In the Centros case, two Danes established Centros Limited under UK company law. The company was to trade only in Denmark however. And the incorporators clearly stated that they had established the entity under UK company law solely to avoid the minimum capitalization requirement for Danish limited liability companies. The Danish Commercial Registry considered this to be an unlawful circumvention of the Danish minimum capitalization rules and so refused to register the company's branch office in Denmark. Once again, the question of compatibility with the provisions on freedom of establishment are at stake. In particular, the question was referred to the EU Court whether it is compatible with freedom of establishment, to refuse registration of a branch, of a lawfully founded company that has its registered office in another member state, but in which the company does not itself carry on any business. First, the Court ruled that where a company exercises its freedom of establishment under the treaty, the member states are prohibited from discriminating against this company on the ground that it was formed in accordance with the law of another member state in which it has its registered office, but does not carry on any business. Second, the state is not authorized to restrict freedom of establishment on the ground of protecting creditors, or preventing fraud if there are other ways of countering fraud or protecting creditors. Besides, the Court points to the availability to member states of the option of adopting EU harmonizing legislation in this area of company law. In this leading case, the Court took quite a liberal approach in the context of company rights. Moreover, the Court considers the conditions governing abuses of EU law restrictive.

- C-208/00 – **Uberseering** (2002). Establishes the right of a corporation formed in an EU Member State to move its real seat from its state of incorporation to another EU member state without losing its legal status as a corporate entity under the law of its origin state.

  The case involves a Dutch company (Uberseering) who hired a German company (Nordic Construction) to build a project for it in Germany. Uberseering sued Nordic Construction for damages in a German court due to construction defects. German law provides that an action brought by a party that does not have legal capacity must be dismissed. "According to the settled case-law of the Bundesgerichtshof, which is approved by most German legal commentators, a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established ('Sitztheorie' or company seat principle), as opposed to the 'Grŭndungstheorie' or incorporation principle, by virtue of which legal capacity is determined in accordance with the law of the State in which the company was incorporated. That rule also applies where a company has been validly incorporated in another State and has subsequently transferred its actual centre of administration to Germany."

  Uberseering can not bring suit in a German court unless it has been reincorporated in Germany in such a way as to acquire legal capacity under German law.

  And the Court went further in the Uberseering case. All the directors of Uberseering BV, a limited liability company organized under Dutch law, but resident in Germany. As a consequence, in accordance with current thinking on company seats, the German courts decided that, owing to the location of the company's principle office, German corporate laws

applied to the company. The Dutch corporate entity was therefore dismissed from court proceedings in Germany.

In the judgement, the court ruled that it was incompatible with the freedom of establishment rules guaranteed in the treaty for a member state to deny legal capacity and standing to sue or be sued in courts to a company formed in a member state which moves its central place of administration to another member state. Against the expectations of many legal commentators and the recommendation of the Advocate General, the Court also held that where a company incorporated in one state exercises its freedom of establishment in another member state, that other member state is required to recognize the company's legal capacity, and capacity to be a party to legal proceedings, which it enjoys under the law of its state of incorporation.

Following this judgment, a company incorporated in an EU member state is entitled to rely on the principle of freedom of establishment to contest any refusal by a host state to recognize it as a legal entity with a capacity to enter into contract, and to be a party to legal proceedings. As a matter of German law, this decision signals the end of the current practice whereby the legal capacity of foreign incorporated companies is not recognized where the effective seat of administration is in Germany. It is also certain to provoke much academic discussion on the question of whether and if so to what extent the accepted phenomenon of full recognition of the legal capacity of the pseudo foreign company within the single market will be extended to other areas of company law.

The court concludes that Uberseering has a right to establish its presence in the Netherlands but be recognized with legal capacity in Germany. In doing so it also carefully distinguishes the facts of this case from the facts in Daily Mail.

"Unlike the case before the national court in this instance, *Daily Mail and General Trust* did not concern the way in which one Member State treats a company which is validly incorporated in another Member State and which is exercising its freedom of establishment in the first Member State. So Uberseering, which is validly incorporated in the Netherlands and has its registered office there, is entitled under Articles 43 EC and 48 EC to exercise its freedom of establishment in Germany as a company incorporated under Netherlands law. It is of little significance in that regard that, after the company was formed, all its shares were acquired by German nationals residing in Germany, since that has not caused Uberseering to cease to be a legal person under Netherlands law."

- C-167/01 – **Inspire Art** (2003). Establishes a prohibition on Member States to impose legal obligations on companies that are incorporated in another Member State but conducts their business activities only in another state.

  A Dutchman established the company Inspire Art Limited under the laws of England and Wales, and requested the registration of the company's Dutch branch office at the commercial registry in the Netherlands. The registry took the position that specific Dutch rules for foreign entities registered in the Netherlands were to apply to the company. As a consequence, Inspire Art, Limited would have been required inter alia to use a company name indicating its foreign origin and comply with the minimum capitalization rules for Dutch limited liability companies.

  The Court continued its tendency of deciding in favor of freedom of establishment by holding that rules submitting pseudo-foreign companies to the company law of the host state were inadmissible. It lay down that a foreign company is not only to be respected as a legal entity having the right to be a party to legal proceedings but rather has to be respected as such. That is, as a foreign company that is subject to the company law of its state of incorporation. Any adjustment to the company law of the host state is hence not compatible with EU law.

- C-210/06 – **Cartesio** (2008). Reaffirms the Daily Mail ruling. Requested transfer of seat from Hungary to Italy. Wanted to continue to operate under Hungarian company law. Can a member state have an outright ban. Similar to Daily Mail – transfer abroad of a de facto head office. The court did not overrule Daily Mail, allowing member states to restrict such transfers. Can't transfer seat while remaining See para 111-113. Curious. Same thing? Not right of establishment issue, but future legislation instead. See para 108. Not yet clarified. Good reason to say however that the obiter dictum applies only where

  Cartesio was a Hungarian limited partnership whose application for registration of the transfer of its seat to Italy was rejected by the Hungarian Court of Registration. Cartesio intended only to transfer its de facto head office to Italy, while continuing to operate under Hungarian company law. But because of the refusal to enter transferral or the de facto head office in the Hungarian company register, the question was referred to the European Court of Justice. To determine whether the rules in the treaty preclude a member state from imposing an outright ban on a company incorporated under its legislation transferring its de facto head office to another member state, without having to be wound up in Hungary first, and to have the seat transfer entered in the Hungarian company register. It should be underlined that the Cartesio case is to a considerable extent similar to the Daily Mail decision, since it also raises the question of the transfer abroad of the de facto head office. The Court did not overrule its Daily Mail decision, which allows Member States to restrict the transfer of the central administration of a company abroad. On the country, the Court reaffirm its Daily Mail doctrine when the Court stated, as Community law now stands the Articles are to be interpreted as not precluding legislation of a Member State. Under which a comp-, company incorporated under the law of that member state may not transfer its seat to another member state whilst retaining its status as a company governed by the law of the member state of incorporation. Slightly surprising was the orbiter dictum statement that freedom of establishment also covers the possibility of a company converting itself into a company governed by the law of another member state, which is the de facto, the transfer of the registered office. You can see this in paragraph 111 to 113. This announcement contrasts with a statement in the same judgment, some paragraphs previously, in which the court says it should be pointed out moreover, that the Court also agreed to that conclusion on the basis of the wording of Article 49. The question whether and, if so, how the registered office, the [FOREIGN] or real seat, [FOREIGN] of a company incorporated under national law may be transferred from a member, from one member state to another as problems which are not resolved by the rules concerning the rights of establishment, but must be dealt with by future legislation or conventions. And you can see this in paragraph 108. As a result, the consequences of this obiter dictum for board level participation rules, have not been finally clarified. However, there are good reasons for saying that the obiter dictum applies only if national law completely forbids any kind of transfer of seat to another member state. As long as one form of transfer is allowed under national law, the treaty rules do not apply.

- C-446/03 – **Marks & Spencer** (2005). [not on our reading list but discussed in the video]. An important decision. It was anxiously awaited by businesses and commentators when it was being considered. The court held the UK provisions were a restriction on right of establishment. Marks & Spencer, the company in question, was able to take advantage of cross border tax relief, by offsetting losses in one country against profits in another. But how can the result in this case be justified with the result in the Futura case that had been decided earlier? Why did the Court change its practice? Why did the court not deal with the preliminary question of foreign establishment? These have been some of the questions raised by critics after the judgement was issued.

This judgment was anxiously awaited by governments as well as by companies, lawyers, and academics. Will companies be able to benefit from loss relief in cross border situations? Will there be major consequences for member states national values? Will there be a limitation of the effects of the judgement for budgetary reasons? The answers in short: No temporal limitation, at first sight, no major impact on national budgets. Cross border, loss relief? Yes.

Marks & Spencer, a company registered in England and Wales, in 2001 ceased trading in continental Europe, owing to its losses recorded from the mid 1990's. Subsequently, Marks & Spencers claimed a group relief for losses incurred by its Belgian, German and French subsidiaries. This claim was refused by the UK tax authorities. Under UK law UK resident companies in a group may not pair off their profits and losses among themselves, whether losses are incurred by subsidiaries, which have no establishment in the UK and do not trade there.

Firstly the Court held that the UK provisions constituted a restriction on the freedom of establishment. The Court confirmed that the UK tax system was in accordance with the principle of territoriality enshrined in its national tax law and recognized by EU law. Nevertheless, it ruled that this does not in itself, justify restricting group relief to losses incurred by resident companies. And accordingly, the court dismissed the UK's argument that non-UK resident and UK resident subsidiaries were not in comparable tax situations. Regarding the justification, the court accepted that the preservation of allocation of taxing powers between member states, the prevention of double relief, and the risk of tax avoidance where a multinational seeks to offset losses against the highest tax rate profits, taken together allow a member state, generally, to deny cross-border loss relief. However, where there is no local loss release whatsoever, whether by carryback, current relief or carry forward an unconditional UK denial of cross-border loss relief is disproportionate.

This judgment raises many questions such as, how can the judgment in Marks & Spencer be reconciled with the judgment in Futura where the court held that the system, which is in conformity with the fiscal principle of territoriality, cannot be regarded as entailing any discrimination, overt or covert, prohibited by the treaty. Question two, has the Court changed its practice of striking down in its entirety a member state tax provision where the application of that rule would be disproportionate. Three, why did the Court not expressly deal with the preliminary question on the disadvantage connected to the choice of the legal form of the foreign establishment? A disadvantage flowing from the fact that Marks & Spencer chose to locate establishments in the other member states in the form of subsidiaries rather than in the form of branches.

In conclusion, it can be said that the member states have the right to restrict cross-border loss compensation if, as a consequence, the loss will be offset more than once. That no double-loss compensation will occur has to be proved by the company, and this ultimately must be confirmed by the national court of the parent company's resident state. It is clear that the chosen solution by the Court raises more questions than it answers.

[Note: Here's a summary and analysis of the case I pulled from the Comparativelawblog, by Jaco Bomhoff, 12/16/2005]:

M&S, a company registered in England and Wales, in 2001 ceased trading in Continental Europe owing to the losses recorded from the mid-1990s. Subsequently, M&S claimed 'group relief' for losses incurred by its Belgian, German and French subsidiaries. This claim was refused by the UK tax authorities: UK resident companies in a group may not set off their profits and losses among themselves where the losses are incurred by subsidiaries which have no establishment in the United Kingdom and do not trade there.

Firstly, the ECJ held that the United Kingdom provisions constitute a restriction on freedom of establishment. The ECJ confirmed that the UK tax system was in accordance with the principle of territoriality enshrined in international tax law and recognised by Community law (see Futura). Nevertheless, it ruled that this does not in itself justify restricting group relief to losses incurred by resident companies. Accordingly, the ECJ dismissed the UK's argument that non-UK resident and UK resident subsidiaries were not in comparable tax situations. Regarding justification, the ECJ accepted that the preservation of allocation of taxing powers between Member States, the prevention of double relief and the risk of tax avoidance where a multinational seeks to offset losses against the highest tax rate profits, taken together allow a Member State generally to deny cross-border loss relief. However, where there is no local loss relief whatsoever, whether by carryback, current relief or carryforward, an unconditional UK denial of cross-border loss relief is disproportionate.

The judgment raises many questions, such as:

- How can the M&S judgment be reconciled with the judgment in Futura where the ECJ held that "a system, which is in conformity with the fiscal principle of territoriality, cannot be regarded as entailing any discrimination, overt or covert, prohibited by the Treaty"?
- Has the ECJ changed its practice of striking down in its entirety a Member State tax provision where the application of that rule would be disproportionate?
- Why did the ECJ not expressly deal with the preliminary question on the disadvantage connected to the choice of the legal form of the foreign establishment (a disadvantage flowing from the fact that M&S chose to locate establishments in the other Member States in the form of subsidiaries rather than in the form of branches)?
- How to deal with taxpayers suffering only a timing disadvantage regarding utilisation of EU foreign subsidiaries' losses? Might they nonetheless have a claim?
- How should we apply the test regarding the local possibilities of loss relief? Should we apply the test in the year in which the loss has arisen, or should we apply this test retrospectively when it is clear whether a local loss relief has de facto been granted? If we should apply retroactively, how should we deal with tax assessments – regarding the loss-year – which are final and not open to appeal? Or should the loss be taken into account in another taxable year? And how does all this relate to the procedural autonomy of the Member States?

These questions will undoubtedly trigger new preliminary proceedings. It seems inevitable that positive harmonisation is needed. It is expected that the European Commission will reissue a paper on cross-border loss relief next year. Taken into account Europe's history of direct tax harmonisation, taxpayers' expectations should not be all too high.

- C-196/04 **Cadbury Schweppes** (2006). [not on our reading list but discussed in the video lecture]. Ireland subsidiaries created to avoid UK tax. Does freedom of establishment preclude national tax legislation. The court decides that it is necessary to examine the behavior of a taxpayer when he incorporates in another state, to determine whether it is a mere exercise of freedom of establishment, or an abuse. Requires a stable, continuing business in life of a company. Can not assert establishment in another state solely for economic benefit. Front subsidiary. With this ruling, the court seems to be moving away from the Centros ruling.

  We now refer to the Cadbury and Schweppes case. And this is also another tax law case. The Cadbury Schweppes Group had established two subsidiaries in Ireland solely in order that profits related to the international financing activities of the Cadbury Schweppes Group might benefit from the more favorable tax regime there. In the view of the national court the

subsidiaries were incorporated in Ireland in order not to fall within the application of certain UK tax provisions on exchange transactions. After the national tax authorities demanded the corporation tax be paid anyway, Cadbury Schweppes appealed. In the end the relevant UK court referred to the ECJ to clarify the EU law implications.

And the EU law implications? Well, once again, the freedom of establishment was an issue in this case. The question referred to the Court was whether freedom of establishment precludes national tax legislation, under certain conditions, from imposing a charge upon a parent company, on the profits made in a foreign subsidiary. And in the decision of the Court, it is necessary to examine the behavior of a taxpayer who incorporates a company in another member state in light of the aim of freedom of establishment, in order to assess whether the behavior at stake is a mere exercise of freedom of establishment or illegal abuse. And in this context, national measures restricting freedom establishment, may be justified if they specifically relate to wholly artificial arrangements, aimed at circumventing application of the legislation of the member state concerned.

The Court considered that freedom of establishment requires a stable and continuing basis in the economic life of a member state other than the state of origin. Therefore, a company cannot invoke freedom of establishment in another member state for the sole purpose of benefiting from more advantageous legislation unless the establishment in the other member state is intended to carry on genuine economic activity. According to the Court, a restriction on the freedom of establishment is therefore possible in cases of a letter-box or front subsidiary. With this ruling, the Court seems to move away from Centros, where the company founders set up a company that had never engaged in any economic activity in its founding state, and was aimed solely at avoiding Danish company law.

- C-371/10. **National Grid Indus** (2011). [not on our reading list but discussed in the video lecture] Is the UK migration charge contrary to EU law. A Dutch company, relocated its place of effective management from Netherlands to UK. Unrealized foreign exchange gain. Under the tax treaty, National Grid changed residence. Triggered Dutch liability. If a member state makes a final decision, can the taxpayer rely on EU rules? If yes, is it justified? Finally, does it depend on taxing a gain (not a profit). Court held that the Dutch company transferring its management to another state could rely on article 49. Yes, cash flow disadvantage deters companies from free movement in the market. An exit tax that does not permit payment until gain realized is unfair. Track assets following migration. An exit tax regime that does not take into account subsequent losses, not fair.

  That turns us to the National Grid Indus case. The decision of the court in this case answered the question, is the UK migration charge contrary to EU law? In November 2011, the Court published its decision. This case concerns exit tax rules, where there is a transfer of a company's place of effective management to a member state other than that in which it is incorporated. Although the case concerned the Dutch taxation rules, the case has potentially much wider implications on the European market.

  First, lets look at the background of the case. National Grid Indus is a Dutch company that relocated its place of effective management from the Netherlands to the UK. National Grid Indus held a sterling denominated receivable from a UK group company which showed an unrealized foreign exchange gain at the time of migration. Under the tax treaty concluded between the Netherlands and the UK, National Grid's tax residency was changed to the UK after the relocation. The change of residence triggered a Dutch exit tax liability.

  The questions for the Court were

1. one, if a member state applies a final settlement tax on the transfer of the place of effective management, can the taxpayer rely on Article 49 of the TFEU?
2. Two, if yes, is a final settlement tax, not permitting the possibility of deferring that tax and without the possibility of taking account of subsequent decreases in value after the transfer of the effective place of management, justified by the necessity of allocating powers of taxation between the member states?
3. And finally, number three, does the answer depend on whether the final settlement tax is taxing a gain which would not be recognized as a profit in the other state? And by that we mean a currency gain that would not arise in another member state.

So, what was the decision of the Court? Well, the Court held that a Dutch company transferring its effective management to another member state could rely on Article 49. The answer to the second question was also broadly, yes. The Dutch rules place a cash flow disadvantage on National Grid Indus which does not arise if the effective management is relocated within the Netherlands. This deters companies relocating which is a restriction on the freedom of establishment. A glimmer of hope for the taxing authorities arose when the Court stated that such a tax could be justified by the necessity to ensure a balanced allocation of taxing rights between member states. However, this was then measured by the requirement for such a tax to be proportionate.

And the answer to the third question is, no. It does not matter whether the tax is on a gain that would not arise in the receiving state.

In short, the Court found that an exit tax, which does not give the right to defer payment until the gain becomes realized, is not proportionate. The Court recognized that this could give rise to an additional administrative burden as companies and tax authorities would need to track assets following migration. However, it did not consider this to be persuasive argument for not permitting a deferral. The Court did, however, rule that an exit tax regime that does not take into account subsequent decreases in the value of assets, is not as such in breach of the freedom of establishment.

The Court suggested that legislation covering an exit tax should have two options. One, the immediate payment of tax on unrealized gains, and a deferment until the disposal of the asset, that would be potentially with an interest. And two, the amount would be fixed, and the timing could differ.

Now there is a comparison with other migration cases here. The Court's decisions in Daily Mail, and Cartesio, also considered companies wishing to transfer their legal seat, the central management and control, and in both cases the taxpayer lost. The distinction between these cases and National Grid Indus is that National Grid Indus was not trying to change its status as a Dutch company. Indeed after the transfer, it would still be recognized and registered as a company in the Netherlands. The Dutch legislation did not result in a change to the company's legal status, and thus did not affect whether the company could rely on Article 49. It merely applied a tax charge on the transfer of the effective management of that company.

- C-378/10 – **Vale** (2012). [this case was listed in our reading materials but not commented on in the video lecture]. Vale was a limited liability company registered to do business in Italy in 2000. In 2006 the company asked to be removed from the Italian commercial register because it intended to move to Hungary (transfer of seat). It wanted to become a Hungarian registered company, while at the same time maintain its legal personality, a cross border conversion. Hungarian authorities rejected the transfer. The local court submitted the issue to the ECJ to determine whether such an action violated the right to establishment under articles 49 & 54,

TFEU. "Companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning."

Even though this is a restriction on the right of establishment, "such means can be justified where there are overriding reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions." These may be justified "on the condition that such a restrictive measure is appropriate for ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them."

However such justification is lacking in this particular case. Hungarian law precludes, in a general manner, cross-border conversions, with the result that it prevents such operations from being carried out even if the interests, mentioned in the preceding paragraph, are not threatened. In any event, such a rule goes beyond what is necessary to protect those interests (see, as regards cross-border mergers, *SEVIC Systems*, paragraph 30).

- **Reyners** [not covered in the course materials but listed in question 13 of the ungraded quiz for this Module 2 under the topic of direct discrimination][possibly this is case C-2/74, Reyners v. Belgium, 1974] Dutch national, educated in Belgium, can't become a lawyer in Belgium because the Belgium law restricts the title of avocat only to Belgian nationals. Belgium claims the restriction is permitted since lawyers perform functions that are "connected with the exercise of official authority". The court disagrees and says that exception only applies to activities that "involve a direct and specific connection with the exercise of official authority." It does not apply to lawyers who engage in activities such as consultation and legal assistance or the representation and defense of parties in court.

- **Commission vs. Italy** (dentists) [not covered in the course materials but listed in question 13 of the ungraded quiz for this Module 2] [possibly this is case C-162/99, of 2001] Italian law imposed a residence requirement on dentists. Also, only dentists of Italian nationality could remain registered if they later transferred their residence to another member state. The court concluded both requirements were violations of the Treaty, specifically of the right of establishment and the freedom to provide services of dentists who are nationals of other member states.