



Complete EU Law: Text, Cases, and Materials (5th edn)

Elspeth Berry, Barbara Bogusz, Matthew Homewood, and Sophie Strecker

p. 533 **12. Freedom of establishment and freedom to provide and receive services** 

Elspeth Berry, Reader in Law, Nottingham Trent University, Barbara Bogusz, Lecturer in Law, University of Leicester, Matthew Homewood, Deputy Dean, Nottingham Trent University, and Sophie Strecker, Principal Lecturer in Law, Nottingham Trent University

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Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter first discusses the freedom of establishment, distinguishing between the freedom of establishment for natural persons and the freedom of establishment for legal persons; and then considers the freedom to provide and receive services, explaining the possible derogations to both freedoms. Finally, there is consideration of the impact of Brexit on the freedom of establishment and the freedom to provide and receive services.

Keywords: EU law, freedom of establishment, natural persons, legal persons, services, derogations, Brexit

Key Points

By the end of this chapter, you should be able to:

- define the scope of the freedom of establishment and the freedom to provide and receive services in the European Union (EU);
- identify the relevant Treaty provisions and secondary legislation regarding the freedom of establishment and freedom to provide and receive services in the EU;
- apply the relevant legislation in order to describe the specific rights granted under the freedom of establishment and freedom to provide and receive services;
- explain the possibilities for Member States to implement measures derogating from the freedom of establishment and freedom to provide and receive services; and
- appreciate the impact of Brexit on the freedom of establishment and the freedom to provide and receive services.

Introduction

The freedom of establishment and the freedom to provide and receive services form part of the fundamental freedoms of EU law, characteristic of the internal market. Chapter 11 discussed the free movement of workers and EU citizens and their families. Self-employed persons have rights similar to workers. The freedom of establishment and the freedom to provide services, however, also entail rights for companies.

The fundamental freedoms are guaranteed by the Treaty on the Functioning of the European Union (TFEU) and implemented in secondary legislation. For the self-employed, reference must be made to the Citizenship Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ..., OJ 2004 L158/77), which was discussed in Chapter 11. For companies, the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L376/36) was adopted. Furthermore, the Court of Justice's case law is an important source in this area.

There are many parallels between the freedom of establishment and the freedom to provide and receive services, on the one hand, and the other fundamental freedoms, on the other hand. These will be highlighted throughout the chapter.

The freedom of establishment is discussed first, making a distinction between the freedom of establishment for natural persons and the freedom of establishment for legal persons where relevant. The freedom to provide and receive services is discussed thereafter. Finally, the possible derogations to both freedoms are explained.

p. 534 **12.1 Freedom of establishment**

12.1.1 Article 49 TFEU

Article 49 TFEU sets out the principle of freedom of establishment. This freedom comprises the right of EU citizens and companies to establish themselves in any Member State for a commercial purpose and, when they are already established in a Member State, to set up secondary establishments in another Member State.

Article 49 TFEU

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

The phrase ‘within the framework of the provisions set out below’ in Article 49 TFEU refers to the subsequent Treaty Articles which provide that the prohibition of discrimination set out in Article 49 TFEU will be implemented in secondary legislation—specifically, Directives. This could suggest that, in the absence of such secondary legislation, Article 49 would be ineffective. The Court of Justice has made it clear, however, that this is not the case.

In Case 2/74 *Reyners* [1974] ECR 631, a Dutch national who had undertaken his legal education in Belgium was refused admission to the Belgian Bar based solely on his lack of Belgian nationality. He brought a claim and the Belgian court requested a preliminary ruling from the Court of Justice. Mr Reyners claimed that Article 49 TFEU was capable of producing direct effect and the Court agreed.

Case 2/74 *Reyners* [1974] ECR 631

26. In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 [now Article 49 TFEU] thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures.
27. The fact that this progression has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfilment.

p. 535 ← Article 49 TFEU, as then worded, required the freedom of establishment to be attained by the end of a transitional period and therefore imposed an obligation to attain a precise result: the abolition of discrimination on grounds of nationality. The fulfilment of this result had to be made easier by the implementation of a programme of progressive measures—Directives—but was not dependent on this. It was therefore possible for Mr Reyners to rely on Article 49 TFEU directly. The fact that Article 49 refers to the prohibition of discrimination ‘within the framework of the provisions set out below’ and that no Directives had been made in accordance with these provisions was relevant only during the transitional period. After that, the freedom of establishment was fully attained, allowing Mr Reyners to rely on it despite a lack of secondary legislation implementing it. The Court of Justice emphasized, however, that these Directives had not lost all relevance since they preserved an important role in the field of measures intended to make the effective exercise of the right of freedom of establishment easier (*Reyners*, at para 31).

The Court in *Reyners* also made it clear that Article 49 TFEU had vertical direct effect. The question could still be asked, though, whether it also had horizontal direct effect—in other words, whether it could be relied upon against private parties as well as against the Member States.

Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-779 only partially answered that question. Viking, a large Finnish ferry operator, operated a route between Finland and Estonia. Viking wanted to change its place of establishment to Estonia to provide its services from there, benefiting from the lower Estonian wage levels. Finnish trade union FSU, supported by the International Transport Workers' Federation, opposed these plans, and threatened strike action and other boycotts if the company failed to maintain the higher Finnish wage levels if and when moving to Estonia.

Cross-Reference

For an in-depth explanation and discussion of direct effect, see 4.1.

Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [2007] ECR I-779

34. Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application (see, by analogy, *Walrave and Koch* [Case 36/74 *Walrave and Koch* [1974] ECR 1405], paragraph 19; *Bosman* [Case C-415/93 *Bosman* [1995] ECR I-1921], paragraph 84; and *Angonese* [Case C-281/98 *Angonese* [2000] ECR I-4139], paragraph 33).
- [...]
57. The Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège* [Joined Cases C-51/96 & 191/97 *Deliège* [2000] ECR I-2549], paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others* [Case C-309/99 *Wouters and others v Netherlands Bar* [2002] ECR I-1577], paragraph 120).
- [...]
61. It follows that [Article 49 TFEU] must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions.
- [...]
65. There is no indication in ... case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.

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From this ruling, it is not entirely clear how far Article 49 TFEU can be relied upon against any private party. It could be argued that the fact that the Court of Justice recognized its horizontal direct effect implies that it can be relied upon against any person. However, the Court emphasized that trade unions have particular powers

regarding the negotiation of collective regulation, which could suggest that a certain collective dimension is required. It is to be hoped that future case law resolves this uncertainty.

12.1.2 Meaning of ‘establishment’

The concept of establishment implies the permanent or semi-permanent settlement of a person or a company for economic reasons. The right of establishment, therefore, is the right to set up in another Member State for the purpose of pursuing an economic activity there. The Court of Justice has confirmed, in Case C-55/94 *Gebhard* [1995] ECR I-4165, at para 25, that the concept of establishment is a broad one, ‘allowing an EU 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 Union, in the sphere of activities of self-employed persons’.

As such, it has been decided as follows.

Case 205/84 Commission v Germany [1986] ECR 3755

Summary

[...]

- p. 537
- 2. An insurance undertaking of another Member State which maintains a permanent residence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking’s own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency. ...

In Case C-243/01 *Gambelli* [2003] ECR I-13031, the Court of Justice decided that a bookmaker established in the UK was also established in Italy, where it had a presence in the form of commercial agreements with Italian operators or intermediaries relating to the creation of data transmission centres. Those centres made electronic means of communication available to users, collected and registered the intentions to bet, and forwarded them to the bookmaker in the UK.

The Court of Justice clarified the requirement of presence in the host Member State in Case C-386/04 *Stauffer* [2006] ECR I-8203. It held that, in order for the provisions on freedom of establishment to apply, it was generally necessary to have secured a permanent presence in the host Member State. Where immovable property was purchased and held, that property should be actively managed. The Italian charitable organization in that case did not have any premises in Germany for the purposes of pursuing its activities and the services ancillary to the letting of its German property were provided by a German property agent. As a consequence, the Italian foundation was held not to be established in Germany.

Cross-Reference

The distinction between establishment and the provision of services is discussed at 12.2.3.

Cross-Reference

On the definition of workers, see 11.2.2.

12.1.3 Beneficiaries

12.1.3.1 Natural persons

The TFEU does not define the concept of 'self-employed person', but like the concept of 'worker', it has been defined in the Court of Justice's case law.

Case C-268/99 *Jany* [2001] ECR I-8615 concerned Czech and Polish women working as prostitutes in the Netherlands. They paid rent to the owner of the premises where they conducted their activity and received a monthly income, which they declared to the tax authorities. The Dutch government argued that, because of the subordinate relationship of the prostitutes to their pimps, they were in fact in an employment relationship. The Court considered whether a prostitute could be considered to be a self-employed person and, in so doing, contrasted this concept with the concept of 'worker', providing a definition of the former.

Case C-268/99 *Jany* [2001] ECR I-8615

71. ... [P]rostitution is an economic activity pursued by a self-employed person ... where it is established that it is being carried on by the person providing the service:

- outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;
- under that person's own responsibility; and
- in return for remuneration paid to that person directly and in full.

It is for the national court to determine in each case, in the light of the evidence adduced before it, whether those conditions are satisfied.

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Note

According to *Jany*, a self-employed person (a) provides a service (b) outside any relationship of subordination concerning the choice of that activity, working conditions, and conditions of remuneration (c) under that person's own responsibility (d) in return for remuneration paid to that person directly and in full.

Thinking Point

Applying this definition, do you think that a prostitute could be considered a self-employed person?

In *Jany*, the Court of Justice held that prostitutes could be considered to be self-employed. The Court of Justice disagreed with the Dutch government's view, refusing to accept that a relationship of dependency could be equated to an employment relationship. The potentially immoral character of the activity did not change the Court's opinion. Prostitution was not illegal in the Netherlands and the Court considered that it was not its task to substitute its own assessment for that of the national legislature simply because a legal activity was allegedly immoral.

It is thus apparent that a self-employed person can engage in a wide range of activities. In particular, the Court has explained that a self-employed person may pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions of a Member State (Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557).

12.1.3.2 Legal persons

According to Article 54 TFEU, 'companies or firms' means 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making'.

This definition is very wide and so it can cover many organizations. However, non-profit-making organizations are excluded. This means that, similarly to a self-employed person who pursues activities for remuneration, a company or a self-employed person must pursue economic activities. Charities are therefore excluded. That does not mean that a company must make a profit to be included in the definition. An organization making a loss or breaking even falls within the definition provided that it pursues economic activities—that is, activities intended to make a profit.

For natural persons, it is fairly easy to determine whether they are Member State nationals and consequently EU citizens.

For companies, nationality is determined by reference to the Member State in which they have their seat according to their statutes. It has been clarified by the Court of Justice that, for the application of the provisions on the right of establishment, it is required only that the company is formed in accordance with the law of a Member State and that it has its registered office, central administration, or principal place of business within the EU. In Case 79/85 *Segers* [1986] ECR 2375, the Court added that the fact that the company conducted its business through an agency, branch, or subsidiary solely in another Member State is immaterial. In other words, when a company is formed in accordance with the law of a Member State and has its registered office, central administration, or principal place of business somewhere in the EU, it is established in the Member State according to which law it is formed, even if it conducts no business whatsoever in that Member State. This position was confirmed in Case C-212/97 *Centros* [1999] ECR 1459, in which the Court of Justice held that it was immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main—or even its entire—business was to be conducted.

Cross-Reference

See 11.1.1 on EU citizens.

The situation is somewhat different if the company is formed in accordance with the law of a Member State, but has its registered office, central administration, or principal place of business outside the EU and only its seat prescribed by its statutes in the EU. The Council's General Programme for the Abolition of Restrictions on Freedom to Provide Services, OJ 1962 32/3, stipulates that, under these circumstances, for the company to be established in a Member State, the company's activities must have an effective and continuous link with the economy of a Member State, excluding the possibility that this link might depend on nationality—particularly, the nationality of the partners or the members of the managing or supervisory bodies, or of the persons holding the capital stock. Once established in a Member State, the company can set up branches and agencies in other Member States, even though it does not have its principal office in the EU.

Review Question

Which requirements must be met before organizations can benefit from the provisions on the freedom of establishment?

Answer: The company must have been formed in accordance with the law of a Member State. The company must also have its registered office, central administration, or principal place of business within the EU—that is, it must be located in a Member State. When only the seat prescribed by its statutes is in the EU, but not its registered office, central administration, or principal place of business, the company's activity must show a real and continuous link with the economy of a Member State. This link is not one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital.

12.1.4 Rights pertaining to the freedom of establishment

As mentioned earlier, Article 49 TFEU prohibits restrictions on the freedom of establishment. Since this provision has direct effect, a person has rights directly derived from the Treaty. Furthermore, there is secondary legislation that implements the prohibition.

The freedom of establishment entails several rights. Both self-employed persons and organizations can benefit from these rights, but not necessarily in the same way, given the differences between natural persons and legal persons. Where relevant, a distinction will therefore be made between those two categories for the discussion of the rights pertaining to the freedom of establishment.

Cross-Reference

See 12.1.1 on Article 49 TFEU.

p. 540 12.1.4.1 Right of exit, entry, and residence

Natural persons

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, OJ 1973 L172/14, provided that Member States had to abolish restrictions on the movement and residence of nationals wishing to establish themselves in another Member State as self-employed persons or to provide services in another Member State or to enter another Member State to receive services. They also had to abolish restrictions on the movement and residence of the self-employed person's family members. This Directive has been replaced by the Citizenship Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ..., OJ 2004 L158/77), which was discussed at 11.1.4 on the rights of EU citizens and their families.

Cross-Reference

See 11.1.4 on the rights of EU citizens and their families.

Since all EU citizens have the right of free movement within the EU, EU citizens who are self-employed also enjoy this right. This chapter will not repeat what has been discussed earlier regarding the right of departure, entry, and residence. It will, however, be illustrated within the framework of the freedom of establishment specifically.

EU citizens have the right to leave their home Member State, with their family, to establish themselves in another Member State. This freedom of establishment should not be restricted. A case in which the Court of Justice held that it was restricted was Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409.

Mr de Lasteyrie left France to go and live in Belgium. The French authorities charged him with an ‘exit tax’ on an unrealized increase in the value of securities that was payable when taxpayers transferred their residence outside France for tax purposes. The Court of Justice held that, even though the provisions concerning freedom of establishment were aimed particularly at ensuring that foreign nationals were treated in the host Member State in the same way as nationals of that State, Article 49 TFEU also prohibited the Member State of origin (France) from hindering the establishment in another Member State (Belgium) of one of its own nationals. The prohibition on Member States imposing restrictions on the freedom of establishment also applied to tax provisions. Although direct taxation did not, as such, fall within the scope of the EU’s jurisdiction, Member States must exercise their powers in this area in compliance with EU law. Even if French tax legislation did not prevent a French taxpayer from exercising their right of establishment, it was nevertheless of such a nature as to restrict the exercise of that right, having at the very least a dissuasive effect on taxpayers wishing to establish themselves in another Member State. A taxpayer wishing to transfer their tax residence outside France, in exercise of the right guaranteed to them by Article 49 TFEU, was subjected to disadvantageous treatment in comparison with a person who maintained their residence in France. Mr de Lasteyrie had become liable, simply because of the transfer, to tax on income that had not yet been realized and which he therefore did not have, whereas had he remained in France, he would have become liable to pay tax on the income only when and to the extent that it was actually realized.

The French court had also inquired in its preliminary question whether there could be any justification on the ground of preventing tax avoidance. The Court of Justice considered that the French legislation in question

^{p. 541} was not specifically designed to exclude from a tax ↪ advantage purely artificial arrangements aimed at circumventing French tax law. It was aimed, more generally, at any situation in which a taxpayer with substantial holdings in a company subject to corporation tax transferred their tax residence outside France for whatever reason. The transfer of a physical person’s tax residence outside the territory of a Member State did not, in itself, imply tax avoidance and could not justify a national fiscal measure that compromised the exercise of a fundamental freedom guaranteed by the Treaty.

Legal persons

Although the Citizenship Directive, which sets out the rights of EU citizens and their families (ie natural persons) to move and reside freely within the territory of the Member States, does not apply to organizations, that does not mean that companies do not have these rights. They can rely on Article 49 TFEU directly. As the Court held in Case C-446/03 *Marks & Spencer plc v David Halsey* [2005] ECR I-2647, similarly to self-employed persons, a company’s right of establishment can be hindered in practice not only by the law of the host Member State, but also by the law of the home Member State. As a rule, this is not allowed under EU law.

Cross-Reference

On Case C-446/03 *Marks & Spencer plc v David Halsey* [2005] ECR I-2647, see 12.1.4.2.

This does not mean, however, that companies have an unfettered right under the freedom of establishment to move their registered office, central administration, or principal place of business to another Member State while retaining an establishment in the home Member State. This was made clear in Case 81/87 *The Queen v HM Treasury and Commissioners of Inland Revenue, ex p Daily Mail and General Trust plc* [1988] ECR 5483.

Daily Mail, an investment holding company incorporated under UK legislation and with its registered office in the UK, wanted to transfer its central management and control to the Netherlands. Dutch legislation did not prevent foreign companies from establishing their central management there. UK tax law provided that companies resident in the UK for tax purposes could not cease to be resident there without the consent of HM Treasury. Daily Mail applied for consent, but, without waiting for it, decided to open an investment management office in the Netherlands with a view to providing services to third parties. The main reason for the proposed transfer of central management and control was to enable Daily Mail, after establishing its residence for tax purposes in the Netherlands, to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy its own shares without having to pay the tax to which such transactions would make it liable under UK tax law. Daily Mail argued that the requirement to obtain consent from HM Treasury breached EU law and the English court asked the Court of Justice for a preliminary ruling.

Case 81/87 *The Queen v HM Treasury and Commissioners of Inland Revenue, ex p Daily Mail and General Trust plc [1988] ECR 5483*

11. The first question seeks in essence to determine whether Articles 52 and 58 of the Treaty [now Articles 49 and 54 TFEU] give a company incorporated under the legislation of a Member State and having its registered office there the right to transfer its central management and control to another Member State. If that is so, the national court goes on to ask whether the Member State of origin can make that right subject to the consent of national authorities, the grant of which is linked to the company's tax position.

p. 542 ← [...]

15. The Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable ... Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for ... companies ...

16. Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in [Article 54].

17. In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52. Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company.

18. The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above. Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company. It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company.

19. In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.
20. As the Commission has emphasized, the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor ...
21. The Treaty has taken account of that variety in national legislation ...
[...]
24. Articles 52 and 58 of the Treaty [now Articles 49 and 54 TFEU] cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.

p. 543 ← The *Daily Mail* case established that the Member State from which a company wants to move its registered office, central administration, or principal place of business can subject the company to certain conditions. In this case, the UK could require the *Daily Mail* to settle its taxes and even to wind up the UK company. Because Member State corporate laws have not been harmonized, different Member States define the place of incorporation of a company differently. The question of how far companies can rely on Article 49 TFEU to use these differences in national legislation in order to set up different forms of establishment in different Member States also arose in Case C-212/97 *Centros* [1999] ECR I-1459.

In *Centros*, Mrs Bryde was a Danish national who registered her company, *Centros*, in the UK because UK law did not impose any requirements on limited liability companies for the provision for, or paying up of, minimum share capital. The company never traded in the UK and Mrs Bryde's main purpose was to conduct business in Denmark through a branch office. Danish conditions for minimum capital requirements were far stricter than those in the UK, and Mrs Bryde wanted to avoid these by registering the company in the UK and establishing a secondary establishment in Denmark. The Danish authorities refused to register the branch in Denmark on the grounds that Mrs Bryde was, in fact, not seeking to establish a branch, but a principal establishment, while circumventing Danish national rules.

The Court of Justice ruled that it was contrary to Articles 49 and 54 TFEU for a Member State to refuse on those grounds to register a branch of a company formed in accordance with the law of a Member State in which it has its registered office. National rules aimed at preventing fraud could not justify restrictions on the freedom of establishment of companies. The fact that Mrs Bryde chose to form her company in that Member State in which the rules of company law seemed the least restrictive to her and to set up branches in other Member States did not, in itself, constitute an abuse of the right of establishment.

It could be argued that the decision in *Centros* contradicted the decision in *Daily Mail*. In *Daily Mail*, the Court of Justice held that a Member State could impose certain conditions on a company wanting to move its centre of administration. Such conditions are in effect a restriction on the freedom of establishment as they make it more difficult for the company to establish itself in another Member State. *Centros* had a fact pattern similar to that in *Daily Mail* in the sense that, in both cases, the companies used their freedom of establishment to benefit from a more favourable legal regime. In *Centros*, however, the Court of Justice held that the restrictions on the freedom of establishment imposed by the Member State could not be justified. Case C-208/00 *Überseering* [2002] ECR I-9919 clarified the Court of Justice's approach.

Überseering was a company incorporated under Dutch law, with its registered office in the Netherlands. It wanted to transfer its centre of administration to Germany and sold its entire share capital to German shareholders. Dutch law did not prevent *Überseering* from keeping its establishment there through its continued incorporation, despite transferring its central administration to another Member State. German law, however, did not recognize the legal capacity of a company incorporated in another Member State. Therefore *Überseering* had to reincorporate in Germany if it wanted to appear before the German courts. The Court of Justice distinguished *Daily Mail* from the facts of *Überseering*. *Daily Mail* concerned a company emigrating and the restrictions were imposed by the Member State of incorporation; *Überseering* concerned a company immigrating and the restrictions were imposed by the hosting Member State, which refused to recognize a company incorporated under the law of another Member State.

p. 544 ← The Court held that overriding requirements relating to the general interest could justify restrictions on the freedom of establishment. They could not, however, justify an outright negation of the freedom of establishment. The requirement of reincorporation of the same company in Germany in *Überseering* was tantamount to such negation and therefore prohibited.

12.1.4.2 Equal treatment

Prohibition of discrimination

The second paragraph of Article 49 TFEU states as follows.

Article 49 TFEU

[...]

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected ...

From the wording of Article 49 TFEU, it is clear that direct or indirect discrimination based on nationality is prohibited. In this respect, there are clear parallels between the prohibition of discrimination regarding workers, EU citizens, and the self-employed and companies.

Measures interfering with the free movement of establishment, however, will not necessarily be discriminatory. In line with its case law on the free movement of goods, services, and workers, the Court of Justice has also applied a broader approach in the area of freedom of establishment, focusing not necessarily on the prohibition of discrimination, but also on non-discriminatory restrictions. These will be the subject of the discussion under the next subheading.

Cross-Reference

On equal treatment of workers, see 11.2.3.2; on equal treatment of EU citizens, see 11.1.4.

Cross-Reference

See 10.8.3 on goods, 12.2.3 on services, 12.1.4 on establishment, and 11.2.3 on workers.

Natural persons

An illustration of the prohibition of discrimination regarding the freedom of establishment can be found in Case 2/74 *Reyners* [1974] ECR 631, which involved direct discrimination based on nationality. Mr Reyners was refused admission to the Bar in Belgium based solely on his lack of Belgian nationality.

Cross-Reference

For a full discussion of *Reyners*, see 12.1.1.

In Case C-162/99 *Commission v Italy (Dentists)* [2001] ECR I-541, the national measure in question was an Italian law stating that dentists moving their residence to another Member State lost their registration with the Italian dental association unless they had Italian nationality. Because this law was directly discriminatory, it breached Article 49 TFEU. Similarly, a Belgian rule requiring non-Belgian nationals to have been resident or established in Belgium for at least one year in order to be able to register an aircraft there was prohibited under Article 49 TFEU, because it clearly constituted discrimination on grounds of nationality (Case C-203/98 *Commission v Belgium* [1999] ECR I-4899).

An example of indirect discrimination can be found in Case C-145/99 *Italy v Commission (Lawyers)* [2002] ECR I-2235. Italian law required members of the Bar to reside in the judicial district of the court to which their Bar was attached. As such, members of the Bar established in another Member State could not maintain an establishment in Italy. The Italian rule therefore breached Article 49 TFEU.

Legal persons

The question of discrimination in respect of legal persons often arises in cases concerning taxation. It must be pointed out that Member States are allowed to treat, for tax purposes, resident and non-resident companies differently. This is in accordance with the fiscal principle of territoriality, which was applied in Case C-250/95 *Futura Participations* [1997] ECR I-2471. Luxembourg law provided that all income earned by resident taxpayers was taxable, regardless of where it was earned; for non-resident taxpayers, only income earned in Luxembourg was taxable. The Court of Justice held that the law in question was not discriminatory and did not breach Article 49 TFEU because it was in conformity with the fiscal principle of territoriality.

An example of direct discrimination can be found in Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651. As explained earlier, the nationality of a company is determined by where it has its seat.

Cross-Reference

See 12.1.3.2 for more detail on the nationality of companies.

Direct discrimination on grounds of a company's nationality therefore exists when there is a difference in treatment based on where the company has its seat. In *Royal Bank of Scotland*, this difference in treatment consisted of Greek taxation of company profits at a higher rate for companies with their seat in another Member State. In other words, Greek law provided that the profits of companies with their seat in Greece were taxed at a lower rate than those of companies with their seat in another Member State. Greek law therefore breached Article 49 TFEU.

The Court of Justice found that there was indirect discrimination in Case C-270/83 *Commission v France* [1986] ECR 273. The Court drew an analogy between the place of residence of a natural person and the location of the registered office of a company. The case concerned French law, which granted tax credits to companies with their registered office in France. Companies with only a branch or agency in France and their registered office in another Member State did not benefit from these tax credits. The Court held that Article 49 TFEU expressly left traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that this freedom of choice could not be limited by discriminatory tax provisions.

In Case C-250/95 *Futura Participations* [1997] ECR I-2471, the Court of Justice stated that it was permissible for Member States to impose certain restrictions on the freedom of establishment if they could be justified on the ground of ensuring the effectiveness of fiscal supervision. As such, conditions regarding the keeping of accounts and the location where losses were incurred for non-resident companies could be justified. However, the Court applied a strict proportionality test, which meant that the rule in question in this case was held to be too restrictive and therefore not allowed under Article 49 TFEU.

Non-discriminatory restrictions

Some national measures could create barriers to the freedom of establishment even though they apply

- p. 546 without distinction to all persons established in a Member State—that is, to \leftarrow nationals, as well as non-nationals—and are therefore not discriminatory. It could be thought that they are not prohibited under Article 49 TFEU—but the case law of the Court of Justice has proven otherwise.

Natural persons

The ruling in Case C-55/94 *Gebhard* [1995] ECR I-4165 made it clear that the Court of Justice interpreted Article 49 TFEU broadly, applying the same principles and interpretation to the provisions on free movement of goods, services, workers, and establishment. Mr Gebhard was a German national residing in Italy, with his Italian wife and three children. He found himself the subject of disciplinary proceedings, opened by the Milan Bar Council, for pursuing a professional activity in Italy on a permanent basis in chambers set up by him whilst using the title *avvocato*. Mr Gebhard was a member of the Bar of Stuttgart, Germany, and had applied to the Milan Bar Council to be entered on its roll of members. The Milan Bar Council, however, had not taken any formal decision on the application.

The Court held that whether it is possible for a national of a Member State to exercise their right of establishment and the conditions for exercise of that right must be determined in the light of the activities that the individual intended to pursue on the territory of the host Member State. The freedom of establishment was to be exercised under the conditions laid down for its own nationals by the law of the country where establishment was effected. If the specific activities in question were not subject to any rules in the host Member State, so that a national of that Member State did not have to have any specific qualification in order to pursue them, a national of another Member State was entitled to establish themselves on the territory of the first State and to pursue those activities there. However, the taking up and pursuit of certain self-employed activities could be conditional on complying with certain provisions justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision, and liability. Where this was the case, a national of another Member State intending to pursue those activities must, in principle, comply with those conditions.

The Court added the following.

Case C-55/94 *Gebhard* [1995] ECR I-4165

37. It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it ...

From the *Gebhard* ruling, it follows that not only could (directly or indirectly) discriminatory rules be in breach of the TFEU, but also any national rule that hinders or makes less attractive the exercise of the fundamental freedom of establishment could violate the TFEU unless it is justified. As such, the Court of Justice adopts an obstacle-based approach rather than a discrimination-based approach. This position was confirmed in its p. 547 later case law, such as Case C-400/08 *Commission v Spain* [2011] ECR I-1915. This case concerned Spanish legislation imposing certain restrictions on the establishment of large retail outlets. The Commission was of the opinion that the rules in question were indirectly discriminatory because those wishing to set up large retail establishments were often from other Member States, while smaller retail establishments were usually Spanish, so that the rules favoured these Spanish businesses. The Court of Justice held that the Commission had not been successful in establishing that the rules were indirectly discriminatory. It reiterated, however, that Article 49 TFEU precludes any national measure that, even though it is applicable without distinction on grounds of nationality, is liable to hinder or to render less attractive the exercise by EU citizens of the freedom of establishment that is guaranteed by the Treaty. In that context, the concept of 'restriction' for the purposes of Article 49 TFEU covers measures taken by Member States that, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-EU trade.

Whether a restriction on the freedom of establishment is discriminatory is still relevant for two reasons. First and on the one hand, if a rule is directly discriminatory, it automatically falls within the scope of the prohibition in Article 49 TFEU. A non-discriminatory restriction, on the other hand, must still constitute a sufficient hindrance to the freedom of establishment. This requirement that there be sufficient hindrance, or sufficient effect on inter-State trade, due to a national rule for there to be a breach of EU law on the fundamental freedoms has been established in the Court of Justice's case law regarding the free movement of goods and workers.

Second, a directly discriminatory restriction can be justified only on the grounds provided for in Article 52 TFEU (ie public policy, public security, or public health). A non-discriminatory restriction could be justified on the grounds in Article 52, but could also be based on broader objective justifications.

Thinking Point

Since the Court of Justice applies this obstacle-based approach, rather than a discrimination-based approach, is there any relevance left to the discriminatory nature of a restriction?

A case in which the question arose as to whether there were objective justifications for a restriction was Case C-171/07 *Commission v Italy* [2009] ECR I-4171, which concerned national legislation preventing persons who did not have the status of pharmacists from owning and operating pharmacies. The Court held that such a rule constituted a restriction within the meaning of Article 49 TFEU because it allowed only pharmacists to operate pharmacies, denying other economic operators access to this self-employed activity in the Member State concerned. However, this restriction could be justified by the protection of public health—more specifically, by the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality.

Cross-Reference

See 10.8.3 on goods and 11.2.3 on workers.

In Joined Cases C-570 & 571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios and Principado de Asturias* [2010] ECR I-4629, Spanish legislation provided that p. 548 administrative authorization was required prior to setting up a new ← pharmacy. The authorities in the region of Asturias, Spain, launched a call for applications with a view to issuing new pharmacy licences according to a system that limited the number of pharmacies per area depending on the population and the nearest other pharmacy. Furthermore, there were criteria for the selection of pharmacists based on professional and teaching experience. Mr Pérez and Mrs Gómez wanted to open a new pharmacy in Asturias without having to comply with this territorial planning system, and brought an action against the rules in question. The Spanish court referred the matter to the Court of Justice for a preliminary ruling.

The Court held that the conditions, linked to population density and minimum distance between pharmacies, constituted a restriction on the freedom of establishment. Applying the conditions set out in *Gebhard*, however, the Court assessed whether this restriction could be justified.

Thinking Point

What were the four conditions in *Gebhard* and how might they be applied here?

The first condition was met, since the conditions linked to population density and minimum distance between pharmacies applied without discrimination on grounds of nationality. The second condition was also met, since the objective of the restrictions was to ensure that the provision of medicinal products to the public was reliable and of good quality. As a consequence, the objective constituted an overriding reason relating to the general interest. As to the third condition, the Court considered whether the restriction was appropriate for attaining the objective pursued and held that it was, because it was conceivable that there would not be enough pharmacies in certain areas to ensure a reliable and qualitative service if there were no regulations. The fourth condition was also met, since the Court held that the rules in question did not go beyond those necessary to attain the objective pursued. Since all four conditions were met, the restrictions were not in breach of the freedom of establishment.

From these cases, it is clear that the Court of Justice has adopted the same approach as with other freedoms in assessing whether national legislation breaches EU law regarding the freedom of establishment. Often, the Court will find that there is a potential breach of Article 49 TFEU because the legislation in question is liable to hinder or to render less attractive the exercise by EU citizens of the freedom of establishment that is guaranteed by the Treaty. The Court then assesses, however, whether the national rule could be justified, which will often be the case, although not always.

Note

The *Gebhard* test

National rules that hinder or make less attractive the exercise of the fundamental freedom of establishment violate the TFEU unless they are justified. They are justified when they fulfil four conditions, as follows.

- p. 549
- (1) They must be applied in a non-discriminatory manner.
 - (2) They must be justified by imperative requirements in the general interest.
 - (3) They must be suitable for securing the attainment of the objective that they pursue.
 - (4) They must not go beyond what is necessary in order to attain it.

An example of a case in which the Court of Justice concluded that there was no objective justification is Case C-140/03 *Commission v Greece* [2005] ECR I-3177. According to Greek law, an optician could manage only one optician's shop. The Greek government claimed that the prohibition on operating more than one shop was enacted for overriding reasons of general interest in relation to the protection of public health. The government explained that the measure in question aimed to safeguard the personal relationship of trust within the optician's shop, as well as, in the event of fault, the absolute and unlimited liability of the optician who operated or owned the shop. Only an optician who participated directly in the running of their shop without expending physical or mental energy on running other shops could guarantee this result. The Court of Justice disagreed. It ruled that the national measure, even though it applied without discrimination on grounds of nationality, could hinder or render less attractive the exercise of fundamental freedoms guaranteed under EU law. Such a measure could be justified by overriding reasons of general interest, provided that the measure in question was appropriate for ensuring attainment of the objective pursued and did not go beyond that necessary for the purpose. In this case, the Court held that the objective of protecting public health could be achieved by measures that were less restrictive of the freedom of establishment, for example by requiring the presence of qualified, salaried opticians or associates in each optician's shop, rules concerning civil liability for the actions of others, and rules requiring professional indemnity insurance. Because the restrictions went beyond those required to achieve the objective pursued, there was no justification for them.

Commission v Greece established that the Court of Justice, although it recognizes a diverse range of justifications for national measures hindering the fundamental freedoms, applies a strict proportionality test. The measure in question cannot be justified if the objective pursued could be achieved by a less restrictive measure.

Legal persons

The position of the Court of Justice regarding non-discriminatory restrictions on the freedom of establishment for companies can be illustrated by Case C-446/03 *Marks & Spencer plc v David Halsey* [2005] ECR I-2647. Marks & Spencer, a company established in the UK, had subsidiaries in the UK and in a number of other Member States, including Belgium, France, and Germany. According to UK tax law, a parent company established in the UK was liable for corporation tax only in respect of the profits attributable to its branches or agencies established in the UK. Correspondingly, the parent company could deduct from its taxable profits only losses made by its subsidiaries established in the UK and not losses made by its subsidiaries in other Member States. Marks & Spencer wanted to deduct losses incurred by its subsidiaries in Belgium, France, and Germany, but the UK tax authorities rejected its claim.

p. 550 ← The Court of Justice reiterated that, although direct taxation falls within the competence of the Member States, this competence must be exercised in compliance with EU law. UK tax law constituted a restriction on the freedom of establishment because it treated differently for tax purposes the losses incurred by a resident subsidiary and those incurred by a non-resident subsidiary. This could deter a parent company from setting up subsidiaries in other Member States. The Court acknowledged, however, that such a restriction could be permitted if it were in pursuit of a legitimate objective compatible with EU law and justified by imperative reasons in the public interest—in other words, if the restriction could be objectively justified. The Court set out the relevant objective criteria as being:

- the protection of a balanced allocation of the power to impose taxation between the different Member States concerned;
- the avoidance of the double deduction of losses (once in the Member State in which the parent company was established and once in the Member State in which the subsidiaries were established); and
- the prevention of tax avoidance.

The Court held that the UK tax law at issue pursued legitimate objectives that were compatible with EU law and constituted overriding reasons in the public interest. However, it held that UK tax law would not comply with the principle of proportionality and went beyond that necessary to attain the objectives pursued if the non-resident subsidiary had exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by off-setting the losses against the profits made by the subsidiary in previous periods, and there was no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods, either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

As a consequence, where, in one Member State, the resident parent company had demonstrated to the tax authorities that those conditions were fulfilled, it was contrary to the freedom of establishment to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary.

In Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995, the national rule at issue was a UK rule according to which the profits of a **controlled foreign company (CFC)** were attributed to the resident company and subjected to tax in the UK when the corporation tax in the foreign country was less than three-quarters of the

tax that would have been payable in the UK.

controlled foreign company

A CFC is a foreign company in which a UK resident company owns a holding of more than 50 per cent.

The resident company was given a tax credit for the tax paid by the CFC. The aim of this rule was to make the resident company pay the difference between the tax paid in the foreign country and the tax it would have paid had the company been resident in the UK. Cadbury Schweppes established a subsidiary in Ireland and was charged approximately £9 million in corporation tax in the UK.

The Court of Justice held that the fact that a company was established in a Member State for the purpose of benefiting from more favourable legislation did not in itself suffice to constitute abuse of the freedom of establishment.

- p. 551 ← The Court further held that the separate tax treatment under the legislation on CFCs and the resulting disadvantage for resident companies that have a subsidiary subject in another Member State to a lower level of taxation hindered the exercise of the freedom of establishment by such companies and therefore constituted a restriction on this freedom within the meaning of EU law. The Court added, however, that a national measure restricting freedom of establishment could be justified where it specifically related to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned. In other words, legislation restricting the freedom of establishment could be justified when it was aimed at preventing the avoidance of national taxes by setting up 'letterbox subsidiaries' in another country.

Review Question

In which case did the Court of Justice establish this principle?

Answer: This principle was established in Case C-212/97 *Centros* [1999] ECR 1459.

Professional qualifications

Certain trades and professions are subject to national professional qualification requirements. Since they are more easily met by nationals than by non-nationals, they may hinder free movement. An example of this can be found in Case 71/76 *Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765. Mr Thieffry, who held a doctorate in Belgian law, established himself in Paris, where he wanted to join the Paris Bar. He was refused admission to that Bar because he did not have the required qualifications, despite the fact that he had obtained recognition of the diploma for his doctorate in Belgian law as a qualification equivalent to a

licentiate's degree in French law. The Court of Justice held that this was an unjustified restriction on the freedom of establishment since the only reason why Mr Thieffry was refused admission to the Paris Bar was that he did not have a French diploma, while French law recognized his Belgian diploma as equivalent.

Where qualifications are not recognized as equivalent, they must be compared with the relevant national requirements and they must be accepted, if equivalent. If they are not found to be equivalent based upon this comparison, evidence of relevant knowledge, or aptitude, and experience may be required, as in Case 340/89 *Vlassopoulou v Ministerium für Justiz* [1991] ECR I-2357, a case involving a lawyer who wanted to practise in Greece, as well as Germany.

It must be noted also that harmonization efforts have been made in the area of mutual recognition of qualifications. To that effect, a range of sectoral Directives were adopted, regulating the requirements for specific trades and professions. In addition, Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ 1989 L19/16, Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, OJ 1992 L209/25, and Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the p. 552 recognition of qualifications, OJ 1999 L201/77, ↪ provided for the mutual recognition of qualifications involving three years' professional education, one-year post-secondary courses, and a range of industrial and professional areas, respectively.

Finally, Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ 2005 L255/22, replaced and consolidated most existing Directives, aiming to liberalize the provision of services and to retain the system of mutual recognition of qualifications.

12.2 Freedom to provide services

12.2.1 Articles 56 and 57 TFEU: direct effect

Article 56 TFEU

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended ...

Article 57 TFEU

... Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Similarly to Article 49 TFEU, Article 56 states that restrictions on freedom to provide services are prohibited 'within the framework of the provisions set out below'. In particular, this refers to secondary legislation, in the form of Directives, which is meant to implement the Treaty provisions. Regarding the freedom of establishment, the ruling in *Case 2/74 Reyners* [1974] ECR 631 made it clear that Article 49 TFEU had direct effect, even absent secondary legislation.

Cross-Reference

On *Reyners* and the direct effect of Article 49 TFEU, see 12.1.1.

Shortly after *Reyners*, the question on the direct effect of Article 56 TFEU was raised before the Court of Justice. In *Case 33/74 van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299 a Dutch national, Mr Kortmann, acted as a legal adviser and representative of Mr van Binsbergen in social security proceedings before a Dutch court. During the course of the proceedings, Mr Kortmann transferred his residence from the Netherlands to Belgium. He was told that he could no longer represent Mr van Binsbergen because Dutch law stated that legal representation in social security matters could be provided only by persons established in the Netherlands. The Court of Justice was asked for a preliminary ruling on the direct effect of Article 56 TFEU and the permissibility of a residence requirement as a condition to the provision of services in a Member State.

p. 553 ← The case clearly did not concern direct discrimination based on grounds of nationality as Mr Kortmann (the legal adviser), Mr van Binsbergen (the client), the court, and the law in question were all Dutch. The Court of Justice held, however, that the restrictions to be abolished pursuant to Articles 56 and 57 TFEU included all requirements imposed on the person providing the service by reason in particular of their nationality or of the fact that they do not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service. In particular, a requirement that the person providing the service must be habitually resident within the territory of the State where the service is to be provided could have the result of depriving Article 56 TFEU of all useful effect.

The Court then ruled on the direct effect of Article 56 TFEU. It held that the issuing of Directives, provided for in the Treaty, was intended to accomplish different functions. The first function was to abolish restrictions on the freedom to provide services during the transitional period. The second function was to introduce into the

law of the Member States a set of provisions intended to facilitate the exercise of this freedom. These Directives also had the task of resolving the specific problems resulting from the fact that, where the person providing the service is not established, on a habitual basis, in the State where the service is performed, that person may not be fully subject to the professional rules of conduct in force in that State.

The provisions of Article 56 TFEU, the application of which was to be prepared by Directives issued during the transitional period, therefore became unconditional on the expiry of that period. As a consequence, at least regarding the specific requirement of nationality or residence, Article 56 TFEU imposes a well-defined obligation, the fulfilment of which by the Member State cannot be delayed or jeopardized by the absence of provisions that were to be adopted.

In summary, the first paragraph of Article 56 TFEU has direct effect and can be relied on before national courts, at least insofar as it seeks to abolish any discrimination against a person providing a service by reason of their nationality or of the fact that they reside in a Member State other than that in which the service is to be provided.

12.2.2 The scope of Article 56 TFEU

12.2.2.1 Requirement of a cross-border element

As with the other EU freedoms, Article 56 TFEU does not apply to purely internal situations. An example of this can be found in Case C-97/98 *Jägerskiöld* [1999] ECR I-7319. Mr Gustafsson paid a fishing licence fee, which, according to Finnish law, gave him the right to fish even in private waters. When Mr Gustafsson fished in Mr Jägerskiöld's waters, the latter complained, arguing that Finnish law breached EU law on the free movement of goods and services. The Court of Justice held that the provisions on the free movement of goods did not apply. Those on the freedom to provide services could apply in theory, but they did not apply to activities that were confined in all respects within a single Member State. The proceedings concerned were between two Finnish nationals, both established in Finland, concerning the right of Mr Gustafsson to fish in waters belonging to Mr Jägerskiöld and situated in Finland. ← Such a situation did not present any link to any of the situations envisaged by EU law in the field of the free provision of services.

p. 554

Thinking Point

Do you think the Court of Justice takes a narrow or a wide interpretation of the requirement for a cross-border element?

In Case 15/78 *Koestler* [1978] ECR 1971, a French bank provided services, in the form of stock exchange orders and current account transactions, to a customer established in France. The Court of Justice held that there was a provision of services within the meaning of the Treaty, however, since the person in receipt of the services

had taken up residence in another Member State (Germany) before the termination of the contractual relations between the parties.

Case C-17/00 *De Coster* [2001] ECR I-9445 concerned a municipal tax on satellite dishes. The cross-border element found by the Court of Justice was the receipt, through these dishes, of foreign satellite television, which could come from another Member State.

Joined Cases C-51/96 & 191/97 *Deliège* [2000] ECR I-2549 was a case in which a Belgian athlete challenged the selection rules of the Belgian Judo Federation. It was argued that the proceedings concerned a purely internal situation. The Court of Justice held that it was true that the Treaty provisions on the freedom of services did not apply to activities that were confined in all respects within a single Member State. It held, however, that a degree of extraneousness could derive from the fact that an athlete participates in a competition in a Member State other than that in which they are established.

It becomes clear from this case law that the requirement of a cross-border element is often easily satisfied.

12.2.2.2 Remuneration

Article 57 TFEU

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons ...

The services must be commercial in nature or, in the wording of Article 57 TFEU, they must be normally provided for remuneration. Case C-70/95 *Sodemare* [1997] ECR I-3395 established that services do not lose their commercial nature because they are provided by a non-profit organization nor do they lose their economic nature because there is an element of chance involved, such as in Case C-275/92 *Schindler* [1994] ECR I-1039.

p. 555 ← The essential characteristics of remuneration were clarified in Case 263/86 *Belgium v Humbel* [1988] ECR 5365. The Court of Justice held that 'the essential characteristic of remuneration ... lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service' (*Belgium v Humbel*, at para 17). The Court added as follows.

Case 263/86 *Belgium v Humbel* [1988] ECR 5365

18. That characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.
19. The nature of the activity is not affected by the fact that pupils or their parents pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system ...

Education could constitute a service, however, if it is provided by an institution that seeks to make profit and if it is paid for mainly from private funds (Case C-109/92 *Wirth* [1993] ECR I-6447).

The Court of Justice's approach must be nuanced against the background of its case law regarding cross-border health care. Case C-157/99 *Geraets-Smits/Peerbooms* [2001] ECR I-5473 concerned two people who were insured for medical costs under a Dutch social insurance scheme for people with low incomes. In order to be eligible for reimbursement of medical costs incurred abroad, the insured had to obtain authorization before receiving the treatment. The applicants in this case received treatment in Germany and Austria without prior authorization, and the question arose whether such authorization was prohibited under EU law. It was argued by several governments, applying the principles established in *Belgium v Humbel*, that hospital services did not constitute an economic activity.

Review Question

Applying *Belgium v Humbel*, what do you think the argument was for saying that hospital services did not constitute an economic activity?

Answer: A number of governments argued that hospital services could not constitute an economic activity, particularly when they were provided in kind and free of charge under the relevant sickness insurance scheme. Relying on *Belgium v Humbel*, they argued that there was no remuneration where the patient received care in a hospital infrastructure without having to pay for it themselves or where all or part of the amount they paid was reimbursed.

Some of the governments added to that, relying on *Wirth*, that a further condition to be satisfied before a service can constitute an economic activity was that the person providing the service must do so with a view to making a profit.

p. 556 ← The Court of Justice held as follows.

Case C-157/99 *Geraets-Smits v Stichting Ziekenfonds; Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473

55. With regard more particularly to the argument that hospital services provided in the context of a sickness insurance scheme providing benefits in kind, such as that governed by the ZFW, should not be classified as services within the meaning of Article 60 of the Treaty, it should be noted that, far from falling under such a scheme, the medical treatment at issue in the main proceedings, which was provided in Member States other than those in which the persons concerned were insured, did lead to the establishments providing the treatment being paid directly by the patients. It must be accepted that a medical service provided in one Member State and paid for by the patient should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation which is essentially of the type which provides for benefits in kind.

The fact that hospital medical treatment was financed directly by sickness insurance funds on the basis of agreements and a pre-set scale of fees was not, in any event, such as to remove treatment from the sphere of services within the meaning of Article 57 TFEU.

12.2.2.3 The meaning of ‘services’

Article 57 TFEU

... ‘Services’ shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

Even though Article 57 TFEU contains a list of activities that constitute services, this list is not exhaustive. As may become clear from the examples of case law discussed throughout this chapter, the Court of Justice has accepted a diverse list of activities as services under EU law.

Review Question

Can you think of some examples of activities that constitute services according to the Court of Justice's case law?

Answer: Examples include prostitution (Case C-268/99 *Jany* [2001] ECR I-8615), education services (Case C-109/92 *Wirth* [1993] ECR I-6447), television signals (Case C-17/00 *De Coster* [2001] ECR I-9445), medical treatment (Case C-157/99 *Geraets-Smits/Peerbooms* [2001] ECR I-5473), and legal advice (Case 33/74 *van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299).

p. 557 **12.2.2.4 Illegal activities**

Some activities are legal in one Member State and illegal in another Member State. The fact that they are illegal does not necessarily mean, however, that they will escape the application of Article 56 TFEU. This can be illustrated through a range of relatively recent cases.

In Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685, a students' union in Dublin provided information about lawful abortion in London. Abortion was illegal in Ireland at the time (and it remains so after the first 12 weeks of pregnancy), subject only to limited exceptions such as situations in which the life of the expecting mother is at risk, and Irish law contained restrictions on the publication of information regarding abortion services in other Member States. The Society for the Protection of Unborn Children (SPUC) took the students' union to court and the Court of Justice was asked for a preliminary ruling. The Court held that the provision of abortion could constitute a service—but, because the students' union was not providing the information on behalf of the economic operators (the abortion clinics), the Irish restrictions were allowed.

Case C-275/92 *Schindler* [1994] ECR I-1039 concerned agents of a German public lottery seeking to promote the lottery in the UK. Since they were in breach of UK lotteries legislation, they were charged with an offence. Several Member States intervening in the case argued that lotteries were not economic activities because they are usually subject to very strict control and often operated by public authorities. The Court of Justice disagreed. It held that lotteries were services provided for remuneration. The Court considered UK legislation prohibiting lotteries to be a non-discriminatory obstacle to the freedom to provide services. As such, however, it could be justified on social and cultural grounds, the concern to prevent fraud, the protection of players, or the maintenance of order in society.

In Case C-268/99 *Jany* [2001] ECR I-8615, the Court of Justice held that a prostitute's services were services provided for remuneration under EU law. The Court reiterated what it had also pointed out previously in *SPUC v Grogan* and *Schindler*, and said that, far from being prohibited in all Member States, prostitution is tolerated or even regulated by most Member States.

Cross-Reference

On *Jany*, see 12.1.3.

In Case C-137/09 *Josemans* [2010] ECR I-13019, the Court of Justice looked into the prohibition of access for non-residents to coffee shops (shops selling cannabis) in the Netherlands. Marketing of cannabis was tolerated, but not legal, in the Netherlands. Therefore the owner of a coffee shop could not rely on the provisions regarding freedom of services for the marketing of cannabis. In relation to the food and drinks he sold in his establishment, however, he could rely on the freedom to provide services and Article 56 TFEU. As such, the national rules, precluding non-residents from entering coffee shops, were indirectly discriminatory because non-residents were more likely to be non-Dutch nationals. However, the rule could be justified by the legitimate aim of combating drug tourism.

This decision seems to contradict prior decisions because illegal, yet tolerated, activities escape the application of the provisions on freedom of services, where they had not previously done so. This can be explained by differences in circumstances, as the Court of Justice distinguished *Josemans* from its previous case law. In *Josemans*, the activity concerned was the marketing of narcotics, which was illegal in all Member States, while the activities concerned in the other cases were not illegal in all Member States, but only in some.

- p. 558 ← From this case law, it seems that a remunerated activity constitutes a service for the purposes of EU law provided that it is legal in some Member States. Restrictions on the freedom to provide such services, however, may be justified.

12.2.2.5 Freedom to receive services

Article 56 TFEU expressly refers to providers of services, but is silent on the recipients of services. Secondary legislation, however, also gives certain rights to the recipients.

Cross-Reference

See 11.1.4 on the rights of EU citizens.

Furthermore, the Court of Justice has confirmed in its case law that Article 56 TFEU applies not only to providers of services, but also to recipients of services.

Joined Cases 286/82 & 26/83 *Luisi and Carbone* [1984] ECR 377 concerned two Italian nationals who were prosecuted for attempting to export more Italian currency than the legal maximum. They argued that they needed it to pay for services as tourists and medical treatment, and that the restrictions as to how much currency they could export infringed EU law. The Court of Justice held that, in order to enable services to be provided, the person providing the services could go to the Member State where the person for whom it is to be provided is established or the person for whom it is to be provided may go to the Member State in which

the service provider is established. While the former possibility is expressly mentioned in Article 57 TFEU, the latter possibility is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons, and capital.

Cross-Reference

On the freedom to move, see 12.2.3.1.

The Court explained as follows.

Joined Cases 286/82 & 26/83 *Luisi and Carbone* [1984] ECR 377, 377

The freedom to provide services includes the freedom to, for the recipient of services, go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments, and that tourists, persons receiving medical treatment and persons travelling for the purposes of education or business are to be regarded as recipients of services.

Another case regarding recipients of services was Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195. A British tourist was violently assaulted when exiting a metro station during a brief visit to Paris. Since the assailants could not be identified, Mr Cowan applied for compensation from the French State. He was denied such compensation since, under French law, this was available to French nationals only. Mr Cohan, relying on the prohibition of discrimination in Article 18 TEU, challenged this denial. The Court observed that tourists must be regarded as recipients of services and, as such, they must not be discriminated against as compared to nationals of the Member State in question. They are entitled to equal treatment, including the protection from harm in the Member State in question and the right to obtain financial compensation provided for by national law when the risk of harm materializes.

p. 559 12.2.3 Rights pertaining to the freedom to provide services

12.2.3.1 The right to move and reside

Cross-Reference

See 11.1.4 on the rights of EU citizens and their families.

The right to move and reside has been discussed in detail in Chapter 11. Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, OJ 1973 L172/14, was the original secondary legislation implementing the rights of entry and residence for service providers and recipients. This Directive has, however, been repealed by the Citizenship Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ..., OJ 2004 L158/77).

It is relevant to note here that although the right of establishment and the freedom to provide services share common features and provisions, they constitute two separate branches of EU law. The meaning of establishment has been explained earlier.

Cross-Reference

See 12.1.2 on the meaning of 'establishment'.

Where establishment means integration into a national economy, the freedom to provide services does not. This freedom to provide services merely enables a self-employed person established in a Member State in which that person is integrated to exercise their activity in another Member State (Case C-55/94 *Gebhard* [1995] ECR I-4165). The provision of services often involves temporary and/or occasional pursuit of economic activities in another Member State, and it does not require the provider, as a matter of principle, to reside in that Member State. It was held in *Gebhard* that establishment and the provision of services are mutually exclusive, therefore distinguishing the rules governing the two types of activity. The key distinguishing feature is duration, and the temporary nature of services must be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodicity, or continuity.

12.2.3.2 Equal treatment

Prohibition of discrimination

Article 56 TFEU

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended ...

Article 57 TFEU

... Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

p. 560 ← Both direct and indirect discrimination are prohibited under Article 57 TFEU. In Case C-288/89 *Gouda* [1991] ECR I-4007, the Court of Justice explained the meaning of direct discrimination in the context of the freedom to provide services.

Case C-288/89 *Gouda* [1991] ECR I-4007

Summary

1. ... Article 59 of the Treaty [now Article 56 TFEU] entails, in the first place, the abolition of any discrimination against a person providing services on the grounds of his nationality or the fact that he is established in a Member State other than the one in which the service is provided.

National rules which are not applicable to services without discrimination as regards their origin are compatible with Community law [now EU law] only if they can be brought within an express derogation, such as that contained in Article 56 of the Treaty [now Article 52 TFEU] ...

A case in which there was such direct discrimination was Case C-17/92 *FDC* [1993] ECR I-2239. Spanish law provided that film distributors were granted a licence to dub foreign language films on condition that they distributed a Spanish-language film at the same time. According to the Court of Justice, this rule breached Article 56 TFEU because it gave preferential treatment to the producers of national films in comparison with producers established in other Member States, since the former had a guarantee that their films would be distributed, whereas the latter were dependent solely on the choice of the Spanish distributors. The obligation to distribute a Spanish film therefore had the effect of protecting undertakings producing Spanish films and, by the same token, it placed undertakings of the same type established in other Member States at a disadvantage. Since the producers of films from other Member States were thus deprived of the advantage granted to the producers of Spanish films, that restriction was discriminatory.

An example of indirect discrimination can be found in Case 33/74 *van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, in which a Dutch rule requiring legal representatives to be resident in the Netherlands was found to breach EU law because, although it could be

objectively justified on the ground of professional rules of conduct connected with the administration of justice, it was disproportionate.

Cross-Reference

See 12.2.1 for a more detailed discussion of *van Binsbergen*.

Non-discriminatory restrictions

As with the other freedoms, the case law of the Court of Justice has evolved to a point at which not only discriminatory rules are prohibited under EU law, but also measures that are liable to prohibit or otherwise impede the activities of a provider of services. The milestone case in this respect is Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221. Dennemeyer was a specialist in patent renewal services, based in the UK. It had clients in Germany for whom it monitored patents and it informed them when renewal fees were due. German law required persons attending to the legal affairs of others, such as the monitoring of patents, to have a licence. Dennemeyer did not have such a licence and a German patent agent, Säger, complained. Dennemeyer argued that German law breached Article 56 TFEU.

The Court of Justice ruled that Article 56 TFEU requires not only the elimination of all discrimination against a person providing services on the ground of their nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where that person lawfully provides similar services. It continued that the freedom to provide services can be limited only by rules that are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, insofar as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which they are established. In particular, those objectives must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services, and they must not exceed what is necessary to attain those objectives.

This ruling confirms that the same principles apply to all EU freedoms. Discrimination is not required for a national measure to constitute an impediment to freedom of movement; Article 56 TFEU captures all national measures that are liable to prohibit, impede, or render less advantageous the activities of a provider of services established in another Member State where that person lawfully provides similar services (Joined Cases C-369 & 376/96 *Arblade* [1999] ECR I-8453).

Note

The *Säger* test

A national measure restricting the freedom to provide services can be justified if:

- it is non-discriminatory;
- it is justified by imperative requirements in the general interest;
- it is suitable to attain the objective it pursues; and
- it does not go beyond what is necessary in order to attain its objective.

Thinking Point

Bearing in mind the case law regarding the free movement of goods, do you think that advertising restrictions could breach Article 56 TFEU? And how could they be justified?

Case C-405/98 *Gourmet* [2001] ECR I-1795 confirmed that a prohibition on advertising, even if it is non-discriminatory, had a particular effect on the cross-border supply of advertising space and thereby constituted a restriction on the freedom to provide services within the meaning of Article 56 TFEU. Such a restriction could be justified, however, by the protection of public health.

p. 562 ← A wide range of national measures could constitute a restriction on the freedom to provide services prohibited under Article 56 TFEU. Correspondingly, however, there is a wide range of public interest grounds that could justify such restrictions, rendering them permissible under EU law.

In Case C-384/93 *Alpine Investments* [1995] ECR I-1141, the restriction in question was the Dutch prohibition on cold calling—that is, the making of phone calls without prior consent in order to offer services. The Court of Justice held that such a prohibition, although it was general and non-discriminatory, could constitute a restriction on the freedom to provide cross-border services. Maintaining the good reputation of the national financial sector, however, could constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.

12.2.4 The Services Directive

The Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L376/36) implements the TFEU provisions on the freedom of establishment and the free movement of services. In its Article 1, the Directive articulates that it establishes

general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

The Directive aims to facilitate these freedoms 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; and
- (4) to establish administrative cooperation between the Member States.

To ease the freedom of establishment, the Directive provides that Member States cannot make access to a service activity or the exercise thereof subject to an authorization scheme unless it does not discriminate and it is justified by an overriding reason relating to the public interest (Article 9). It also contains certain principles regarding the conditions and procedures of authorization. Furthermore, the Directive lists certain requirements that are prohibited under EU law, as well as requirements that need to be evaluated.

To ease the freedom to provide services, the Directive puts in place points of single contact for service providers to complete all formalities (Article 6) and provides that this should be made possible online (Article 8).

Article 16 of the Directive provides that the Member States must ensure free access to and free exercise of a service activity within their territory. They cannot make access to or exercise of a service activity subject to compliance with any requirements, unless these requirements are non-discriminatory, necessary, and proportionate.

The Directive protects the rights of service recipients by guaranteeing their right to use services from another Member State (Article 19), and by providing them with certain information on the service and the service provider (Article 22).

- p. 563 ← To promote the quality of services, the Directive encourages certain voluntary action, such as certification by independent bodies, the drawing up of quality charters, and the drawing up of European standards (Article 26).

Regarding administrative cooperation, the Directive contains the obligation of mutual assistance between the Member States (Articles 28–29). Essential to achieving this is the development of an electronic system to exchange information, which is provided for in Article 34.

12.3 Derogations to the freedom of establishment and the freedom to

provide and receive services

12.3.1 The official authority exception

Article 51 TFEU

The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

Article 62 TFEU

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

Cross-Reference

See 11.2.3 on the rights of workers under EU law.

The Chapter to which Article 51 TFEU refers is Chapter 2, headed 'Right of establishment'. The Chapter referred to in Article 62 TFEU is Chapter 3, headed 'Services'.

In Case *2/74 Reynolds* [1974] ECR 631, the Court of Justice clarified the scope of the official authority exception.

Cross-Reference

On *Reynolds*, see 12.1.1.

The question at issue here was whether, within a profession such as that of *avocat* (lawyer), only those activities inherent in this profession that were connected with the exercise of official authority were excepted from the application of the Chapter on the right of establishment, or whether the whole profession was excepted because it comprised activities connected with the exercise of this authority. The Luxembourg government and the Belgian Bar argued that the whole profession was exonerated from the rules on the right of establishment because it was connected organically with the functioning of the public service of the administration of justice.

The Court of Justice held that the first paragraph of Article 51 TFEU enables Member States to exclude non-nationals from taking up functions involving the exercise of official authority that were connected with an activity as a self-employed person. This need was fully satisfied when the exclusion was limited to those activities that, taken on their own, constituted a direct ← and specific connection with the exercise of official authority. An extension of the exception allowed by Article 51 TFEU to a whole profession would be possible only in cases in which such activities were linked with that profession in such a way that the freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority. This extension was, however, not possible when, within the framework of an independent profession, the activities connected with the exercise of official authority were separable from the professional activity in question taken as a whole.

The Court of Justice has construed the official authority exception narrowly. In Case C-306/89 *Commission v Greece* [1991] ECR I-5863, it held that road traffic experts did not come under the exception in Article 51 TFEU. In Case C-272/91 *Commission v Italy* [1994] ECR I-1409, it was decided that the concession of computer services for the state lottery did not come within the scope of the exception either. Finally, in Case C-47/08 *Commission v Belgium* [2011] ECR I-4105, the Court of Justice ruled that the activities of notaries were not connected with the exercise of official authority within the meaning of Article 51 TFEU.

Thinking Point

These provisions have a role similar to which exception relating to free movement of workers considered in Chapter 11?

12.3.2 Public policy, public security, and public health

Article 52 TFEU

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health ...

Article 62 TFEU

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

Similar to the provisions on the official authority exception, Article 52 TFEU refers to Chapter 2 on 'Right of establishment' and Article 62 refers to Chapter 3 on 'Services'. These derogations are regulated in secondary legislation. For natural persons, that is the Citizenship Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members

^{p. 565} to move and reside freely ← within the territory of the Member States ..., OJ 2004 L158/77), which applies not only to the self-employed, but also to all EU citizens and their families.

Cross-Reference

See 11.3.1 and 11.3.2 on derogations to the free movement of persons for reasons of public policy and public security, and public health, respectively.

For companies, the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L376/36) applies. The Services Directive reflects the Court of Justice's case law, including the principle of proportionality.

Cross-Reference

See 12.2.4 on the Services Directive.

The derogations and their application in the area of freedom of establishment and free movement of services will be illustrated by the relevant case law.

Cross-Reference

For further discussion on the derogations, see 11.3.1 and 11.3.2, and on goods, see 10.8.12.

In Case 79/85 *Segers* [1986] ECR 2375, the Court of Justice held that, as regards the freedom of establishment, Article 52 TFEU allowed different treatment for companies formed in accordance with the law of another Member State, provided that the different treatment was justified on grounds of public policy, public security, or public health. The need to combat fraud could constitute such a ground justifying different treatment. The mere risk of tax avoidance, however, could not justify discriminatory treatment.

Case C-36/02 *Omega* [2004] ECR I-9609 concerned the prohibition of certain laser games involving the simulation of acts of violence against people—in particular, the representation of acts of homicide. The Court of Justice accepted that the protection of human dignity constituted a ground of public policy that could justify the restriction on the freedom to provide services, provided that the measure was proportionate. It was held that, by prohibiting only the commercial exploitation of that variant of the game which involved playing at killing people, the prohibition did not go beyond that necessary to attain the objective pursued—that is, the respect for human dignity—and was therefore justified under EU law.

Case C-158/96 *Kohll* [1998] ECR I-1931 concerned national legislation under which reimbursement of the cost of dental treatment provided by an orthodontist, established in another Member State, was subject to authorization by the person's social security institution. The Court of Justice held that although the freedom to provide services could be limited on grounds of public health, that did not permit the Member States from excluding the public health sector, as a sector of economic activity and from the point of view of freedom to provide services, from the application of the fundamental principle of freedom of movement. The Member States were allowed to restrict the freedom to provide medical and hospital services insofar as the maintenance of a treatment facility or medical service on national territory was essential for the public health and even the survival of the population.

In Case C-429/02 *Bacardi France* [2004] ECR I-6613, the question that arose was whether Article 56 TFEU precluded the prohibition of television advertising for alcoholic beverages marketed in a Member State in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of binational sporting events taking place in other Member States. The Court of Justice ruled that such rules on television advertising constituted a restriction on freedom to provide services because the owners of the advertising hoardings had to refuse advertising for alcoholic drinks if the sporting event was likely to be transmitted in another Member State. Such rules also impeded the provision of broadcasting services since broadcasters from the Member State concerned had to refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic drinks may be visible. The restriction was justified, however, according to the Court, because it pursued an objective relating to the protection of public health—in particular, the objective of combating alcohol abuse.

Finally, it is important to bear in mind that economic aims do not constitute grounds of public policy within the meaning of Article 52 TFEU (Case C-288/89 *Gouda* [1991] ECR I-4007).

Cross-Reference

For a discussion of *Gouda*, see 12.2.3.

Furthermore, in line with the Court's judgment in Case C-158/96 *Kohll* [1998] ECR I-1931, it was held that Article 52 TFEU did not permit a Member State to exclude an entire economic sector from the application of the provisions on freedom of establishment and services (Case C-496/01 *Commission v France* [2004] ECR I-2351).

Review Question

How is this decision in line with the judgment in *Kohll*?

Answer: In *Kohll*, the Court of Justice had ruled to that effect regarding the public health sector, which could not, as a sector of economic activity, be excluded in its entirety from the application of the fundamental principle of freedom of movement.

12.4 Freedom of establishment and the freedom to provide and receive services and Brexit

The transition period post Brexit, during which EU law continued to apply in the UK, including the freedom of establishment and the freedom to provide and receive services, ended on 31 December 2020. This means the UK is no longer participating in the internal market and freedom of establishment and freedom to provide and receive services no longer apply. That being said, some rules replacing the internal market were agreed in the Trade and Cooperation Agreement (TCA).

Cross-Reference

For a detailed discussion of the Trade and Cooperation Agreement see Chapter 16.

In essence, the UK and the EU agreed on a level of openness and freedom beyond that of the World Trade Organization's General Agreement on Trade in Services (GATS), to which they are both parties. That being said, there are some restrictions now that did not exist in the internal market. The new regime does not provide for a complete mutual recognition of professional qualifications for example. Furthermore, there is no longer a system that allows financial services firms to show they meet shared EU standards, which allowed them to establish branches anywhere in the EU. In the UK, where financial services contribute greatly to the economy, such a change is very significant because it has led some business to be moved from London to cities in the EU.

Summary

- The freedom of establishment (Article 49 TFEU):
 - ‘Establishment’, for the purposes of European Union law implies the permanent or semi-permanent settlement for economic reasons and can be enjoyed by both self-employed persons (defined widely) and companies.

p. 567

- Rights include the right of exit, entry, and residence, provided by Directive 2004/38 for the self-employed and by Article 49 TFEU and case law for companies.
- A fundamental right of equal treatment exists, which includes the prohibition of direct or indirect discrimination, and the prohibition of measures which hinder or make less attractive the exercise of the freedom of establishment, unless justified.
- The freedom to provide services (Articles 56–57 TFEU):
 - A cross-border element is required (a wholly internal situation is not covered by the rules).
 - Services should normally be provided for remuneration and may include illegal activities where such activity is legal in some Member States.
 - Whilst Article 56 is silent on the freedom to receive services, case law has confirmed that it includes this corresponding right.
 - The right to move and reside is provided by Directive 2004/38.
 - A fundamental right of equal treatment exists, which includes the prohibition of direct or indirect discrimination, and the prohibition of measures which prohibit, impede, or render less advantageous the freedom to provide services, unless justified.
 - Directive 2006/123 provides general provisions facilitating the exercise of the freedom of establishment and the free movement of services.
- Derogations to the freedom of establishment and freedom to provide and receive services can be found in the official authority exception (Articles 51 and 62 TFEU) and on the grounds of public policy, public security, and public health (Articles 52 and 62 TFEU).

Brexit

- The TCA provides for a certain level of openness and freedom between the UK and the EU but there are restrictions post Brexit that impact establishment and services.

Further Reading

Articles

T Connor, ‘Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement’ (2010) 11 German LJ 159

Detailed discussion of Court of Justice case law on free movement of goods, persons, services and capital within the EU.

WH Roth, ‘From *Centros* to *Überseering*: Free Movement of Companies, Private International Law, and Community Law’ (2003) 52(1) ICLQ 177

In-depth analysis of the issues underlying *Centros*, as well as further developments.

Books

M Andenas and WH Roth, *Services and Free Movement in EU Law* (Oxford: Oxford University Press, 2003)

Critical analysis of the recent state of EU services law as well as contribution to the development of the right to provide services.

C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 6th edn (Oxford: Oxford University Press, 2019)

Thorough analysis of relevant legislation and case law, with critical commentary, background, historical developments, and visual aids.

P Craig and G de Búrca, *EU Law: Text, Cases, and Materials*, 7th edn (Oxford: Oxford University Press, 2020), esp ch 23

Focused and accessible account of relevant cases and materials.

p. 568 ← A Kaczorowska, *European Union Law*, 4th edn (Abingdon: Routledge-Cavendish, 2016), esp ch 24

Comprehensive, but accessible, source of EU law.

Questions

Jacques owns a successful patisserie in Paris, France renowned for authentic French pastries. The business has been successful over a number of years and he is keen to capitalize on the recent baking trend in Belgium. Jacques has identified suitable premises in Antwerp, Belgium where he can expand and establish a new patisserie, recruiting skilled local staff to work as pastry chefs. However, Jacques is unfamiliar with Belgian leasehold arrangements and contacts the (fictitious) Belgian Food Manufacturers Association who advertise free advice on such matters. When Jacques receives a letter from the Association informing him he is ineligible for free advice as he is not a Belgian national, he begins to wonder about his rights.

Advise Jacques on his rights under EU law in relation to all aspects of this scenario.

Visit the online resources for an outline answer to this

question <https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-12-guidance-on-answering-assessment-questions?options=showName>, **and additional self-test questions** <https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-12-self-test-questions?options=showName> **with feedback.**

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