Tiesības veikt uzņēmējdarbību un pakalpojumu brīva aprite

22

FREEDOM OF ESTABLISHMENT AND TO PROVIDE SERVICES

1 CENTRAL ISSUES

In addition to the category of workers, the TFEU has two separate chapters on self-employ persons who move on a permanent or temporary basis between Member States. These are th chapters on freedom of establishment and freedom to provide services.

The central principles governing freedom of establishment and the free movement of servic are laid down in the TFEU and have been developed through case law. Important developmen have also been brought about through secondary legislation in sectors such as insurance, broad casting, financial services, electronic commerce, telecommunications, and other 'services o general economic interest'. However, with the exception of the two general directives mentione in (iii), this chapter focuses on the broad constitutional principles applicable to every sector an not on the particularities of the secondary legislation in specific sectors.

Two important general pieces of secondary legislation dealing with services and establishme were adopted in 2005 and 2006 respectively. In 2005, a consolidating directive on the recogni tion of professional qualifications replaced most of the previous general and sectoral legislatio on this issue.[1] And in 2006, after a lengthy and politically heated debate, a general directive o services in the internal market was adopted.[2]

Articles 49–54 TFEU (ex Articles 43–48 EC) on freedom of establishment require the removal restrictions on the right of individuals and companies to maintain a permanent or settled pla of business in a Member State. Establishment is defined as 'the actual pursuit of an economi activity through a fixed establishment in another Member State for an indefinite period'.[3]

Articles 56–62 TFEU (ex Articles 49–55 EC) on the free movement of services require the remov of restrictions on the provision of services between Member States, whenever a cross-border el ment is present. This element can result from the fact that the provider is not established in the sta where the services are supplied, or that the recipient has travelled to receive services in a Memb State other than that in which he or she is established. A movement of services within the scope Articles 56–57 TFEU (ex Articles 49–50 EC) may also occur without the provider or the recipie

[1] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition professional qualifications [2005] OJ L255/22.

[2] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in t internal market [2006] OJ L376/36.

[3] Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* [1991] ECR I-3905, [20].

moving, for example, where the provision of the service takes place by telecommunication or electronically.[4]

vi. The Treaty provisions governing the free movement of services are residual, in that they apply only insofar as the provisions concerning capital,[5] persons, or goods do not apply. Nonetheless it is often difficult, in contexts such as broadcasting or telecommunications, to separate the issues concerning goods from those concerning services,[6] and several of the Treaty freedoms are often affected by a single national measure.[7]

vii. Although the principle of non-discrimination in Article 18 TFEU (ex Article 12 EC) is an important aspect of these two Treaty chapters,[8] the ECJ has ruled, just as in the case of the other internal market freedoms, that non-discriminatory obstacles are also *prima facie* caught by the relevant Treaty provisions. However, the concept of 'discriminatory measures' is not sharply defined, and the distinction between discriminatory and non-discriminatory measures is often unclear.

viii. In addition to the Treaty-based exceptions to freedom of movement on grounds of public policy, security, and health, the ECJ has ruled, just as in the cases of goods, workers, and citizens, that a range of other public-interest justifications may be invoked by Member States to restrict the free movement of services and freedom of establishment.

2. DIFFERENCES AND COMMONALITIES BETWEEN THE FREE MOVEMENT OF PERSONS, SERVICES, AND ESTABLISHMENT

COMPARING THE TREATY CHAPTERS

There are several points of similarity between the various chapters on the free movement of persons and services, including also now the Treaty provisions on EU citizenship. Advocate General Mayras in *Van Binsbergen* pointed out that the principle of equal treatment on grounds of nationality underpinned the Treaty provisions on workers, services, and establishment alike.[9] They are comparable in that each requires equal treatment for persons who have *settled* in a Member State after exercising their freedom of movement,[10] the essential difference being whether they are working in an employed or a self-employed capacity.[11]

[4] See, eg, Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

[5] See, eg, Case C-423/98 *Albore* [2000] ECR I-5965.

[6] See, eg, Case C-390/99 *Canal Satélite Digital v Administracion General del Estado* [2002] ECR I-607, [31]-[33]. For a case in which the ECJ treated the goods and services dimensions of a restriction on alcohol advertising separately, but reached the same conclusion in each case, see Case C-405/98 *Konsumentombudsmannen v Gourmet International Products* [2001] ECR I-1795. For fishing permits as services rather than goods see Case C-97/98 *Jägerskiöld v Gustafsson* [1999] ECR I-7319. For an early case on the relationship between goods and services see Case 155/73 *Sacchi* [1974] ECR 409.

[7] See, eg, Case C-150/04 *Commission v Denmark* [2007] ECR I-1163; Case C-522/04 *Commission v Belgium* [2007] ECR I-5701, including the Opinion of AG Stix-Hackl concerning taxation of pension benefits and insurance.

[8] Case 2/74 *Reyners v Belgium* [1974] ECR 631, [15]-[16].

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

[10] See, eg, Case C-345/05 *Commission v Portugal* [2006] ECR I-10633; Case C-104/06 *Commission v Sweden* [2007] ECR I-671, dealing simultaneously with Arts 45 and 49 TFEU on workers and establishment, and Art 21 on citizenship.

[11] AG Mayras in Case 2/74 *Reyners* (n 8) and the ECJ in Case C-107/94 *Asscher v Staatsecretaris van Financiën* [1996] ECR I-3089; Case C-268/99 *Jany v Staatssecretaris van Justitie* [2001] ECR I-8615, [68]-[70], in the context of the EU-Poland Association Agreement.

The overlap between workers (Article 45) and temporary service providers (Article 56) can be seen in a series of cases concerning so-called 'posted workers' in which the ECJ has distinguished the two by ruling that 'workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work'.[12]

The similarities between establishment and services are evident when considering at what stage a self-employed person providing regular services into or within a Member State may be considered to be sufficiently connected with that state to be established, rather than merely providing services there.[13] The factors which go to distinguish the temporary provision of services from the exercise of the right of establishment in a Member State were addressed by the ECJ in *Gebhard*:[14]

> 25. The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see *Reyners* para. 21).
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> 26. In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that he is to pursue his activity there on a temporary basis.
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> 27. As the Advocate General has pointed out, the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.

The crucial features of establishment are the 'stable and continuous basis' on which the economic or professional activity is carried on, and the fact that there is an established professional base within the host Member State.[15] For the provision of services, the temporary nature of the activity is to be determined by reference to its 'periodicity, continuity and regularity', and providers of services will not be deemed to be 'established' simply by virtue of the fact that they equip themselves with some form of infrastructure in the host Member State.[16] The ECJ's graduated distinction between establishment and temporary service provision has been adopted by the consolidating directive on the recognition of professional qualifications in 2005.[17]

In the past, it was suggested that Article 56 TFEU was more concerned with liberalizing the mobility of services and setting up a single market,[18] and had more in common with the Treaty provisions on free movement of goods[19] than with the Treaty provisions on workers and establishment,

[12] Case C-49/98 *Finalarte Sociedade Construçao Civil v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I-7831, [22]-[23].

[13] Case 205/84 *Commission v Germany* [1986] ECR 3755, [22]; Case 33/74 *Van Binsbergen* (n 9) [13]; Opinion of AG Jacobs in Case C-76/90 *Säger v Dennemeyer & Co Ltd* [1991] ECR I-4221.

[14] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

[15] Where a person or company establishes in a Member State to provide services to recipients there for an indefinite period, this does not fall within the Treaty provisions on freedom to provide services: Case C-70/95 *Sodemare v Regione Lombardia* [1997] ECR I-3395.

[16] Case C-215/01 *Schnitzer* [2003] ECR I-14847. Providers of services cannot be made subject to a particular type of mandatory 'employment' relationship, since that would deprive them of their self-employed status: see Case C-398/95 *SETTG v Ypourgos Ergasias* [1997] ECR I-3091; Case C-255/04 *Commission v France* [2006] ECR I-5251.

[17] Art 5(2) of Dir 2005/36 [2005] OJ L255/22, discussed below.

[18] AG Warner in Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833, 872.

[19] AG Jacobs in Case C-76/90 *Säger* (n 13) 4234-4235, and AG Gulmann in Case C-275/92 *HM Customs and Excise v Schindler* [1994] ECR I-1039, 1059; J Snell, *Goods and Services in EC Law* (Oxford University Press, 2002).

which were based primarily on the principle of non-discrimination. In recent years, however, a robust approach has been adopted to the rights of establishment (and workers) too, placing as much emphasis on liberalization and the removal of obstacles as on equal treatment, thereby bringing the law on the different freedoms closer together.[20] It will be evident from the discussion in this chapter that the gradual extension of EU rules to cover genuinely non-discriminatory restrictions on establishment and services has reached increasingly into sensitive areas of national social and economic policy, often with a deregulatory emphasis, and that many controversies have arisen as a result.

(B) ARE THE FREEDOMS HORIZONTALLY APPLICABLE?

We saw in Chapter 21 how the ECJ ruled that, unlike Article 34 TFEU on the free movement of goods, the provisions of Article 45 are binding not only on the state but also on private bodies.[21] In the field of services, the ECJ ruled in the early case of *Walrave and Koch* that the Treaty rules applied not only 'to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services'.[22] It remained unclear however, even after the case of *Angonese* in the field of free movement of workers which explicitly deemed Article 45 TFEU to be applicable to private persons,[23] whether the Treaty provisions on establishment and services were equally fully horizontally applicable, in the sense of imposing legal obligations on all individuals and not just on powerful, self-regulating collective actors such as sporting organizations, which possess powers akin to public law. In *Wouters* the ECJ applied the *Walrave* ruling to a regulatory measure adopted by the Netherlands Bar Council concerning partnerships between barristers and accountants, but gave no further guidance on the applicability of the Treaty rules to purely individual private conduct.[24] The ECJ returned to this question in the famous *Laval* and *Viking* judgments,[25] where it ruled that Articles 49 and 56 TFEU were applicable to the organization of collective action by trade unions:

Case C-438/05 International Transport Workers Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line ABP and OÜ Viking Line Eesti
[2007] ECR I-0779

[Note Lisbon Treaty renumbering: Arts 39, 43, and 49 EC are now Arts 45, 49, and 56 TFEU]

THE ECJ

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

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[20] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; Case C-55/94 *Gebhard* (n 14); Case C-400/08 *Commission v Spain*, 24 Mar 2011.

[21] Case C-415/93 *Bosman* [1995] ECR I-4921, [83]-[84]; Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, [32].

[22] Case 36/74 *Walrave and Koch* [1974] ECR 1405.

[23] Case C-281/98 (n 21). The employer in *Angonese* was a bank, but it might be argued that the field of free movement of workers differs from the other freedoms in that Art 7(4) of Reg 1612/68 expressly applies the Treaty rules to contracts between individual employers and employees.

[24] Case C-309/99 *Wouters et al v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, [120]; Case C-411/98 *Ferlini v CHL* [2000] ECR I-8081, [50].

[25] Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-11767, [98]-[100].

adopted by private persons, limiting application of the prohibitions laid down by these [Treaty] articles to acts of a public authority would risk creating inequality in its application (see, by analogy, *Walrave and Koch*, paragraph 19; *Bosman*, paragraph 84; and *Angonese*, paragraph 33).

....

57 [T]he 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.

...

60. In the present case, it must be borne in mind that... the collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organisations which are not public law entities but exercise the legal autonomy conferred on them, inter alia, by national law.

61. It follows that Article 43 EC must be interpreted as meaning that... it may be relied on by a private undertaking against a trade union or an association of trade unions.

62. This interpretation is also supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State (see Case C–265/95 *Commission v France*, paragraph 30, and *Schmidberger*, paragraphs 57 and 62).

63. The interpretation set out in paragraph 61 of the present judgment is also not called into question by the fact that the restriction at issue in the proceedings before the national court stems from the exercise of a right conferred by Finnish national law, such as, in this case, the right to take collective action, including the right to strike.

64. It must be added that, contrary to the claims, in particular, of ITF, it does not follow from the case-law of the Court... that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.

65. There is no indication in that 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.

The case, together with the *Laval* ruling,[26] clearly states that the horizontal applicability of the Treaty provisions on establishment and services is not confined to entities exercising a regulatory task or having quasi-legislative powers. However, it is not entirely clear from the judgments just how far the horizontal applicability of the Treaty rules to 'private parties' extends, and in particular whether there is some threshold requirement as regards the scope, impact, or collective nature of private power before the Treaty rules apply. On the one hand, the reference in paragraph 62 to 'actions by individuals' in the context of free movement of goods could be taken to suggest that no collective dimension will be required, while on the other hand the emphasis in paragraph 65 on the power of trade unions to participate in the collective regulation of labour could be taken to suggest the contrary. Future rulings may reveal how far the ECJ is prepared to push the scope of the Treaty provisions on the free movement of services and establishment towards full horizontal applicability, but for now some uncertainty remains.

[26] Case C-341/05 (n 25).

(c) THE 'OFFICIAL AUTHORITY' EXCEPTION

Article 51 TFEU (ex Article 45 EC), which is extended by Article 62 TFEU to cover the chapter on services, states that the provisions of the chapter on freedom of establishment 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'. This provision has a similar role to that of the public-service derogation for workers in Article 45(4) TFEU. Advocate General Mayras in *Reyners* defined official authority as implying 'the power of enjoying the prerogatives outside the general law, privileges of official power, and powers of coercion over citizens'.[27]

The wording of Article 51 refers to those 'activities' which are connected with the use of official power, rather than to professions or vocations within which official authority might, under certain circumstances, be exercised. In *Reyners*, the ECJ was asked whether the whole of the legal profession of *avocat* was exempt from the Treaty rules.[28] According to the Luxembourg Government, the whole profession should be excepted because it was 'connected organically' with the public service of the administration of justice. The Court considered that it was possible to exclude a whole profession on the basis of Article 51 'only in cases where such activities were linked with that profession in such a way that 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'.[29] If, however, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole, the exception allowed by Article 51 will not apply. In *Reyners* itself the professional activities of an *avocat*, involving regular and official contact and even compulsory cooperation with the courts, were held not to involve the necessary connection with the exercise of official authority, since the discretion of the judicial authority and the free exercise of judicial power were left intact.

The Court has continued to interpret the official-authority exception narrowly in response to Member States' attempts to invoke it for a wide range of professions.[30] In a recent case involving infringement proceedings against six Member States, the ECJ has been asked whether the profession of notary can be excluded from the scope of the freedom of establishment rules in Article 49.[31] The Member States concerned argued that since the core of a notary's activities consist in the power to authenticate, which entails the exercise of official authority, it falls within the scope of Article 51(1) and thereby permits the exclusion of non-nationals. While Advocate General Cruz Villalón agreed that the power of authentication is 'connected directly and specifically with the exercise of official authority' and that satisfied the conditions articulated in *Reyners* since it constitutes 'the inseparable core of the functions performed by notaries', he was unwilling to accept that this could permit the application of a nationality test. The ECJ however disagreed, and in a lengthy reasoned judgment ruled that the activities of notaries as defined in the Belgian legal system were not connected with the exercise of official authority within Article 51.[32]

[27] Case 2/74 (n 8) 664.

[28] Ibid.

[29] Ibid [46].

[30] Case C-42/92 *Thijssen v Controledienst voor de Verzekeringen* [1993] ECR I-4047 on the post of commissioner of insurance companies; Case C-306/89 *Commission v Greece* [1991] ECR I-5863 on traffic accident experts; Case C-272/91 *Commission v Italy* [1994] ECR I-1409 on operating a computerization system for a national lottery; Case C-263/99 *Commission v Italy* [2001] ECR I-4195 on transport consultants; Case C-114/97 *Commission v Spain* [1998] ECR I-6717; Case C-355/98 *Commission v Belgium* [2000] ECR I-1221; Case C-283/99 *Commission v Italy* [2001] ECR I-4363 on private security activities; Case C-160/08 *Commission v Germany*, 29 Apr 2010, on ambulance service activities; Case C-438/08 *Commission v Portugal* [2009] ECR I-10219 on the activity of vehicle inspection.

[31] Case C-61/08 *Commission v Greece*; Case C-54/08 *Commission v Germany*; Case C-53/08 *Commission v Austria*; Case C-51/08 *Commission v Luxembourg*; Case C-50/08 *Commission v France*; Case C-47/08 *Commission v Belgium*, 4 May 2011.

[32] Ibid [81]–[124].

(5) THE PUBLIC POLICY, SECURITY, AND HEALTH EXCEPTIONS

Article 52 in the chapter on establishment and Article 62 in the chapter on services provide that the provisions of those chapters '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'. In their application to natural persons these derogations are regulated, together with their application to other categories of EU citizen and their families, by the provisions of Directive 2004/38.[33] In their application to companies the derogations are governed by the Treaty and by the general principles of EU law,[34] and more recently by the relevant provisions of the Services Directive.[35] The general principles of EU law articulated by the ECJ include the principles of non-discrimination and of proportionality, which also govern the justification of public-interest-based restrictions on freedom of movement which have been judicially developed alongside the Treaty derogations.[36] Further, the ECJ has ruled that Article 52 does not permit a Member State to exclude an entire economic sector from the application of the principles on freedom of establishment and services.[37]

(6) LEGISLATION GOVERNING ENTRY, RESIDENCE, AND EXPULSION

As we saw in Chapter 21, Directive 2004/38 governs the terms and conditions of entry of all EU citizens and their families into a host Member State, as well as their right to remain there after having pursued an economic activity, and the conditions under which their rights may be restricted or revoked.[38] This includes self-employed persons and service providers, so that the discussion of Directive 2004/38 in Sections 6 and 8 of Chapter 21 is equally relevant here.

The provisions of the earlier legislation governing self-employed persons, Directive 73/148, which regulated rights of 'abode' and rights of temporary residence for the duration of the services, have been replaced with the simple right of residence for self-employed persons in Article 7(a) of Directive 2004/38. Further, as we shall see in Chapter 23 on citizenship, even where a self-employed person is no longer engaged in economic activity, the right of residence as an EU citizen continues unless that person has, through lack of sufficient resources, become an unreasonable burden on the host-state.

(3) THE RIGHT OF ESTABLISHMENT

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

[33] Ch 21, Section 8.

[34] For examples of the application of Arts 52 and 62 TFEU to companies see Case 3/88 *Commission v Italy* [1989] ECR 4035; Case 352/85 *Bond van Adverteerders v Netherlands* [1988] ECR 2085; Case C-114/97 *Commission v Spain* [1998] ECR I-6717; Case C-355/98 *Commission v Belgium* [2000] ECR I-1221. For a failed attempt see Case C-171/02 *Commission v Portugal* [2004] ECR I-5645.

[35] For further discussion see Section 6(b) below.

[36] On the role of EU law in a situation which was not covered by the Treaty's free-movement provisions, given the special geographical status of the British Channel islands, see Case C-171/96 *Pereira Roque v Governor of Jersey* [1998] ECR I-4607.

[37] Case C-496/01 *Commission v France* [2004] ECR I-2351.

[38] Dir 2004/38 replaced the previous Dir 73/148 in this respect.

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.

Paragraph one requires the *abolition of restrictions* on freedom of primary and secondary establishment, whereas paragraph two provides for the right to pursue self-employed activities *on an equal footing* with the nationals of the Member State of establishment. The reference to capital acknowledges that there is a separate chapter on the free movement of capital, which has been subject to a different and more gradual regime of liberalization.[39]

Article 49 on its face appears to give rights only to persons in a Member State other than the Member State of their nationality. Secondly, it appears to prohibit discrimination, and to imply that its requirements are satisfied if the person exercising the right of establishment is treated in the same way as a national. However, we shall see that Article 49 has been given a broader reading on these two points. First, nationals may in appropriate circumstances rely on Article 49 against their own state, and secondly Article 49 prohibits not merely unequal treatment but also any unjustified obstacles to freedom of establishment.

Article 50 TFEU originally required the Council to draw up a General Programme for the abolition of restrictions on establishment (which it did in 1961[40]) and to issue directives to achieve freedom for particular activities. Article 53 now requires the European Parliament and the Council to issue directives, acting in accordance with the ordinary legislative procedure, for the mutual recognition of diplomas and other qualifications, and Article 54 places companies in the same position as natural persons for the purpose of the application of this chapter of the Treaty.

THE EFFECT OF ARTICLE 49

In 1974 in *Reyners*, the ECJ ruled that Article 49 TFEU was directly effective, despite the fact that the conditions for direct effect set out in *Van Gend en Loos* were arguably not met,[41] and despite the Council's failure to adopt the necessary implementing legislation envisaged by the Treaty provisions. Such legislation had not yet been adopted at the time of *Reyners*, partly on account of the slow progress of legislation in the Council in the aftermath of the Luxembourg Accords, and partly on account of the opposition within Member States to the process of opening the professions, and in particular the legal profession, to non-nationals.[42]

Reyners, a Dutch national who had obtained his legal education in Belgium, was refused admission to the Belgian Bar solely because he lacked Belgian nationality. The ECJ ruled that, despite the Treaty requirement that directives should be adopted, Article 49 laid down a precise result which was to be achieved by the end of the transitional period, namely the requirement of non-discrimination on grounds of nationality. The fulfilment of this result had to be made easier by, but was not made dependent on, the implementation of a programme of progressive measures.[43] Thus he could invoke Article 49 directly. The ECJ acknowledged, however, that the directives had 'not lost all interest since

[39] Ch 20.
[40] OJ Spec Ed, Second Ser, IX.
[41] Case 2/74 (n 8); see Ch 7 on direct effect.
[42] Ibid, AG Mayras, 658.
[43] Ibid [26].

they preserve an important scope in the field of measures intended to make easier the effective exercise of the right of freedom of establishment'.[44]

However, even before the relevant secondary legislation had begun to be adopted, it was argued to the ECJ that where a national restriction was based not on nationality but on the adequacy of qualifications, Article 49 could be relied on by an EU national seeking to practise a profession in another Member State. In *Thieffry*, a Belgian national who obtained a doctorate in law in Belgium and practised as an advocate in Brussels subsequently obtained French university recognition of his qualifications as equivalent to a degree in French law, and a certificate of aptitude for the profession of *avocat*.[45] He was refused admission to the training stage as an advocate at the Paris Bar on the ground that he lacked a degree in French law. According to the ECJ, since he had already obtained what was recognized in France, for both professional and academic purposes, to be an equivalent qualification and had satisfied the necessary practical training requirements, the state authorities were not justified in refusing to admit Thieffry to the Bar solely on the ground that he did not possess a French qualification, despite the absence of EU directives in the field.[46]

In subsequent cases the ECJ went further still and ruled that Article 49 precluded the competent national authorities from simply refusing, without further explanation, to allow nationals of another Member State to practise their trade or profession on the ground that their qualification was not equivalent to the corresponding national qualification. Instead, the Treaty provisions imposed specific, positive obligations on national authorities and professional bodies to take steps to secure the free movement of workers and freedom of establishment, even in the absence of EU or national legislation providing for equivalence or for the recognition of qualifications. In *Heylens* the ECJ ruled in the case of a Belgian football trainer working in France whose application for recognition of the equivalence of his Belgian diploma was refused by the French Ministry of Sport, that Member States were entitled, in the absence of harmonizing directives, to regulate the knowledge and qualifications necessary to pursue a particular occupation. However:

> [T]he procedure for the recognition of equivalence must enable the national authorities to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. The assessment of the equivalence of the foreign diploma must be effected exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training which the diploma certifies that he has carried out.[47]

Further, where employment was dependent on possession of a diploma, it had to be possible for a national of a Member State to obtain judicial review of a decision of the authorities of another Member State, and to ascertain the reasons for refusing to recognize the equivalence of a diploma.

In *Vlassopoulou*, a Greek national who had obtained a Greek law degree and had practised German law for several years in Germany applied for admission to the Bar there. Her authorization to practise was rejected on the ground that she lacked the necessary qualifications because she had not passed the relevant German examinations. The ECJ began by ruling that even the non-discriminatory application of national qualification requirements could hinder the exercise of freedom of establishment:

[44] Ibid [31].
[45] Case 71/76 *Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.
[46] Ibid [17]; Case 11/77 *Patrick v Ministre des Affairs Culturelles* [1977] ECR 1199.
[47] Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, [13].

> Consequently, a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.[48]

Thus the national authorities must consider any education and training received by the holder of the diploma or certificate, and must compare the knowledge and skills acquired with those required by the domestic qualification.[49] If they are found to be equivalent, the state must recognize the qualification, and if they are not so found, the state must assess whether any knowledge or practical training the person may have acquired in the host Member State is sufficient to make up for what was lacking in the qualification.

Vlassopoulou highlights the extent to which the effectiveness of Article 49 was bolstered by the ECJ in the years following *Reyners*, where the ECJ held that in the absence of legislation only the core non-discrimination requirement of the Article was directly effective. By the time of *Vlassopoulou* it had been held that, despite the diversity of national educational and training systems and despite the lack of EU coordinating legislation, Article 49 TFEU imposed a precise obligation on national authorities to examine thoroughly the basis for the qualification held by an EU national, to inform the person concerned of the reasons if the qualification was deemed not to be equivalent, and to respect their rights in the process. The effect was that a Member State could no longer simply refuse someone entry to a profession or to practise a trade solely on the ground that he or she lacked the domestic qualification, even where there was as yet no domestic recognition of the equivalence of the foreign qualification.[50]

The approach adopted by the ECJ in *Vlassopoulou* closely reflected the provisions of Council Directive 89/48 on the mutual recognition of higher education diplomas which had been adopted around that time,[51] although not in time to be applicable in the case of *Vlassopoulou*. Directive 89/48 has since been replaced by consolidating Directive 2005/36, which embodies the same approach and the same principles.[52] Further, as we shall see, the principles articulated in the *Vlassopoulou* and *Heylens* cases continue to apply to situations which are not covered by the secondary legislation.

(3) THE SCOPE OF ARTICLE 49

(i) *Non-Discriminatory Restrictions*

It was noted above that the wording of Article 49 emphasizes the requirement of equal treatment of nationals and non-nationals. In some of its earlier case law, such as *Commission v Belgium*[53] and *Fearon*,[54] the ECJ appeared to suggest that, in the absence of discrimination, rules which restricted

[48] Case 340/89 *Vlassopoulou v Ministerium für Justiz, Bundes und Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357, [16].

[49] See also Case C-104/91 *Borrell* [1992] ECR I-3001.

[50] See also Case C-164/94 *Arantis v Land Berlin* [1996] ECR I-135.

[51] See (n 248) and text below. For proceedings brought against Italy concerning inadequate implementation of Dir 89/48 in relation to lawyers see Case C-145/99 *Commission v Italy* [2002] ECR I-2235.

[52] (N 1) and (nn 256–257).

[53] Case 221/85 *Commission v Belgium* [1987] ECR 719 on clinical biology services.

[54] Case 182/83 *Fearon v Irish Land Commission* [1984] ECR 3677, on a residence requirement for exemption from compulsory purchase of land. For other cases concerning nationality and residence restrictions on land use see Case 305/87 *Commission v Greece* [1989] ECR 1461; Case C-302/97 *Konle v Austria* [1999] ECR I-2651.

the right of establishment would not violate Article 49. However, in keeping with the pattern of its case law on the free movement of goods, services, and workers, the ECJ has since moved away from the emphasis on unequal treatment.

In *Klopp*, a German lawyer who was refused admission to the Paris Bar on the sole ground that he already maintained an office as a lawyer in another Member State successfully challenged the rule under Article 49, even though the rule applied equally to nationals and non-nationals alike.[55] The ECJ ruled that Article 49 specifically guarantees the freedom to set up more than one place of work in the EU and there were less restrictive ways, given modern transport and telecommunications, of ensuring that lawyers maintain sufficient contact with their clients and the judicial authorities, and obeyed the rules of the profession.

Klopp was not of itself authority for a general proposition that even non-discriminatory rules may breach Article 49, given that Article 49 expressly guarantees the right to secondary establishment which was being denied in that case,[56] but it demonstrated that freedom of establishment requires more than equal treatment in certain circumstances. In *Wolf*,[57] *Stanton*,[58] and *Kemmler*,[59] the ECJ ruled that certain indistinctly applicable national rules on social-security exemptions for the self-employed were impermissible, because they constituted an unjustified impediment to the pursuit of occupational activities in more than one Member State, even though the rules contained no direct or indirect discrimination on grounds of nationality.[60] Similarly in cases concerning non-discriminatory registration requirements, the ECJ found a violation of Article 49 in the absence of objective justification.[61]

The *Gebhard* ruling gave the clearest indication of the Court's broad interpretation of Article 49 TFEU.[62] In this case the ECJ declared that the same principles underpin all of the Treaty provisions on freedom of movement, and stated that the provisions on goods,[63] services,[64] workers,[65] and establishment should be similarly construed. *Gebhard* concerned a German national against whom disciplinary proceedings were brought by the Milan Bar Council for pursuing a professional activity as a lawyer in Italy on a permanent basis. He had set up his chambers using the title *avvocato*, although he had not been admitted as a member of the Milan Bar and although his training, qualifications and experience had not formally been recognized in Italy. Having established that in the absence of EU rules, Member States may justifiably subject the pursuit of self-employed activities to *bona fide* rules relating to organization, ethics, qualifications, titles, etc, the ECJ continued:[66]

[55] Case 107/83 *Ordre des Avocats v Klopp* [1984] ECR 2971.

[56] See also Case 96/85 *Commission v France* [1986] ECR 1475; Case C-351/90 *Commission v Luxembourg* [1992] ECR I-3945, condemning other similar single-practice rules for doctors, dentists, and vets; Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351; Case C-162/99 *Commission v Italy* [2001] ECR I-541.

[57] Cases 154-155/87 *RSVZ v Wolf* [1988] ECR 3897.

[58] Case 143/87 *Stanton v INASTI* [1988] ECR 3877.

[59] Case C-53/95 *INASTI v Kemmler* [1996] ECR I-704; Case C-68/99 *Commission v Germany* [2001] ECR I-1865 concerning social insurance law affecting artists. Compare however Case C-249/04 *Allard v INASTI* [2005] ECR I-4535; Case C-565/08 *Commission* v *Italy*, 29 Mar 2011, in which maximum tariffs applicable to lawyers' fees were held not to restrict the freedom of establishment or to provide services.

[60] Case 143/87 *Stanton* (n 58) [9].

[61] Cases 292/86 *Gullung v Conseil de l'Ordre des Avocats* [1988] ECR 111; Case 271/82 *Auer v Ministère Public* [1983] ECR 2727, [18].

[62] Case C-55/94 *Gebhard* (n 14).

[63] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649; Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097; Cases C-34-36/95 *de Agostini* [1997] ECR I-3843; Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* [2000] ECR I-151. See more generally the discussion in Ch 19.

[64] See, eg, Case C-384/93 *Alpine Investments* (n 4); Cases C-369 and 376/96 *Arblade* [1999] ECR I-8453.

[65] Case C-415/93 *Bosman* (n 21), [82]-[84].

[66] Ibid [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.

There is no mention in this paragraph of any requirement of discrimination, whether direct or indirect. Instead, any national rule which is liable to hinder or make less attractive the exercise of the fundamental' freedom of establishment (or any of the other fundamental freedoms) may violate the Treaty unless it is justified by an imperative requirement and applied in a proportionate and non-discriminatory manner.[67] Moreover while rules which create 'equally applicable' obstacles to freedom of establishment often impose a heavier burden in practice on non-nationals than on nationals,[68] and hence could be classified as indirectly discriminatory, this is not true of all such rules and some are genuinely equally applicable in law and in fact. The essence of *Gebhard*, adopting an obstacle approach rather than a discrimination approach, has been affirmed by the Court on many occasions since.[69] A recent example is to be found in the *Commission v Spain* case concerning a Catalonian retail law involving stringent regulation of larger retail establishments (*hipermercados*), in which the ECJ ruled that:[70]

> the concept of 'restriction' for the purposes of Article 43 EC [now Art 49 TFEU] covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade.[71]

The Commission had argued that the legislation in practice favoured typically smaller Spanish establishments and harmed operators from other Member States, who preferred larger establishments. The Court, however, following the Opinion of Advocate General Sharpston, found that the Commission had not demonstrated that the legislation had an indirectly discriminatory effect. Nonetheless, since Article 49 TFEU prohibits even non-discriminatory measures that hinder the exercise of the freedom of establishment, for example by affecting access to the market, the legislation still had to satisfy the requirements of proportionality, which it failed to do in several respects. The strict scrutiny applied by the ECJ to what was agreed to be non-discriminatory Spanish legislation here clearly illustrates the powerfully liberalizing approach adopted by the Court to the economic freedoms of the Treaty.

It should be noted, however, that the discriminatory nature of a restriction is not irrelevant, for several reasons. First, if a restriction on freedom of establishment discriminates directly on grounds of nationality, it will, without further question, fall within the scope of the Treaty prohibition. By comparison, not every non-discriminatory restriction will constitute a sufficient hindrance, by analogy

[67] See also Case C-108/96 *MacQuen* [2001] ECR I-837, [26]-[27].

[68] G Marenco, 'The Notion of a Restriction on the Freedom of Establishment and the Provisions of Services in the Case Law of the ECJ' (1991) 11 YBEL 111.

[69] See, eg, Case C-108/96 *MacQuen* (n 67); Case C-212/97 *Centros* (n 20), [34]; Case C-289/02 *AMOK Verlags GmbH v A & R Gastronomie GmbH* [2003] ECR I-15059, [36]; Case C-8/02 *Leichtle v Bundesanstalt für Arbeit* [2004] ECR I-2641, [32]; Case C-346/04 *Conijn v Finanzamt Hamburg-Nord* [2006] ECR I-6137; Case C-433/04 *Commission v Belgium* [2006] ECR I-10653; Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, and P Stanley, Note (1996) 33 CMLRev 713.

[70] Case C-400/08 *Commission v Spain* (n 20).

[71] Ibid [64]. The ECJ has begun to make increasing use of this concerning phrase 'access to the market', which is to be found in the *Alpine Investments* case regarding services at (n 4). See, eg, Case C-518/06 *Commission v Italy* [2009] ECR I-3491; Case C-89/09 *Commission v France*, 16 Dec 2010; Case C-169/07 *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung and Oberösterreichische Landesregierung* [2009] ECR I-1721.

with the case law on goods[72] and on workers, as in *Graf*.[73] Secondly, it seems that, at least in certain contexts, if a restriction is directly or deliberately discriminatory, the Member State may rely for justification only on the express derogations on grounds of public policy, security, and health in Article 52 TFEU.[74] The Court's ruling in *Laval* seems to confirm this position, since it established that a Swedish law which discriminated against collective agreements concluded under the law of another state, as compared with collective agreements concluded under Swedish law, could not be justified on public interest grounds such as the creation of a climate of fair competition, but only on the limited grounds set out in Article 52 TFEU, none of which was applicable in the case.[75] By comparison, when the obstacle stems from an equally applicable rule which does not constitute deliberate discrimination, a wider and open-ended range of public-interest grounds, which are referred to *inter alia* as mandatory requirements, imperative requirements, and objective justifications, may be relied upon to justify the restrictive measure. It should be noted, however, that the internal-market case law on what constitutes discrimination, whether direct or indirect, and on what kinds of justification are available is highly confused.[76] This problem has been discussed in more detail in Chapter 19 in the context of the free movement of goods.[77]

(ii) *Reverse Discrimination and Wholly Internal Situations: When Can Nationals Rely on Article 49 in Their Own Member State?*

We noted above that the wording of the first sentence of Article 49 refers to the situation of nationals of a Member State wishing to establish themselves 'in the territory of another Member State'. A first reading of this sentence suggests that nationals setting up in a self-employed capacity in their own Member State cannot complain under Article 49 about the domestic regulation of those activities. The situation is somewhat more complex, however.

In the first place, a Member State is clearly obliged under both Article 49 and Directive 2004/38 not to restrict its own nationals who wish to *leave* the territory in order to set up an establishment in another Member State.

Secondly, it is obvious that nationals who wish to establish themselves within their own Member State may be disadvantaged if the qualifications they have obtained in another Member State are not recognized by their own state. In *Knoors*, where a Dutch national sought to practise as a plumber in the Netherlands, having obtained training and experience in Belgium, the Dutch government argued that a national could not rely in his own Member State on Article 49 to gain recognition for qualifications obtained, since he might be seeking to evade the application of legitimate national provisions. The ECJ firmly rejected this argument:[78]

[72] Cases 267 and 268/91 *Keck* (n 63) and the discussion in Ch 19.

[73] Case C-190/98 *Graf v Filzmoser Maschinenbau* [2000] ECR I-493.

[74] Case 352/85 *Bond van Adverteerders v Netherlands* [1988] ECR 2085, [32]-[33]; Case C-17/92 *Federación de Distribuidores Cinematográficos v Estado Español et Unión de Productores de Cine y Televisión* [1993] ECR I-2239, [16]; Case C-484/93 *Svensson and Gustavsson v Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, [15].

[75] Case C-341/05 *Laval* (n 25) [116]-[119].

[76] Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249 on the free movement of workers, where the ECJ seemed to say that restrictions which appeared to be discriminatory could be justified without recourse to the specific Treaty exceptions. See also the range of justifications considered by the ECJ for the (arguably directly discriminatory) nationality restrictions in Case C-415/93 *Bosman* (n 21). For a more general discussion of this confusion see 'Mandatory Requirements' by J Scott in C Barnard and J Scott (eds), *Law of the Single European Market* (Hart, 2002) ch 10.

[77] Ch 19.

[78] Case 115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399; Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311. Compare however the restrictive approach of the ECJ in the first *Auer* case: Case 136/78 *Ministère Public v Auer* [1979] ECR 437, [20]-[21], and see the later Case 271/82 *Auer* (n 61).

> 20. In fact these liberties, which are fundamental in the Community system, could not be fully realized if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement and establishment and who have acquired, by virtue of such facilities, the trade qualifications referred to by the Directive in a Member State other than that whose nationality they possess.
>
> 24. Although it is true that the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State, the position nevertheless remains that the reference in Article 52 [now Art 49 TFEU] to 'nationals of a Member State' who wish to establish themselves 'in the territory of another Member State' cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognized by the provisions of Community law, are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty.

We have seen above how, in *Heylens* and *Vlassopoulou*, despite the absence of EU legislation, Member States were obliged to consider the equivalence of qualifications obtained in other Member States.[79] Where, however, unlike in *Heylens* and *Vlassopoulou*, the applicant is a national of the host Member State, concerns such as those expressed by the government in *Knoors* about a possible evasion or abuse have occasionally been raised.[80]

Now, however, a national who has obtained a qualification in another Member State and has returned to practise in his or her Member State of origin will probably be covered by the terms of Directive 2005/36 (which replaced Directive 89/48) on the recognition of professional qualifications. Further, even where Directive 2005/36 does not cover the facts of the situation, it now seems that the principles in *Heylens* and *Vlassopoulou* will be applied even when the applicant is a national of the host state.[81] Whenever a national of a Member State has obtained a qualification in another Member State and has returned to practise in the home state, it is no longer a wholly internal situation and the right of establishment in Article 49 applies.[82]

This was made evident in the case of *Koller*, in which an Austrian national, after obtaining a law degree in Austria, went to Spain and, after taking additional courses and examinations, had his degree declared equivalent to the Spanish 'Licenciado en Derecho' authorizing him to use the title *abogado*'.[83] When he later applied for admission to the aptitude test for the profession of lawyer in Austria, his request was refused on the ground that in Spain, unlike in Austria, practical experience was not required in order to pursue the profession of a lawyer. The Austrian Admissions Board concluded that his application was designed to circumvent the requirement for five years' practical experience required by the Austrian rules. The ECJ however held that Koller fell within the scope of Directive 89/48 and that he could not be refused the option of taking an aptitude test solely on the ground that he had not completed the period of practical experience required by the 'host' state. On the contrary, the ECJ took the view that the very purpose of the aptitude test was 'to ensure that

[79] See also Case C-108/96 *MacQuen* (n 67).

[80] See, eg, Case C-61/89 *Bouchoucha* [1990] ECR I-3551, where a French national in France was unable to rely on the Treaty because there was no EU legislation governing the qualification in question; Cases C-330-331/90 *Ministero Fiscal y Lopez Brea* [1992] ECR I-323.

[81] Case C-19/92 *Kraus* (n 69); Case C-234/97 *Fernández de Bobadilla v Museo Nacional del Prado* [1999] ECR I-4773.

[82] Case C-234/97 *De Bobadilla* (n 81) [30]-[34].

[83] Case C-118/09 *Robert Koller*, 22 Dec 2010.

the applicant is capable of exercising the regulated profession in that Member State'.[84] Thus, so long as some 'EU element' is present and the situation is not wholly internal, individuals can rely on Article 49 in their own state.[85]

Conversely, nationals who have never exercised the freedom to move within the EU will have no EU law claim against their state. This gives rise to the curious phenomenon of 'reverse discrimination' whereby nationals of a Member State find themselves disadvantaged by comparison with other EU nationals within the same Member State. In the *Belgian Social Security* case, the Flemish Government, a federated entity of the Belgian state, had enacted a scheme of care insurance that was available only to those working and residing in either the Dutch-speaking region or the bilingual region of Brussels-Capital.[86] The ECJ ruled that this constituted a restriction under Articles 45 and 59 TFEU, since 'migrant workers, pursuing or contemplating the pursuit of employment or self-employment in one of those two regions, might be dissuaded from making use of their freedom of movement and from leaving their Member State of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed'.[87] The ECJ insisted that any EU national working in either of these two regions must be eligible for the scheme, regardless of where in Belgium they resided, with the exception of Belgian nationals living in the French- or German-speaking region who had never exercised their freedom to move. The Court ruled that EU law 'clearly cannot be applied to such purely internal situations'.[88] The consequence is that a Spanish national establishing herself in the French-speaking region and working in the Dutch-speaking region will be able to join the insurance scheme, while her Belgian colleague and neighbour, who has worked and lived all his life in Belgium, will not.

In *Werner*, the ECJ indicated that even if a national was resident in a Member State other than that of his nationality, so long as he maintained his place of establishment and professional practice in his own Member State, he could not rely on Article 49 to challenge tax provisions of his own state which favoured residents over non-residents.[89] By way of contrast, in *Asscher*, a Dutch national residing in Belgium who was a director of companies *both* in Belgium and in the Netherlands, and who, on account of his non-resident status and the level of his earnings outside the Netherlands, was subject within the Netherlands to a considerably higher rate of tax than residents of that state, was entitled to invoke Article 49 against his own Member State.[90] The ECJ ruled this was not an 'internal' situation because his exercise of his Treaty rights of establishment and his dual economic activities in Belgium and the Netherlands had resulted in this unfavourable tax situation. Although differential treatment of resident and non-resident taxpayers which constitutes *prima facie* discrimination under Article 49 could be justified by the state, given the possible objective differences between them, there can be no justification where such differences do not actually exist.[91]

[84] Ibid.

[85] For cases involving a wholly internal situation see Cases 54 and 91/88 and 14/89 *Niño and others* [1990] ECR 3537; Case 204/87 *Bekaert* [1988] ECR 2029; Case C-152/94 *Openbaar Ministerie v Geert van Buydner* [1995] ECR I-3981; Case C-134/94 *Esso Española SA v Comunidad Autónoma de Canarias* [1995] ECR I-4223; Case C-17/94 *Gervais* [1995] ECR I-4353; Case C-134/95 *Unità Socio-Sanitaria Locale no 47 de Biella v INAIL* [1997] ECR I-195, Cases C-225-227/95 *Kapasakalis v Greece* [1998] ECR I-4329; E Cannizzaro, 'Producing "Reverse Discrimination" through the Exercise of Competences' (1997) 17 YBEL 29; C Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234' (2006) 31 ELRev 690.

[86] Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683.

[87] Ibid [48].

[88] Ibid, [37]-[38].

[89] Case C-112/91 *Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-429.

[90] Case C-107/94 *Asscher* (n 11).

[91] See also Case C-80/94 *Wielockx* [1995] ECR I-2493; Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225; Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* [2002] ECR I-11779; Case C-383/05 *Talotta v Belgium* [2007] ECR I-2555; Case C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006]

Cases such as *Kraus* and *Asscher* indicate clearly that EU law on freedom of establishment is not only about the elimination of unequal treatment of non-nationals or the elimination of protectionism, but also entails a robust attempt to liberalize the 'single market' such that, whatever their nationality, self-employed individuals and companies can set up business in various locations within that market without encountering unnecessary obstacles.

(iii) *Are Restrictions on Social Benefits Contrary to Article 49?*

We have seen that many different national rules and provisions constitute potential obstacles to freedom of establishment under the Treaty. However, there was initially no equivalent, within the law on freedom of establishment, to Regulation 1612/68 governing the rights of workers and their families, which expressly guaranteed EU migrant workers the same social and tax advantages as were available to nationals, as well as housing and educational rights for their children. Now however, apart from the general non-discrimination clause in Article 18 TFEU and the specific non-discrimination requirement in Article 49,[92] Article 24 of Directive 2004/38 on the rights of movement and residence of EU citizens contains an umbrella equal treatment clause.

We shall see below that the denial of tax advantages to companies whose primary establishment or registered office is not within the state may also infringe Article 49.[93] Such measures, although they may not directly regulate or curb the right of establishment, nevertheless are deemed to be disadvantages for those exercising such Treaty rights.

(c) ESTABLISHMENT OF COMPANIES

Article 54 TFEU provides:

> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
>
> '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.

Although this Article requires companies to be treated in the same way as nationals for the purposes of the Treaty provisions on freedom of establishment, this is not strictly possible, given the differences between natural and legal persons. Further, despite the many company law directives which

ECR I-7409. In the context of services see Case C-484/93 *Svensson and Gustavsson* (n 74); Case C-294/97 *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna* [1999] ECR I-7447, and see the series of cases on corporate taxation at (n 116).

[92] For some cases in which the ECJ insisted on equality of treatment for persons exercising the right of establishment see, eg, Case 63/86 *Commission v Italy* [1988] ECR 29; Case C-337/97 *Meeusen v Hofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289; Case 197/84 *Steinhauser v City of Biarritz* [1985] ECR 1819; Case 143/87 *Stanton* (n 58); Case 79/85 *Segers* [1986] ECR 2375; Case C-334/94 *Commission v France* [1996] ECR I-1307, [21]; Case C-151/96 *Commission v Ireland* [1997] ECR I-3327.

[93] Case 270/83 *Commission v France* [1986] ECR 273. On indirect disadvantages to non-established credit institutions, due to the conditions imposed on subsidies for borrowers, see Case C-484/93 *Svensson and Gustavsson* (n 74); Case C-410/96 *André Ambry* [1998] ECR I-7875 concerning restrictions imposed on travel agencies arranging security with a financial institution in another Member State to ensure that a guarantee agreement is concluded with a credit institution situated in the host Member State.

have been adopted, considerable differences in the way the various Member States regulate companies and their activities remain.

The definition of a company in Article 54 is wide, referring to 'legal persons governed by private or public law'. However, it excludes non-profit-making companies even though non-profit-making economic activities may be covered by Article 49.[94] The exclusion of non-profit-making companies can be compared with the exclusion from the scope of the Treaty of workers who are not remunerated and services which are not provided for remuneration.[95]

[illegible] Company 'Established' in a Member State?

It is clear that, so long as a company is formed in accordance with the law of a Member State and has its registered office there and its principal place of business *somewhere* in the EU, it will be established in the first Member State within the meaning of the Treaty. The ECJ made it clear in *Segers* that this would hold true even if the company conducted no business of any kind in that Member State, but instead conducted its business through one of the various forms of secondary establishment, such as a subsidiary, branch, or agency, in another Member State.[96]

This was affirmed in *Centros*, where the ECJ ruled that a company was lawfully established in the UK even though it had never traded there.[97] Further, in the *Insurance Services* case, the Court held that even an office managed for a company by an independent person on a permanent basis would amount to establishment in that Member State.[98] This form of establishment would amount to a secondary establishment, since the registered office or seat of the company and its principal place of business would presumably be elsewhere in the EU. A company has a right of secondary establishment only if it already has its principal place of business or central or registered office within the EU.

[illegible] Migration in the Absence of EU Harmonization

While companies are not covered by Directive 2004/38 on citizens, (nor were they by its predecessor Directive 73/148) governing the right of natural persons to leave their Member State, the ECJ ruled in the *Daily Mail* case that companies enjoy similar rights under the Treaty.[99] However, the *Daily Mail* judgment also declared that the Treaty provisions on freedom of establishment did not give companies an unfettered right to move their registered offices or their central management and control to another Member State, whilst retaining an establishment in the first Member State. On the contrary, the Court ruled that the Member State from which the company wishes to move its registered office or central place of administration is entitled to subject the company to certain conditions. In this particular case, the UK could legitimately require a company which wished to transfer its central management and control to the Netherlands to first settle its taxes and even to wind up the company in the UK. The reason given by the Court for this was that the laws of the Member States on what constitutes the place of incorporation or the 'real seat' of the company are not harmonized, and that different

[94] Case C-70/95 *Sodemare* (n 15).

[95] The fact that a company is non-profit-making does not however mean that it is not engaged in economic activity. For an illustration of this point in a different context see Case C-382/92 *Commission v UK* [1994] ECR I-2435, [45], and see the cases on cross-border access to health care in the context of services (n 183).

[96] Case 79/85 *Segers* (n 92) [16].

[97] Case C-212/97 *Centros* (n 20).

[98] Case 205/84 (n 13) [21]. Compare Case C-386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* [2006] ECR I-8203, [18]-[20].

[99] Case 81/87 *R v HM Treasury and Commissioners of Inland Revenue, ex p Daily Mail and General Trust PLC* [1988] ECR 5483.

Member States may legitimately have different views and different ways of regulating how a transfer of head office may be effected.[100]

The general question underlying *Daily Mail*, ie, to what extent a company can rely on Article 49 TFEU when it seeks to set up various forms of establishment in more than one Member State which have different systems of corporate regulation, given the continued absence of EU harmonization, was revisited just over ten years later in *Centros*. This time the restriction was imposed not by the state in which the company had its primary establishment (which was again the UK), but by the state in which the company sought to conduct business through a secondary establishment, which in this case was Denmark.

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

[**Note** Lisbon Treaty renumbering: Arts 52, 54, and 58 EEC are now Arts 43, 48, and 54 TFEU.]

The facts concerned a company which was registered (and therefore had its primary establishment) in the UK, but which had never traded there. It had chosen the UK in which to register because UK law imposed no requirements on limited liability companies as to the provision for, or the paying-up of, a minimum share capital. The main purpose of establishing in the UK was to conduct business in Denmark, the minimum capital requirement laws of which were considerably stricter, through a branch. The Danish Board of Trade and Companies refused to register the branch on the ground that Centros was not in fact seeking to establish a branch in Denmark, but rather a principal establishment, while circumventing legitimate national rules including those on the paying-up of minimum capital. The Danish government argued that Centros was seeking to abuse EU rights of establishment; and secondly, following the reasoning in *Daily Mail*, the absence of harmonization of national corporate laws seemed to militate against permitting Centros to rely on Article 49 TFEU.

THE ECJ

21. Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58 of the [EEC] Treaty.

22. Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.

24. It is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law....

25. However, although, in such circumstances, the national courts may, case by case, take account—on the basis of objective evidence—of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions....

[100] Art 293 EC (ex Art 220 EEC) had originally recognized the need for the adoption of agreements for the mutual recognition of companies and the retention of legal personality in the event of transfer of their seat from one country to another, but the Convention on the Mutual Recognition of Companies, which was adopted pursuant to this Art in 1968, did not come into force: J Wouters, 'European Company Law: Quo Vadis?' (2000) 37 CMLRev 257.

26. In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.

27. That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

28. In this connection, the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, on the basis of the powers conferred upon it by Article 54(3)(g) of the EC Treaty, to achieve complete harmonisation.

29. In addition, it is clear from paragraph 16 of *Segers* that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

While the principles of law expressed in *Centros* were familiar principles long articulated by the ECJ in the context of freedom of establishment, their application to this factual situation and with this outcome caused considerable surprise, in particular amongst company lawyers, and generated extensive commentary. The fact that the particular manoeuvre engaged in by the company to choose its preferred regulatory environment within the EU internal market (the UK), while conducting all of its business in a different geographic part of the market (Denmark), was not caught by the 'avoidance or 'abuse' exception was unexpected.

The ECJ ruled that, far from constituting an *abuse* of Article 49, the deliberate choice of a Member State with lenient legislative requirements concerning incorporation in order to enjoy the right of secondary establishment more freely in a Member State with stricter incorporation requirements was simply an exercise of the rights inherent in the notion of freedom of establishment.[101] Further, the absence of legislative harmonization, which the ECJ in *Daily Mail* had given as a reason for the inapplicability of Article 49 to the case, was deemed to be irrelevant in *Centros*, and even gave the Court occasion to point out the availability to Member States of the option of adopting EU harmonizing legislation in this area of company law.[102] The Court took the view that there were other options, including under existing EU corporate account and disclosure legislation, available to Member States seeking to protect creditors, to counter fraud, or to prevent unjustified corporate evasion of *legitimate* regulatory requirements, which would be less restrictive than imposing the full range of its company law requirements on a branch the primary establishment of which was lawfully in another Member State.

The case has been described as reflecting a judicial 'willingness to break down the remaining constraints to the free movement of companies in the [EU] and as 'opening the door to competition

[101] For discussion of the ECJ's similar approach to allegations of abuse in the context of the rights of citizenship and the rights of free movement of workers, see Ch 21 and Ch 23,

[102] For a similar dismissal of the relevance, for the freedom of establishment of companies, of the fact that EU law in the field of cross-border mergers had not been harmonized see Case C-411/03 *Sevic Systems* [2005] ECR I-10805, [26]. P Behrens, Note (2006) 43 CMLRev 1669.

among national rules as an alternative approach to ensure the completion of the internal market'.[103] Others however noted that it left the ruling in *Daily Mail* for the moment untouched.[104]

Centros was followed by the *Überseering*[105] and *Inspire Art*[106] rulings which confirmed and extended the *Centros* approach. Überseering was a company incorporated in the Netherlands under Dutch law, where it had its registered office. It then sought to transfer its centre of administration to Germany, and its entire share capital was bought by German shareholders. Unlike the position of the UK in the *Daily Mail* case, the Netherlands did not seek to prevent the company from transferring its administration, or to deny the validity of its continued incorporation under Dutch law. German law, however, would not recognize the legal capacity of a company incorporated in the Netherlands, thus prohibiting it from appearing before the German courts. German law followed the 'company seat principle' rather than the 'incorporation principle' as the relevant factor of connection for a company, and since Überseering had moved its real seat from the Netherlands to Germany, German law would not recognize the company's legal capacity unless it re-incorporated again under German law.

Although the ECJ distinguished the *Daily Mail* case (where the restriction was imposed by the Member State of incorporation, the UK) on its facts, the reasoning in *Überseering* clearly moves away from the underlying broad rationale in *Daily Mail*. *Überseering* establishes that, despite the lack of harmonization of the laws governing the connecting factor for incorporation, a company which is legitimately incorporated in one Member State and which moves its centre of administration to another state cannot in those circumstances be denied recognition of its legal personality by the latter. Although objectives such as enhancing legal certainty, protecting creditors and minority investors, and legitimate fiscal requirements could in principle justify rules restricting the freedom of establishment, the German rule in *Überseering* amounted to an outright denial of freedom of establishment and was held to be disproportionate.

The case of *Inspire Art* addressed the question whether a restriction on a company's secondary establishment which is less drastic than an outright denial of the right of establishment might be compatible with Article 49.[107] Dutch legislation sought to impose regulatory requirements concerning minimum share capital and directors' liability on a company which was incorporated in the UK. Once again, while the ECJ accepted that restrictive regulations could in principle be justified in the interests of protecting creditors and investors, or ensuring an effective tax inspection system, the rules at issue were found disproportionate and unnecessary.

While these rulings did not explicitly overturn *Daily Mail*, they seemed to limit its impact and scope quite significantly. Consequently, the 2008 ruling in *Cartesio* came as something of a surprise.[108] Cartesio, a company formed under Hungarian law, wished to transfer its seat to Italy. However, Hungarian law did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law. The national court considered that while *Daily Mail* seemed to indicate that Articles 49 and 54 TFEU do not include the right for a company to transfer its central administration to another Member State while retaining its legal personality and nationality

[103] P Cabral and P Cunha, '"Presumed innocent": Companies and the Exercise of the Right of Establishment under Community Law' (2000) 25 ELRev 157; W-H Roth, Note (2000) 37 CMLRev 147; S Deakin, 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economics Perspective on *Centros*' (1999) 2 CYELS 231; A Johnston, 'EC Freedom of Establishment, Employee Participation in Corporate Governance and the Limits of Regulatory Competition' (2006) 6 Journal of Corporate Law Studies 71.

[104] Roth (n 103) 153–155.

[105] Case C-208/00 *Überseering v NCC* [2002] ECR I-9919.

[106] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

[107] Ibid.

[108] Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641; M Szydło, Note (2009) 46 CMLRev 703; O Valk, Note (2010) 6 Utrecht LRev 151; G Vossestein, 'Cross-border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment' (2009) 6 European Company Law 115; L Burian, 'Personal Law of Companies and Freedom of Establishment' (2008) 61 RHDI 71.

of origin, later case law rendered the situation unclear. Advocate General Maduro argued that Member States did not enjoy 'an absolute freedom to determine the "life and death" of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment', and took the view that the Hungarian legislation amounted to an outright negation of the freedom of establishment, which could not be justified on public interest grounds. The ECJ, however, did not follow his opinion, declaring instead that companies were creatures of national law which existed only by virtue of the national legislation which determined their incorporation and functioning:

Case C-210/06 **Cartesio Oktató és Szolgáltató bt**
[2008] ECR I-9641

[Post-Lisbon Treaty renumbering: Arts 43 and 48 EC are now Arts 49 and 54 TFEU]

109. Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article—like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom—is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

110. Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.

Cartesio's confirmation of the *Daily Mail* ruling and its underlying premise was unexpected after the series of robust rulings, from *Centros* to *Inspire Art*, which had introduced a mutual recognition principle into the law on freedom of establishment. While those cases insist that a Member State must recognize the legitimacy of a company's incorporation (and primary establishment) under the law of another Member State and should not impose unnecessary restrictions on the right of secondary establishment, the ECJ in *Cartesio* on the other hand has affirmed that the basic rules as to what is necessary for incorporation in the first place remain, in the absence of EU harmonization, for the Member State of incorporation to decide.

(iii) *Restrictions on the Freedom of Establishment of Companies: Direct Taxation Rules*

Many of the cases before the ECJ have concerned restrictions or disadvantages imposed by Member States on companies, or on the employees of companies,[109] the registered offices of which were in another Member State. Other cases however have involved restrictions, particularly tax restrictions,

[109] Case 79/85 *Segers* (n 92).

imposed by states on companies the registered offices of which are within that state, but which have subsidiaries or branches in other Member States. The compatibility with EU law of tax rules which distinguish between resident and non-resident companies and subsidiaries has generated a large case law.

In *Commission v France*, the Court drew an analogy between the location of the registered office of a company and the place of residence of a natural person.[110] According to the Court 'it is their corporate seat... that serves as the connecting factor with the legal system of a Member State, like nationality in the case of natural persons'.[111] It ruled that discrimination in tax laws against branches or agencies in a Member State by taxing them on the same basis as companies the registered offices of which are in that state yet not giving them the same tax advantages as such companies was an infringement of Article 49. Neither the lack of harmonization of the tax laws of the different Member States nor the risk of tax avoidance by companies could justify the restriction.[112]

Nevertheless, the ECJ has accepted that a distinction based on the location of the registered office of a company or the place of residence of a natural person may, under certain conditions, be justified in an area such as tax law.[113] In *Futura*, it was permissible for a Member State to impose conditions as regards the keeping of accounts and the location where losses were incurred on a non-resident company, which had a branch but not a main establishment in the state, for the purposes of assessing liability to tax and allowable losses.[114] However, the specific restrictions imposed by Luxembourg in *Futura* were closely scrutinized for proportionality, and the accounting requirement, even in the absence of harmonized EU rules in this area, was found to be excessively restrictive. In *X Holding BV* the ECJ held that legislation preventing a parent company from forming a single tax entity with its subsidiaries in other Member States, while it could do so with resident subsidiaries, was justified by the need to safeguard the allocation of power to impose taxes between Member States.[115]

In recent years there has been a significant amount of important litigation, including the high-profile *Marks & Spencer*[116] and *Cadbury Schweppes*[117] cases and a series of other test cases,[118] to clarify

[110] Case 270/83 (n 93) [18].

[111] Case C-330/91 *Commerzbank* (n 112) [18]; Case C-264/96 *ICI v Colmer* [1998] ECR I-4695, [20]; Case C-307/97 *Compagnie de Saint-Gobain v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, [35]; Cases C-397 and 410/98 *Metallgesellschaft Ltd v Internal Revenue* [2001] ECR I-4727, [42].

[112] Case C-330/91 *R v Inland Revenue Commissioners, ex p Commerzbank AG* [1993] ECR I-4017; Case C-1/93 *Halliburton Services BV v Staatssecretaris van Financiën* [1994] ECR I-1137; Case C-253/03 *CLT-UFA SA v Finanzamt Köln-West* [2006] ECR I-1831.

[113] Case 270/83 *Commission v France* (n 93) [19]; Case C-279/93 *Schumacker* (n 91); Case C-80/94 *Wielockx* (n 91); Case C-107/94 *Asscher* (n 11); Case C-311/97 *Royal Bank of Scotland v Greece* [1999] ECR I-2651. Compare Case C-264/96 *ICI* (n 111); Case C-200/98 *X and Y v Riksskatteverket* [1999] ECR I-8261; Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409.

[114] Case C-250/95 *Futura Participations SA Singer v Administration des Contributions* [1997] ECR I-2471. For indirect tax discrimination against companies having their principal place of business in other Member States see, eg, Case C-254/97 *Société Baxter v Premier Ministre* [1999] ECR I-4809; Case C-436/00 *X, Y v Riksskatteverket* [2002] ECR I-10829; Case C-334/02 *Commission v France* [2004] ECR I-2229.

[115] Case C-337/08 *X Holding BV v Staatssecretaris van Financiën*, 25 Feb 2010; Case C-231/05 *Oy AA* [2007] ECR I-6373.

[116] Case C-446/03 *Marks & Spencer v Hasley* [2005] ECR I-10837.

[117] Case C-196/04 *Cadbury Schweppes plc v Inland Revenue* [2006] ECR I-7995. For a critique of the 'wholly artificial arrangement' criterion introduced by the ECJ here see P Tran, '*Cadbury Schweppes plc v Commissioners of Inland Revenue*: Eliminating Harmful Tax Practice or Encouraging Multinational to Shop Around the Bloc?' (2008) 30 Loyola LA Int'l & Comp L Rev 77; and for a critique of the UK legal response to the ruling see A Lyden-Horn, 'Cadbury Schweppes: A Critical Look at the Future and Futility of UK Controlled Foreign Company Legislation' (2008) 11 Temple Int'l & Comp LJ 191.

[118] Case C-253/03 *CLT-UFA* (n 112); Case C-347/04 *Rewe-Zentralfinanz v Finanzamt Köln-Mitte* [2007] ECR I-2647; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v Inland Revenue* [2006] ECR I-11673; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Inland Revenue* [2007] ECR I-2107; Case C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation v Commissioners of Inland Revenue* [2008] ECR I-2875.

the scope and applicability of Article 49 to a range of corporate taxation laws directed at cross-border situations—governing matters such as tax credits, deductibility of losses (group relief), and taxation of dividends—as applied to companies which are established in more than one Member State. The Court has ruled that while states may in appropriate circumstances treat resident companies differently from non-resident companies, and resident companies with non-resident subsidiaries differently from resident companies with resident subsidiaries, and foreign-sourced dividends differently from domestic-sourced dividends, as far as direct taxation rules are concerned, this is always subject to the requirement of demonstrating reasonable and proportionate justification. While the Court has accepted that goals such as preventing tax avoidance or preventing companies from benefiting twice from rules governing tax relief may be legitimate objectives, it has continued to apply strict scrutiny to the national laws which claim to be necessitated by such objectives.

(iv) *Restrictions on the Freedom of Establishment of Companies: Vessel Registration Requirements*

A second issue area which has generated a sizeable body of case law on freedom of establishment is that dealing with vessel registration.[119] In *Commission v Ireland*, it was held contrary to Article 49 to require nationals of other Member States who owned a vessel registered in Ireland to establish a company in Ireland.[120] In *Factortame*, the ECJ condemned several residency and nationality requirements for the registration of fishing vessels, but permitted a Member State to stipulate as a requirement for registration that a vessel must be managed and its operations directed and controlled from within that Member State.[121]

The most important and controversial ruling to date on this issue however is the *Viking* case, which was discussed above in the context of the 'horizontal' applicability of Article 49 to trade unions.[122]

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-10779

[Note Lisbon Treaty renumbering: Arts 43 and 137 EC are now Arts 49 and 153 TFEU]

Viking was a company incorporated under Finnish law, which operated the *Rosella* vessel on the route between Tallinn (Estonia) and Helsinki (Finland). The *Rosella* was running at a loss due to competition from Estonian vessels operating on the same route with lower wage costs. Under the Finnish flag, Viking was obliged—under Finnish law and the terms of a collective bargaining agreement—to pay the crew wages at the same level as those applicable in Finland. Consequently, Viking planned to reflag the *Rosella* by registering it in Estonia. FSU, the Finnish union of seamen, together with the international federation of transport workers' unions (ITF), decided to take collective action against the adoption of such a 'flag of convenience' and requested affiliated unions to refrain from entering into negotiations with Viking. Viking argued that the action by FSU and ITF was contrary to its freedom of establishment.

[119] Case C-246/89 *Commission v UK* [1991] ECR I-4585; Case C-334/94 *Commission v France* (n 92); Case C-151/94 *Commission v Ireland* (n 92); Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761.

[120] Case 93/89 *Commission v Ireland* [1991] ECR I-4569.

[121] Case C-221/89 *Factortame* (n 3).

[122] Case C-438/05 *Viking Line* (n 25); P Chaumette, 'Reflagging a Vessel in the European Market and Dealing with Transnational Collective Disputes: ITF & Finnish Seamen's Union v Viking Line' (2010) 15 Ocean & Coastal LJ 1.

FSU and ITF, supported by the Danish and Swedish governments, argued that the situation did not fall within the scope of the Treaty rules.

THE ECJ

36. [C]ollective action such as that at issue in the main proceedings, which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking.

37. It follows that collective action... falls, in principle, within the scope of Article 43 EC.

40. In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law...

41. Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC.

44. Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law.

45. In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

46. However, in *Schmidberger* and *Omega*, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

47. It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to the collective action at issue in the main proceedings.

The ECJ ruled ultimately that the collective action constituted a restriction on Viking's exercise of its right to freedom of establishment in Estonia by making it less attractive or pointless to re-flag there, and that it was for the national court to determine whether the collective action might be justified as a proportionate and necessary means of protecting the rights of workers. The case has been subject to extensive critical analysis.[123]

[123] The EU's Eur-lex website shows that 79 case notes or commentaries have been published at the time of writing. For some examples see B Bercusson, 'The Trade Union Movement and the European Union: Judgment Day' (2007) 13 ELJ 279; T Novitz, 'The Right to Strike and Re-flagging in the European Union: Free Movement Provisions and Human

(D) SUMMARY

i. Article 49 may be invoked by a national in his or her Member State of establishment so long as there is an EU element present. This element often consists of the fact that the individual has obtained a qualification or professional training in another Member State, so long as the situation involves no attempted 'abuse' of EU rights. The notion of abuse or evasion of legitimate control remains, after cases such as *Koller* concerning individuals, and *Centros* and *Cadbury Schweppes* concerning companies, hypothetical and underspecified.

ii. The case of *Viking* (and *Laval* for services) controversially extended the horizontal application of the Treaty provisions on establishment to the activities of trade unions, even though they are not public regulatory actors and do not possess quasi-legislative powers, and even where they are acting pursuant to their fundamental right to strike, to impose lock-outs, or other forms of collective action.

iii. Despite the importance of non-discrimination in the field of establishment, the ECJ adopts broadly the same approach to freedom of establishment as it does in other areas of free movement. In other words, any obstacle to the right of establishment in a Member State and any restriction on 'access to the market' for persons seeking to establish themselves, whether or not it has a differential impact on nationals and non-nationals, is caught by the prohibition in Article 49 unless it can be justified.

iv. The law governing establishment of companies is more complex than that governing natural persons, mainly due to the differences between national company laws. Rather than await legislative harmonization at EU level, the ECJ has required host states to permit companies validly incorporated in another state, even under a very different corporate law regime, to exercise rights of secondary establishment in a host state without imposing undue regulatory restrictions. However, the cases of *Daily Mail* and *Cartesio* indicate that the Member State of incorporation of a company (home state) retains the right to set the conditions for acquisition and maintenance of the status as an incorporated entity.

v. Tax restrictions on companies established in more than one Member State, which seek to combine the advantages and minimize the disadvantages of different tax regimes within the different states in which they are established, have been regularly and successfully challenged in recent years.

FREE MOVEMENT OF SERVICES

We have seen that the right of establishment entails the pursuit of an economic activity from a fixed base in a Member State for an indefinite period. Freedom to provide services under Article 56 TFEU, on the other hand, entails the carrying out of an economic activity for a temporary period in a Member State in which either the provider or the recipient of the service is not established.

According to the *Insurance Services* case, if a person or an undertaking maintains a *permanent* economic base in a Member State, even if only through an office, it cannot avail itself of the right to provide services in that state but will be governed by the law on freedom of establishment.[124] In *Gebhard*, however, we saw that the ECJ acknowledged that the provision of services did not necessarily cease to be *temporary* simply because the provider might need to equip herself with the necessary

Rights' [2006] LMCLQ 242; A Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 ILJ 126; C Barnard, 'Social Dumping or Dumping Socialism?' (2008) 37 CLJ 262.

[124] Case 205/84 (n 13) [21]. The earlier decision in Case 39/75 *Coenen v Sociaal-Economische Raad* [1975] ECR 1547 was somewhat contradictory on this point.

infrastructure, for example an office or chambers, to perform those services.[125] The relevant criterion is not the mere existence of an office in a Member State, but rather the temporary or permanent nature of the economic activities carried on there.

This may prove difficult to establish, especially when certain services, such as the construction of large buildings, take a long time. The Court has held that the fact that services are provided over an extended period, even over several years, does not mean that Article 56 is inapplicable.[126] In *Commission v Portugal* the Court held that the imposition of authorization rules concerning construction activity in Portugal were incompatible with Article 56, since those rules imposed the same requirements on the provision of temporary services as were imposed on the establishment of providers of building services.[127] According to the ECJ, the fact that the provision of construction services generally takes some time and that it may prove difficult to distinguish from the situation in which the provider is actually established in the host Member State does not have the effect of precluding those services from the scope of Article 56 TFEU.

The ECJ has also ruled that people who direct most or all of their services at the territory of a particular Member State, but maintain their place of establishment outside that state in order to evade its professional rules (the abuse/evasion theory), may in certain circumstances be treated as being established within the Member State, and thus covered not by Article 56 on services but by Article 49 on establishment instead.[128] In such a case the professional rules which were being evaded by the maintenance of an establishment in a different Member State could be applied as though the person were established in the regulating state. Cases in which such an evasion or abuse has been found seem relatively rare, and the onus is firmly on a Member State to show that a person was seeking to evade legitimate requirements rather than simply exercising their Treaty freedoms.[129]

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.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 56 indicates that in order to benefit from the right to provide services, the person in question, natural or legal, must already have a place of establishment within the EU and, if a natural person, must possess the nationality of a Member State.[130] The General Programme on freedom to provide services specified in more detail that the right to provide services was available only to nationals established in the EU, or to companies formed under the laws of a Member State and having their seat, centre of administration, or main establishment within the EU.[131] If only the seat of a company

[125] Case C-55/94 *Gebhard* (n 14) [27].
[126] Case C-215/01 *Schnitzer* (n 16) [30].
[127] Case C-458/08 *Commission v Portugal*, 18 Nov 2010.
[128] Case 33/74 *Van Binsbergen* (n 9) [13]; Case 205/84 *Commission v Germany* (n 13) [22]. For an example of a justified state restriction to prevent an evasion of domestic rules where a provider of broadcasting services was established outside the Netherlands yet was directing its services at the Netherlands see Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487 and Case C-23/93 *TV10 SA v Commissariaat voor de Media* [1994] ECR I-4795. Contrast Cases C-369 and 376/96 *Arblade* (n 64) [32].
[129] Case C-212/97 *Centros* (n 20) [29]; AG's Opinion in Case C-55/94 *Gebhard* (n 14) [84].
[130] Case C-290/04 *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel* [2006] ECR I-9461.
[131] The 1961 General Programme (n 40).

is situated within the EU, then its activity must have a 'real and continuous link' with the economy of a Member State, other than a link of nationality.

Without that economic foothold within the EU, there is no right under EU law for a company or a EU national established *outside* the EU to provide temporary services *within* the EU.[132] A permanent economic base must first be established within a Member State, and from that base the person may provide temporary services in other Member States.

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.

'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.

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.

Article 57 specifies that the provisions on free movement of services will apply only in so far as a particular restriction is not covered by the provisions on free movement of goods, persons, or capital. Article 58 also excludes transport services from the chapter on services since transport is dealt with elsewhere in the Treaty,[133] and provides that banking and insurance services connected with capital movements are to be dealt with in line with the Treaty provisions on movement of capital.[134]

As in the chapter on establishment, Article 59 provided for a General Programme to be drawn up, and for directives to be issued by the Council so as to liberalize specific services. The General Programme which was drawn up was similar in many respects to that adopted on establishment, with an emphasis on the abolition of discrimination.

THE EFFECT OF ARTICLE 56 TFEU

The chapter on the free movement of services is very similar to that on establishment, except that the activity in question is pursued on a temporary rather than a permanent basis in a Member State. Shortly after the *Reyners* ruling first established that Article 49 was directly effective, the *Van Binsbergen* case on the direct effect of Article 56 came before the Court.[135] The UK and Irish Governments intervened to argue that, despite the ECJ's ruling in *Reyners*, the area of provision of services was subject to even greater problems of control and discipline than that of establishment, that Articles 56 and 57 should not be found to have direct effect, and that the only satisfactory solution was the adoption of directives as provided for by the Treaty.

[132] Case C-452/04 *Fidium Finanz v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521.
[133] Arts 90-100 TFEU.
[134] Ch 20.
[135] Case 33/74 (n 9).

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

[Note Lisbon Treaty renumbering: Arts 59, 60, 63, and 66 EC are now Arts 56, 57, 59, and 62 TFEU]

A Dutch national acting as legal adviser to Van Binsbergen in respect of proceedings before a Dutch social security court transferred his place of residence from the Netherlands to Belgium during the course of the proceedings. He was told that he could no longer represent his client since, under Dutch law, only those established in the Netherlands could act as legal advisers. A reference was made to the ECJ to determine whether Article 56 TFEU had direct effect, and whether the Dutch rule was compatible with it.

THE ECJ

20. With a view to the progressive abolition during the transitional period of the restrictions referred to in Article 59, Article 63 has provided for the drawing up of a 'general programme'—laid down by Council Decision of 18 December 1961—to be implemented by a series of directives.

21. Within the scheme of the chapter relating to the provision of services, these directives are intended to accomplish different functions, the first being to abolish, during the transitional period, restrictions on freedom to provide services, the second being to introduce into the law of Member States a set of provisions intended to facilitate the effective exercise of this freedom, in particular by the mutual recognition of qualifications and the coordination of laws with regard to the pursuit of activities as self-employed persons.

22. These directives also have 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 he may not be fully subject to the professional rules of conduct in force in that State.

24. The provisions of Article 59, the application of which was to be prepared by directives issued during the transitional period, therefore became unconditional on the expiry of that period.

25. The provisions of that article abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.

26. Therefore, at least as regards the specific requirement of nationality or of residence, Articles 59 and 60 impose a well-defined obligation, the fulfilment of which by the Member States cannot be delayed or jeopardized by the absence of provisions which were to be adopted in pursuance of powers conferred under Articles 63 and 66.

The Court here identified two reasons for the Treaty provisions on the adoption of directives: first, to abolish restrictions and, secondly, to facilitate the freedom to provide services. With regard to the first, where the restriction was a straightforward restriction on the ground of nationality or place of establishment, the ECJ considered that no directive was necessary and the provisions of Article 56 could be relied on directly. A residence requirement was a particularly straightforward infringement, given that the aim of Article 56 was to abolish state restrictions on the freedom to provide services which were imposed on non-resident providers. More generally, restrictions imposed on the basis of residence are seen as being liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners.[136]

[136] Case C-350/96 *Clean Car Autoservice v Landeshauptmann von Wien* [1998] ECR I-2521; Case C-224/97 *Ciola v Land Vorarlberg* [1999] ECR I-2517.

Notably, the lawyer in *Van Binsbergen* was a national relying on Article 56 in his own Member State. This did not pose any problem because the relevant factor for the application of Article 56 is simply that the provider must be established in a Member State other than that of the person for whom the service is to be provided. The provider may rely on Article 56 as against the state in which he or she is established, so long as the services are provided for persons established in another Member State.[137]

(B) THE SCOPE OF ARTICLE 56

(i) *The Need for an Inter-State Element*

As with the other freedoms, the Treaty chapter on services does not apply to 'wholly internal situations' where the relevant elements of an activity are confined within a single Member State.[138]

In *Koestler*, which concerned a bank in France carrying out certain stock-exchange orders and account transactions for a customer established in France, the ECJ ruled that although both the provider and the recipient of services were established in the same Member State, there was a provision of services within the meaning of Article 57 because the customer moved, before the contractual relationship with the bank was terminated, to establish himself in Germany.[139] Similarly in *Deliège*, in which a Belgian sportswoman had challenged the selection rules of the Belgian Judo Federation, the ECJ rejected the argument that this was a wholly internal situation, relying on the fact that 'a degree of extraneity may derive in particular from the fact that an athlete participates in a competition in a Member State other than that in which he is established'.[140] Further, in certain sectors such as public procurement, where harmonizing legislation has been adopted, the legislation is made applicable even to wholly internal situations.[141] Finally, the Court's focus has been as much on the mobility of the service as that of the persons involved.[142]

(ii) *The Freedom to Receive Services*

Article 56 expressly refers to the freedom to *provide* services, and Article 57 to the rights of the *provider* of services, and does not mention the recipient of the services. In *Luisi and Carbone*, however, the ECJ confirmed that the Treaty covers the situation of recipients as well as providers of services, and ruled that the freedom for the recipient to move was the necessary corollary of the freedom for the provider:

> It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, ...

[137] Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, [30]; Case C-379/92 *Peralta* [1994] ECR I-3453, [40]. For a 'wholly internal situation' in the services context see Case C-108/98 *RI.SAN v Comune di Ischia* [1999] ECR I-5219.

[138] For an example of such a 'purely internal situation' see Case 52/79 *Debauve* (n 18) on broadcasting services. Compare two other broadcasting cases, Case 62/79 *Coditel v SA Ciné Vog Films* [1980] ECR 881, [10], [15] and Case 352/85 *Bond van Adverteerders* (n 74) [14]–[15], where there was a certain inter-state element, in that the substance of the services, the cable television broadcasts, originated in a different Member State. See the subsequent 'TV without frontiers' Broadcasting Directive 89/552 [1989] OJ L298/23.

[139] Case 15/78 *Société Générale Alsacienne de Banque SA v Koestler* [1978] ECR 1971.

[140] Cases C-51/96 and C-191/97 *Deliège v Ligue Francophone de Judi et Disciplines Associées ASBL* [2000] ECR I-2549, [59]; S van den Bogaert, Note (2000) 25 ELRev 554.

[141] V Hatzopoulos and T Do, 'The Case Law of the ECJ Concerning the Free Provision of Services: 2000–2005' (2006) 43 CMLRev 923.

[142] See the discussion on the cases concerning cross-border access to health care, below. For more general discussion see V Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) 37 CMLRev 43 and Snell (n 19).

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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.[143]

This holding was confirmed in subsequent judgments,[144] notably in *Cowan*, in which the ECJ found that the refusal, under a French criminal compensation scheme, to compensate a British tourist who had been attacked while in Paris constituted a restriction within the meaning of Article 56, without specifying exactly what service he had received.[145]

(iii) *The Commercial Nature of the Services*

Whether a provision of services falls within Articles 56 to 57 depends not just on the inter-state element, but also on the services being commercial in nature, in that they must be provided *for remuneration*. The ECJ has ruled that remunerated services do not lose their economic nature either because the provider is a non-profit-making enterprise,[146] or because of an 'element of chance' inherent in the return, or because of the recreational or sporting nature of the services.[147]

In *Deliège* the ECJ ruled further that 'the mere fact that a sports association or federation unilaterally classifies its members as amateur athletes does not in itself mean that those members do not engage in economic activities'[148] and in *Bond van Adverteerders* the Court specified that the remuneration does not have to come from the recipient of the services, so long as there is remuneration from some party.[149] This was elaborated upon in *Deliège* where the ECJ drew on its case law in the field of free movement of workers concerning economic activity which was not 'marginal or ancillary' and ruled:

> 56. In that connection, it must be stated that sporting activities and, in particular, a high-ranking athlete's participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 59 [*now Article 56 TFEU*] of the Treaty even if some of those services are not paid for by those for whom they are performed...
>
> 57. For example, an organiser of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself.[150]

[143] Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, [16].

[144] Case C-17/00 *De Coster v Collège des Bourgmestre et échevins de Watermael-Boitsford* [2001] ECR I-9445; Case C-294/97 *Eurowings Luftverkehrs* (n 91); Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931.

[145] Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195.

[146] Case C-70/95 *Sodemare* (n 15).

[147] Case C-275/92 *Schindler* (n 19) [33]-[34]. For similar rulings on the concept of an economic activity under Art 45 see Case 36/74 *Walrave* (n 22); Case C-415/93 *Bosman* (n 21); Cases C-51/96 and 191/97 *Deliège* (n 140); Case C-176/96 *Lehtonen v FRBSB* [2000] ECR I-2681.

[148] Cases C-51/96 and 191/97 (n 140).

[149] Case 352/85 (n 74); Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685 where student distributors of information in Ireland about abortion services in the UK received no remuneration from the providers of the actual service in the second Member State. In the absence of such an economic link between the information ban and the freedom to provide the service, the connection between them was deemed 'too tenuous' to attract the application of Art 56 TFEU.

[150] (N 140).

What is the legal position where the remuneration for the service is provided by the state? This issue came to prominence in a series of cases concerning cross-border access to medical and health care services, which threatened to disrupt the operation of national welfare systems.[151] The question had arisen previously in the context of a course taught under the national educational system in *Humbel*, where the ECJ ruled that it did not fall within the scope of the Treaty rules on services:

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

17. The essential characteristic of remuneration thus 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.

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 must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.

Conversely, the ECJ in *Wirth* declared that, although most institutions of higher education were financed from public funds, those which sought to make a profit and were financed mainly from private funds, for example by students or their parents, could constitute providers of services within Articles 56 and 57.[152] This was confirmed by the ruling in *Schwarz*, where the German government's refusal to grant tax relief to the parents of school-going children on the ground that the private school they attended was established in another Member State amounted to a restriction under Article 56 TFEU.[153]

The distinction between publicly and privately remunerated services on which these cases are based is however a difficult one, and the applicability of the reasoning in *Humbel* has been narrowed, as the cases concerning access to cross-border health care demonstrate. In *Kohll*, the ECJ ruled that treatment provided by an orthodontist established in a different Member State from the applicant amounted to a service provided for remuneration, and that the requirement of prior authorization from the home state's social security institution before the cost would be reimbursed constituted an unjustified restriction on the freedom to receive cross-border services.[154] Together

[151] Case C-120/95 *Decker* [1998] ECR I-1831 (albeit dealing with goods rather than services); Case C-158/96 *Kohll* (n 144); Case C-368/98 *Vanbraekel v ANMC* [2001] ECR I-5363; Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, Case C-385/99 *Müller-Fauré* [2003] ECR I-4509; Case C-372/04 *Watts v Bedford Primary Care Trust* [2006] ECR I-4325; Case C-444/05 *Stamatelaki v OAEE* [2007] ECR I-3185.

[152] Case C-109/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447; Case C-159/90 *Grogan* (n 149); S O'Leary, Note (1992) 17 ELRev 138; Case C-70/95 *Sodemare* (n 15), in which the ECJ considered the applicability of Art 56 to Italian conditions on the involvement of economic operators in the provision of the state's social welfare services, such as the running of old people's homes.

[153] Case C-76/05 *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6849; Case C-318/05 *Commission v Germany* [2007] ECR I-6957; Case C-281/06 *Hans-Dieter and Hedwig Jundt v Finanzamt Offenburg* [2007] ECR I-12231.

[154] Case C-158/96 *Kohll* (n 144). This was decided on the same day as the parallel Case C-120/95 *Decker* (n 151) which concerned a prior authorization requirement from the competent social security institution before reimbursement of spectacles purchased in another Member State could be made. For comment see P Cabral, Note (1999) 24 ELRev 387.

with the subsequent cases of *Geraets-Smits/Peerbooms*,[155] *Inizan*,[156] and *Vanbraekel*,[157] this ruling demonstrates vividly the potentially disruptive effects on national welfare systems of the decision to bring essential and publicly organized services within the scope of the Treaty's free movement provisions.

In *Geraets-Smits/Peerbooms*, the two applicants were insured for their medical costs under a Dutch social insurance scheme for people whose income is below a certain level. Some of the funding in the scheme was derived from individual premiums, some from the state, and some from subsidization by other private insurance funds. Both applicants received medical treatment abroad without prior authorization from the fund, apparently because of the restrictive conditions for authorization which entailed that (i) the treatment must be regarded as 'normal in the professional circles concerned' and (ii) the treatment must be 'necessary', in the sense that adequate care could not be provided without undue delay by a care provider in the home state.

In addressing whether this kind of prior authorization requirement was prohibited by Articles 56 and 57, the ECJ began by reaffirming that Member States retain the power to organize their social security systems, subject to compliance with the rules of EU law.[158] The Court went on to consider the argument made by several governments, citing *Humbel*, that hospital services did not constitute an economic activity when provided free of charge under a sickness insurance scheme.

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

[Note Lisbon Treaty renumbering: Art 60 EC is now Art 57 TFEU]

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 the hospital treatment was financed directly by the sickness insurance funds on the basis of agreements and pre-set fee scales did not remove such treatment from the ambit of Article 57. The ECJ reiterated that Article 57 did not require the service to be paid for by those for whom it was performed and declared that the payments made by the sickness insurance funds under the contractual

[154] For a case concerning non-discriminatory access to medical care under what is now Art 18 TFEU see Case C-411/98 *Ferlini* (n 24).

[155] (N 151); E Steyger, Note (2002) 29 LIEI 97; G Davies, Note (2002) 29 LIEI 27.

[156] Case C-56/01 *Inizan v Caisse primaire d'assurance maladie des Hauts-de-Seine* [2003] ECR I-12403.

[157] Case C-368/98 *Vanbraekel* (n 151).

[158] Several of the health care cases involve an interpretation of Reg 1408/71 on the cross-border coordination of social security, and particularly of Art 22 thereof, but for the purposes of this chapter the focus will be only on the ECJ's conclusions about the applicability of Art 56 TFEU on the free movement of services.

arrangements constituted consideration for the hospital services, and represented remuneration for the hospital which was engaged in an activity of an economic character.

Geraets-Smits was followed by the cases of *Müller Fauré*[159] and *Watts*,[160] which confirmed and extended its reasoning. Both cases dealt with a national requirement for prior authorization before travelling to receive medical care in another state. *Watts*, however, concerned the UK's tax-funded National Health Service (NHS) and not the kind of insurance-based health care systems at issue in the previous cases. The referring court asked the ECJ whether Article 56 was applicable to the situation in which the applicant had travelled to another state for medical care and was now seeking reimbursement, despite the fact that the NHS had no fund out of which to pay for health care received in another state, and despite the fact that it had no obligation to pay for private health care obtained *within* the UK.

The ECJ's answer was that Article 56 applied where a patient received medical services in a hospital environment for consideration in a Member State other than the state of residence 'regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates'. However, the Court refused to be drawn on the question whether the provision of health care services by the NHS within the UK amounted to the provision of a commercial service, and stated that there was 'no need in the present case to determine whether the provision of hospital treatment in the context of a national health service such as the NHS is in itself a service within the meaning of those provisions'.

While the outcomes on the facts of these cases may not in themselves be alarming, since the Court in each case acknowledged the importance of the stable financing of national social insurance systems and the justifiability of measures which seek to maintain a balanced and manageable national health care system, they have undoubtedly opened up to the rigours of the Treaty rules and to cross-border economic activity, some of the core aspects of national welfare systems.[161]

The ECJ delivered a somewhat more cautious ruling recently in *Commission v Spain*, which did not concern people who travel abroad in order to receive medical treatment, but rather those who travel for other reasons such as travel or education, and the need for medical care arises unexpectedly during their stay.[162] The Court held that the Spanish legislation limiting the level of cover, in such circumstances, to that applicable in the state where the treatment was administered did not amount to a restriction of the freedom to provide services. Distinguishing the case from *Vanbraekel*, where it had ruled that a similar limit on the level of cover would constitute a restriction on the free movement of services where a person had gone abroad specifically to receive scheduled medical treatment, the ECJ ruled that the potential interference with free movement in a case involving unscheduled medical care was too 'uncertain and indirect' to constitute a restriction on the Treaty freedom.[163]

Despite this more careful ruling on the issue of unscheduled medical treatment abroad, the upshot of the Court's rulings remains that Articles 56–57 TFEU apply to any service, however important a public service it may be, which is 'provided for remuneration'.[164] The line between publicly and privately remunerated services remains uncertain. Health care services, however funded, fall within the scope of the Treaty where a patient who has travelled to another state and paid for health care there seeks reimbursement from their national system. There is no exception from the Treaty rules for state-provided welfare services. One of the consequences of these rulings has been a move by

[159] Case C–385/99 (n 151).

[160] Case C–372/04 (n 151).

[161] See, eg, in Case C–372/04 *Watts* (n 151), how the Court engaged in a detailed review of the way in which the NHS treated waiting lists for the purposes of managing health care provision.

[162] Case C–211/08 *Commission v Spain*, 15 June 2010.

[163] Ibid [61]–[62].

[164] G Davies, 'Welfare as a Service' (2002) 29 LIEI 27.

the EU legislature—after three years of contestation and debate—to adopt a Directive codifying and clarifying the law on cross-border access to health care.[165]

(iv) *Can Illegal Activities Constitute Services within Articles 56–57?*

Several cases, including a recent stream of rulings on the subject of lotteries and gambling, have raised the question of illegal or 'immoral' services in relation to activities which are lawful in certain states but not in others. Clearly if a person established in a Member State in which a particular activity is lawful wishes to provide services in another Member State in which it is not lawful, the second state may have good reasons for restricting the provision of that service. An initial question is whether such activities, on the legality of which the Member States do not agree, can constitute 'services' at all within EU law.

In *Koestler*, the ECJ ruled that Germany's refusal to allow a French bank which had provided services for a German national, including a stock-exchange transaction which was treated as an illegal wagering contract in Germany but not in France, to recover from that client was not contrary to Article 56 if the same refusal would apply to banks established in Germany.[166] Despite the fact that the services were considered illegal in Germany, the ECJ ruled that the conclusion of the wagering contract could constitute a service, although Germany was justified in restricting that service by refusing to allow the bank to sue for recovery.

In *Grogan*, the Court considered whether the provision of abortion was a service within the meaning of the Treaty, in order to determine whether the restriction in one Member State on information about the provision of abortion in another state was contrary to Article 56.[167] In response to the argument that abortion could not be categorized as a service on the ground that it was immoral, the ECJ ruled that it was not for the Court 'to substitute its assessment for that of the legislature in those Member States where the activities are practised legally'.[168] As *Koestler* indicates however, the fact that abortion constitutes a service within Article 56 does not mean that a Member State in which abortion services are illegal may not prohibit or restrict their provision in its territory by health care providers who are established in another Member State. Less clear, even after *Grogan*, is whether a Member State can restrict the access of its citizens to services in another Member State, where those services are prohibited or restricted within the regulating state.[169]

In *Schindler*, the defendants were acting as agents on behalf of a German public lottery, seeking to promote that lottery within the UK, and they were charged with an offence under the UK lotteries legislation. When the case was referred to the ECJ, several Member States argued that lotteries were not an 'economic activity' within the meaning of the Treaty, since they were traditionally prohibited or operated by public authorities in the public interest. The Court rejected the argument, ruling that lotteries were services provided for remuneration, the price of the lottery ticket, and that, although they were closely regulated in some Member States, they were not totally prohibited in any.[170] Although the morality of lotteries was 'questionable', they could not be regarded as 'activities whose harmful nature

[165] Dir 2011/24, OJ [2011] L88/45.

[166] Case 15/78 (n 139).

[167] Case C-159/90 (n 149).

[168] Ibid [20].

[169] The AG in *Grogan* (n 149) took the view that the restriction on information in the case in question was proportionate. For an indirect restriction by the UK on access to artificial insemination services in another Member State which was not referred to the ECJ see *R v Human Fertilisation and Embryology Authority, ex p Diane Blood* [1997] 2 CMLR 591. For a revival of the 'Irish problem' concerning whether a woman seeking access to abortion in another Member State may be restricted by the state from travelling for that purpose see *D v Health Service Executive*, Irish High Court, 9 May 2007.

[170] Case C-275/92 *Schindler* (n 19).

causes them to be prohibited in all the Member States and whose position under Community law may be likened to that of activities involving illegal products'.[171]

Similarly, in a series of cases concerning gambling, despite the fact that these constituted services within the meaning of the Treaty, the Court ruled that 'the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities'.[172] As with all instances of 'objective justification' of Treaty freedoms, the regulation of such services must be carried out in a genuine, non-discriminatory, proportionate, and consistent manner.[173]

In *Jany*, the ECJ ruled that the relevant provisions of the EU's Association Agreement with Poland on freedom of establishment and services were to have the same meaning and scope as those under the EU Treaties so that 'the activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration'.[174] In response to arguments based on the immoral nature of the services, the Court cited its rulings in *Grogan* and *Schindler*, and declared that, 'far from being prohibited in all Member States, prostitution is tolerated, even regulated, by most of those States'.[175]

Somewhat surprisingly in view of the consistent previous case law, the ECJ in *Josemans* came to a different conclusion as regards the provision of services relating to the marketing of cannabis by so-called marijuana cafés in the Netherlands.[176] The marketing of cannabis in the Netherlands was prohibited but tolerated by law, yet the Court ruled that Article 56 TFEU could not be relied on to challenge municipal legislation which limited access to such cafés to residents only. With regard to the provision of catering services for food and drink in such coffee shops, the Court ruled that although the legislation restricted the free movement of services, this was justified by the need to combat drug tourism. To distinguish the circumstances in *Josemans* (despite the official tolerance of marijuana cafés) from those of previous judgments, the ECJ emphasized that there was a prohibition in all Member States, under both international law and EU law, on the marketing of narcotic drugs, which differentiated it even from the case of prostitution.[177]

The result of these rulings appears to be that provided it is lawful in some Member States, and perhaps even in just one state, a remunerated activity constitutes a service within the meaning of Articles 56–57 TFEU. Nevertheless, Member States remain free to regulate and restrict such services,[178] so long as they do so proportionately and without arbitrary discrimination on grounds of nationality or place of establishment.[179]

[171] Ibid [32].

[172] Case C-67/98 *Zenatti* [1999] ECR I-7289; Case C-42/02 *Lindman* [2003] ECR I-13519; Case C-6/01 *Anomar* [2003] ECR I-8621; Case C-243/01 *Gambelli* [2003] ECR I-13031; Cases C-338, 359, and 360/04 *Placanica, Palazzese and Sorricchio* [2007] ECR I-1891; Cases C-447-448/08 *Otto Sjöberg and Anders Gerdin*, 8 July 2010; Case C-46/08 *Carmen Media Group v Land Schleswig-Holstein*, 8 Sept 2010; Case C-64/08 *Ernst Engelmann*, 9 Sept 2010.

[173] An example of the wide margin of appreciation allowed by the Court is evident in Cases C-316, 358-360 and 409-410/07 *Markus Stoß*, 8 Sept 2010, which establishes that Member States may impose an authorization requirement for the provision of games of chance, even though the operator, established in another Member State, holds an authorization from its own Member State.

[174] Case C-268/99 *Jany* (n 11).

[175] Ibid [57].

[176] Case C-137/09 *Marc Michel Josemans v Burgemeester van Maastricht*, 16 Dec 2010.

[177] Ibid [76]-[77].

[178] See, eg, Case C-36/02 *Omega* (n 4).

[179] The ECJ's conclusion in *Schindler* that the UK legislation was justified on public policy grounds was criticized for ignoring the discrimination practised in favour of national small-scale lotteries, and for applying the proportionality test too loosely: G Straetmans, Note (2000) 37 CMLRev 991 on the subsequent gaming cases, Case C-124/97 *Läärä* [1999] ECR I-6067; Case C-67/98 *Zenatti* (n 172).

(v) *Are Restrictions on Social Benefits Contrary to Article 56?*

We saw in the context of establishment that, despite the absence of secondary legislation such as Regulation 1612/68 for workers, restrictions on certain social advantages and benefits which are linked to the exercise of the self-employed activity may fall within the Treaty prohibition. The same is true of the free movement of services. In the *Italian Housing* case, discussed also in the establishment context above, the ECJ ruled that a nationality requirement for access to reduced-rate mortgage loans and to social housing was contrary to Article 49 TFEU on freedom of establishment, but the Italian Government argued that access to publicly built housing could not possibly be relevant to the exercise of the right to provide services, which was precisely the right to provide services without having to have a place of residence in that state.

Case 63/86 Commission v Italy
[1988] ECR 29

18. It is true, as the Italian Government has contended, that in practice not all instances of establishment give rise to the same need to find permanent housing and that as a rule that need is not felt in the case of the provision of services. It is also true that in most cases the provider of services will not satisfy the conditions, of a non-discriminatory nature, bound up with the objectives of the legislation on social housing.

19. However, it cannot be held to be *a priori* out of the question that a person, whilst retaining his principal place of establishment in one Member State, may be led to pursue his occupational activities in another Member State for such an extended period that he needs to have permanent housing there and that he may satisfy the conditions of a non-discriminatory nature for access to social housing. It follows that no distinction can be drawn between different forms of establishment and that providers of services cannot be excluded from the benefit of the fundamental principle of national treatment.

In *Cowan*, a British tourist in France was refused state compensation for victims of violent crime which was available to nationals and to residents.[180] The ECJ cited the general prohibition on discrimination 'within the scope of application of this Treaty' in Article 18 TFEU,[181] and referred to its ruling in *Luisi and Carbone* to the effect that tourists were covered by Article 56 as recipients of services:

> When Community law guarantees a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. It follows that the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law when that risk materialises. The fact that the compensation at issue is financed by the Public Treasury cannot alter the rules regarding the protection of the rights guaranteed by the Treaty.[182]

[180] Case 186/87 *Cowan* (n 145). See also Case C-164/07 *Wood* [2008] ECR I-4143, which however concerned a resident and not a temporary service-recipient or provider.

[181] For cases in which the ECJ ruled that Art 18 TFEU could be the basis for a claim of discrimination in treatment, without being linked to another specific Treaty provision, see Cases C-92 and 326/92 *Phil Collins v Imtrat Handelsgesellschaft* [1993] ECR I-5145; Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-411/98 *Ferlini* (n 24). The ECJ sometimes does not rely on Art 18 where a more specific Treaty provision such as Art 49 applies: Case C-1/93 *Halliburton* (n 112).

[182] [1989] ECR 195, [17]; Case C-45/93 *Commission v Spain* [1994] ECR I-911, concerning free admission to national museums.

Thus, although the state compensation is publicly funded, it is not (following *Humbel*[183]) the compensation which constitutes the commercial service being provided. Instead the relevant services in these cases, although not specifically identified by the ECJ, must be other services such as hotels, restaurants, etc for which the recipients, as tourists, provide remuneration. If, whilst in the course of a temporary stay in a Member State in order to avail themselves of remunerated services of this nature, such tourists are denied equal treatment in matters such as compensation for assault and entry fees to museums they may be able to invoke Article 56.[184]

Article 24 of Directive 2004/38 now articulates a general rule of equal treatment for EU citizens who are resident in a host Member State. In the case of a person who is temporarily resident in order to provide or receive services, however, it seems likely that there will have to be some general link between the nature and purpose of the temporary residence and the nature of the social benefit sought.

JUSTIFYING RESTRICTIONS ON THE FREE MOVEMENT OF SERVICES

Alongside the express exceptions for public policy, security, and health contained in Article 52 TFEU, which are made applicable to the field of services by Article 62,[185] the ECJ has developed a justificatory test for workers, services, and establishment alike which is similar to the *Cassis de Dijon* 'rule of reason' in the free movement of goods context.[186] Although in the area of goods these open-ended exceptions have generally been referred to as 'mandatory requirements', in the field of services the term 'imperative requirements' or the generic term 'objective justification' is more often used.

The origins of this approach in the services context can be found in the case of *Van Binsbergen*.[187] We saw in that case how various Member States argued that there were greater dangers in the area of services than in the area of establishment, since evasion of national regulation and control would be easier where service providers were not—or were only temporarily—resident in the state where the service was provided.[188] The ECJ addressed the issue by indicating that, although the imposition of a residence requirement would probably be excessive in that particular case as a way of ensuring 'observance of professional rules of conduct connected with the administration of justice and with respect for professional ethics', it might not always be so.[189] The test for justification laid down by the Court in *Van Binsbergen* contains several conditions which must be satisfied if a restriction on the freedom to provide services is to be compatible with Article 56.

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

[184] For other cases on the provision or receipt of inter-state services see Case C-43/95 *Data Delecta and Forsberg v MSL Dynamics* [1996] ECR I-4661; Case C-323/95 *Hayes v Kronenberger* [1997] ECR I-1171; Case C-122/96 *Saldanha and MTS Securities Corporation v Hiross Holdings* [1997] ECR I-5325 on national procedures requiring non-residents to provide security for costs in litigation, which were held to be capable of having an indirect effect on trade in goods and services between Member States. Compare Case C-177/94 *Perfili* [1996] ECR I-161.

[185] See Section 2(d) above.

[186] Ch 19.

[187] Case 33/74 *Van Binsbergen* (n 9); Cases 110-111/78 *Ministère Public v Van Wesemael* [1979] ECR 5; Case 279/80 *Webb* [1981] ECR 3305.

[188] AG Mayras in *Van Binsbergen* (n 9) 1317. These concerns about temporary service provision are to some extent reflected in the distinction between establishment and services in the 2005 Dir on recognition of professional qualifications: Dir 2005/36, Arts 7–9 in particular, and rec 6.

[189] Case 33/74 *Van Binsbergen* (n 9) [12]–[14]; Case 39/75 *Coenen* (n 124) [9]; Case C-131/01 *Commission v Italy* [2003] ECR I-1659. For a case in which the protection of creditors and the 'sound administration of justice' was found to be an important objective justifying the imposition of restrictions on the practice of debt collection see Case C-3/95 *Reisebüro Broede v Sandker* [1996] ECR I-6511. On restrictions preventing legal advocates from practising in partnership with accountants see Case C-309/99 *Wouters* (n 24) [97]–[99].

First, the restriction must be adopted in pursuit of a legitimate public interest compatible with EU aims. In keeping with the scope of permissible exceptions to other Treaty freedoms, the ECJ has ruled that an economic aim is not a legitimate aim. Thus the aim of protecting a particular economic sector within a Member State is not legitimate,[190] whereas the maintenance of the financial balance of the social security system with a view to protecting public health is legitimate.[191] In *Finalarte* the ECJ ruled that that the aim of a measure is something to be determined 'objectively' by the national court,[192] although the ECJ retains the ultimate role of pronouncing on the legitimacy of the aim.

Secondly, the restriction must be equally applicable to persons established within the state, and must be applied without discrimination.[193] For example, in a series of cases concerning broadcasting restrictions, the Court held that, although the promotion of cultural policy through ensuring a balance of programmes and restricting the content and frequency of advertisements was a legitimate aim, it must not be pursued in a discriminatory or protectionist manner.[194]

Thirdly, the restriction imposed on the provider of services must be *proportionate* to the need to observe the legitimate rules in question.[195] The proportionality test entails examining whether the rule is 'suitable' or 'appropriate' in achieving its aim, and although the ECJ has not consistently applied this part of the proportionality test in all cases, whether that aim could be satisfied by other, less restrictive means.[196] In *Van Binsbergen* itself, the Court ruled that the public interest in the proper administration of justice could be ensured by requiring an address for service to be maintained within the state, rather than a residence there. A crucial factor in appraising the proportionality and necessity of any restriction is whether the provider is subject to similar regulation in the Member State in which that person is established.[197] If the requirement duplicates a condition already satisfied, it imposes a 'dual burden' and therefore cannot be justified.[198] Although the proportionality test in principle is for the national court to apply, the ECJ frequently indicates which requirements or restrictions may

[190] Case C-398/95 *SETTG v Ypourgos Ergasias* [1997] ECR I-3091, [22]–[23]; Case C-49/98 *Finalarte* (n 12) [39]; Case C-338/09 *Yellow Cab Verkehrsbetriebs GmbH v Landeshauptmann von Wien*, 22 Dec 2010, in which the objective of ensuring the profitability of a bus service, as a purely economic objective, could not constitute an overriding reason in the public interest.

[191] See the health care cases at (n 151). In these cases, the states could not rely on aims of a purely economic nature, and in order to plead the 'risk to the financial balance of the social security system' as a justification, they had to frame the argument as a risk to public health rather than to the economic interests of the state.

[192] Case C-49/98 (n 12) [40]–[41].

[193] For an example of a discriminatory and inappropriate way of protecting the confidentiality of data by imposing a requirement of state-ownership of shares see Case 3/88 *Commission v Italy* [1989] ECR 4035; Case C-272/91 *Commission v Italy* (n 30); Case C-101/94 *Commission v Italy* [1996] ECR I-2691.

[194] Case 352/85 (n 74); Case C-288/89 *Stichting Collectieve Antennevoorsiening Gouda v Commissariaat voor de Media* [1991] ECR I-4007; Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069. The subsequent adoption of the Broadcasting Dir 89/552 [1989] OJ L298/23, which was enacted with the aim of ensuring freedom to provide services and freedom of establishment in the sphere of television, generated a further spate of litigation: Case C-222/94 *Commission v UK* [1996] ECR I-4025; Case C-11/95 *Commission v Belgium* [1996] ECR I-4115; Case C-14/96 *Denuit* [1997] ECR I-2785; Case C-125/06 *Commission v Infront WM AG* [2008] ECR I-1451; Case C-250/06 *United Pan-Europe Communications Belgium SA and Others v Belgian State* [2007] ECR I-11135; Case C-195/06 *KommAustria v ORF* [2007] ECR I-8817. In a high-profile series of cases concerning the broadcasting of international football matches, the General Court upheld the decisions of the Commission authorizing the exemption of exclusive broadcasting of all World Cup and EURO matches, thus reserving these matches for free-for-air television. The restrictions on the freedom of establishment and to provide services were justified by the protection of the right to information and to ensure wide public access to television broadcasts of events of major importance for society: Case T-68/08 *FIFA v Commission*, Case T-55/08 *UEFA v Commission*, and Case T-385/07 *FIFA v Commission*, 17 Feb 2011.

[195] See, eg, the tourist guide cases: Case C-180/89 *Commission v Italy* [1991] ECR I-709; Case C-154/89 *Commission v France* [1991] ECR I-659; Case C-198/89 *Commission v Greece* [1991] ECR I-727; Case C-375/92 *Commission v Spain* [1994] ECR I-923.

[196] For an interesting case concerning alcohol advertising in France, in which the ECJ did not apply a strict proportionality test, see Case C-262/02 *Commission v France* [2004] ECR I-6569.

[197] Case C-272/95 *Guiot and Climatec* [1996] ECR I-1905; Cases C-369 and 376/96 *Arblade* (n 64).

[198] Ch 19, in relation to the free movement of goods.

be disproportionate in the context of the preliminary reference procedure,[199] or more directly in the context of infringement proceedings under Article 258 TFEU (ex Article 226 EC),[200] such as the series of insurance services cases.[201]

A *fourth* condition of the test for justification, which was not mentioned in *Van Binsbergen* and has less frequently been highlighted by the ECJ, but which was clearly stated in the *Carpenter* case,[202] is the requirement that the restrictive measure should also respect fundamental rights.[203]

The question whether specific restrictions on free movement can be justified is one of the most regularly litigated before the Court. Three lines of case law will be discussed below to exemplify the way in which the Court has dealt with claims that a restriction on the free movement of services was justified. These groups of cases concern the subject of (ii) posted workers, (iii) cross-border access to health care, and (iv) direct taxation rules.

(ii) Posted Workers

There has been an important series of ECJ rulings on the subject of 'posted workers', which concerns the provision of manpower on a temporary basis by a service provider from another Member State, and which is governed in part by the Posted Workers Directive.[204] Much of the litigation concerned matters which were not covered by the Directive, so that the Treaty provisions on services were directly applied instead. The case law establishes that preserving the interests of the workforce and ensuring good relations on the labour market are legitimate aims for host Member States to pursue. A host Member State can, in principle, apply its own labour legislation to employees, including non-EU national employees, of a company providing temporary services. The principle of proportionality applies however, so that the imposition of conditions such as a licence requirement is acceptable only if they do not duplicate requirements imposed by the state of establishment (home state), and take account of the relevant evidence and guarantees furnished by the service provider in the home state.[205] In all cases, a claim by the host state that legislative restrictions are intended for the protection of the posted workers must be carefully scrutinized.[206]

The most famous and contested ruling on posted workers to date is that in *Laval*, which came shortly after the *Viking* ruling discussed above.[207] The ECJ in *Laval* ruled that industrial action in the form of a blockade by Swedish labour unions against a Latvian company which, due to its considerably

[199] Case 16/78 *Choquet* [1978] ECR 2293; Case C-193/94 *Skanavi and Chyssanthakopoulos* [1996] ECR I-929 on driving licence requirements. In Case C-49/98 *Finalarte* (n 12) [49]-[52], the Court gave a very directional set of guidelines on how the national court should assess whether the rules are a proportionate restriction. See also Case C-390/99 *Canal Satélite* (n 6) [34]-[42]; Case C-400/08 *Commission v Spain* (n 20).

[200] See, eg, the *Lawyers' Services* case, Case 427/85 *Commission v Germany* [1988] ECR 1123, [26].

[201] Case 205/84 *Commission v Germany* (n 13); Case 206/84 *Commission v Ireland* [1986] ECR 3817; Case 220/83 *Commission v France* [1986] ECR 3663; Case 252/83 *Commission v Denmark* [1986] ECR 3713.

[202] Case C-60/00 *Carpenter v Home Secretary* [2002] ECR I-6279.

[203] Case C-260/89 *ERT v DEP* [1991] ECR I-2925, [42] on freedom of establishment; Case C-370/05 *Festersen* [2007] ECR I-1129 on the free movement of capital.

[204] See Dir 96/71, [1997] OJ L18/1. The Commission in 2006 issued a communication with a view to providing guidance on the consequences of the ECJ's case law: COM(2006)159.

[205] Case 279/80 *Webb* (n 187).

[206] Case C-113/89 *Rush Portuguesa v Office National d'Immigration* [1990] ECR I-1417; Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803; Cases C-369 and 376/96 *Arblade* (n 64); Case C-493/99 *Commission v Germany* [2001] ECR I-8163; Case C-165/98 *Mazzoleni, Guillame and others* [2001] ECR I-2189; Case C-164/99 *Portugaia Construções* [2002] ECR I-787; Case C-445/03 *Commission v Luxembourg* [2004] ECR I-1019; Case C-244/04 *Commission v Germany* [2006] ECR I-885; Case C-168/04 *Commission v Austria* [2006] ECR I-9041; Case C-490/04 *Commission v Germany* [2007] ECR I-6095; Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989; Case C-219/08 *Commission v Belgium* [2009] ECR I-9213; Case C-515/08 *Vítor Manuel dos Santos Palhota and others*, 7 Oct 2010.

[207] (Nn 25-26) above, and text.

lower labour costs, won a construction contract to carry out temporary work in Sweden, where the industrial action was aimed at forcing the company to sign a collective agreement in Sweden containing wage conditions and other terms of employment, was unjustified under Article 56 TFEU.[208] The ECJ based its ruling also on the Posted Workers Directive, under which Sweden could have chosen to impose a legislative minimum wage requirement on the Latvian company, or to declare relevant collective agreements to be universally applicable. However, Sweden's labour relations system was designed to be decentralized, entrusting management and labour with the task of setting wage rates through collective negotiations. Further, in the construction sector it required negotiation to take place on a case-by-case basis at the place of work, taking account of the specific qualifications and tasks of the employees concerned.

Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet ea
[2007] ECR I-11767

[Note Lisbon Treaty renumbering: Arts 2 and 136 EC are now Arts 3 and 151 TFEU; Art 3 EC has been repealed and replaced by Arts 7 TFEU and 13(1) and 21(3) TFEU.]

102. The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.

103. In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty...

104. It should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

105. Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

...

107. In that regard, it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

108. However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective.

...

[208] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet ea* (n 25).

> In addition to [*the possibility under the Posted Workers Directive for Sweden to impose, in relation to posted workers, certain specified minimum protections and conditions of employment on a non-discriminatory basis*], their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.
>
> 109. Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means (see *Seco and Desquenne & Giral*, paragraph 14, *Rush Portuguesa*, paragraph 18, and *Arblade and Others*, paragraph 41).
>
> 110. However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, paragraph 43).

The case has generated significant controversy in Sweden and across Europe. Not only did it involve the disruption of the much-admired Swedish social model, pitting this against the economic freedoms of the Treaty, but it did so in the context of the 'new socio-economic diversity in the Union subsequent to its Eastern Enlargement', bringing to prominence the significant economic disparities between different parts of the European Union.[209] While the judgment has been much criticized, mostly for prioritizing economic free movement over collective labour rights and for the lack of judicial deference in a sensitive domestic field of social and labour policy,[210] it has also divided critics on questions such as whether it can be viewed as enhancing the rights of Latvian workers rather than undermining the rights of Swedish workers. Unlike its 'sister ruling' in *Viking*, above,[211] which was equally criticized for framing collective action as a restriction on freedom of establishment, the Court in *Laval* did not leave it to the national court to apply the proportionality test, but ruled the collective action to be unjustified.

(iii) *Cross-Border Health Care*

A further example of the Court's treatment of attempts to justify restrictions on the free movement of services is in the line of cases governing access to cross-border health care, discussed above.[212] In *Decker* and *Kohll*, the Court rejected the argument that the financial balance of the social security scheme would be upset, given that the expenses incurred were to be reimbursed at exactly the same

[209] C Joerges, 'A New Alliance of De-Legalisation and Legal Formalism? Reflections on Responses to the Social Deficit of the European Integration Project' (2008) 19 Law and Critique 246; N Lindstrom 'Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict' (2010) 48 JCMS 1307; U Belavusau, 'The Case of Laval in the Context of the Post-Enlargement EC Law Development' (2008) 9 German LJ 2279.

[210] N Reich, 'Free Movement v. Social Rights in an Enlarged Union—the Laval and Viking Cases before the ECJ' (2008) 9 German LJ 159; C Kilpatrick 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers' (2009) 34 ELRev 844.

[211] (N 25).

[212] (N 151); J van de Gronden, 'Cross-Border Health Care in the EU and the Organisation of the National Health Care Systems of the Member States: the Dynamics Resulting from the European Court of Justice's Decisions on Free Movement and Competition Law' (2008–2009) 26 Wis Int'l LJ 705; L Hancher and W Sauter, 'One Step Beyond? From Sodemare to Docmorris: the EU's Freedom of Establishment Case Law Concerning Healthcare' (2010) 47 CMLRev 117.

rate as that applicable in the home state.[213] In *Leichtle*, the conditions imposed for reimbursement of accommodation and other expenses associated with obtaining a spa health cure in another Member State were deemed to be excessive and thus unjustified.[214]

In *Geraets-Smits*,[215] the Court concluded that the requirement of prior authorization, subject to the conditions of the necessity and 'normality' of the treatment obtained, might be justified in the interests of maintaining a balanced medical and hospital service open to all, or of preventing the risk of the social security system's financial balance being seriously undermined, or for essential public health reasons under Article 52 TFEU.[216] However, the two conditions had to be applied fairly in a non-discriminatory manner, so that the condition that the treatment sought should be 'normal' must, for example, take into account the findings of international medical science, and the condition concerning the 'necessity' meant that authorization should be given unless the same or equally effective treatment can be obtained without undue delay from an establishment with which the insured person's sickness insurance fund has contractual arrangements.[217] A similar ruling was given in *Müller-Fauré*, where the ECJ distinguished between hospital and non-hospital services, holding that the restrictive measures were more readily justified in the case of the former than the latter.[218] Finally in *Watts*, the aim of 'ensuring sufficient and permanent access to a balanced range of high-quality hospital treatment in the State' was a legitimate aim, if applied in a proportionate way.[219]

(iv) *National Taxation Rules*

Just as in the context of freedom of establishment, there has been an increase in recent years in challenges to national taxation rules on the ground that they constitute unjustifiable restrictions on the freedom to provide services. In cases such as *Danner*,[220] *Gerritse*,[221] *FKP*,[222] *Centro Equestre da Lezíria*,[223] and *Commission v Belgium*,[224] the ECJ ruled that restrictive tax rules may be justified on grounds such as prevention of fraud or tax avoidance, effective fiscal supervision, and the effective collection of taxes, or on social grounds, but it has regularly rejected the argument on the facts of the case. Further, the Court has indicated clearly that objectives such as the prevention of the erosion of the tax revenue base, or compensation for the low level of tax paid in the company's state of establishment do not constitute legitimate aims.[225]

The ECJ has also rejected attempts to justify national restrictions where the goals allegedly pursued by such measures were already satisfied by the existence of EU legislation.[226] Conversely, the Court has also indicated that in the absence of coordination of Member States' regulations on a given issue,

[213] Case C-120/95 *Decker* (n 151); Case C-158/96 *Kohll* (n 151).
[214] Case C-8/02 *Leichtle* [2004] ECR I-2641.
[215] Case C-157/99 *Geraets-Smits* (n 151).
[216] See also Case C-368/98 *Vanbraekel* (n 151), where a refusal to make an equivalent payment for hospital treatment received in another Member State with prior authorization was held to be unjustified under the Treaty and under Reg 1408/71.
[217] See also Case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa*, 5 Oct 2010.
[218] Case C-385/99 *Müller-Fauré* (n 151); Case C-512/08 *Commission v France*, 5 Oct 2010, indicating that authorization requirements can also be allowed when applied to extra-mural medical services that imply the use of major medical equipment (such as PET scanners).
[219] Case C-372/05 *Watts* (n 151).
[220] Case C-136/00 *Danner* [2002] ECR I-8147.
[221] Case C-234/01 *Gerritse* [2003] ECR I-5933.
[222] Case *C-290/04 FKP Scorpio (n 130).*
[223] Case *C-345/04 Centro Equestre da Lezíria Grande Lda v Bundesamt für Finanzen [2007] ECR I-1425.*
[224] Case C-433/04 *Commission v Belgium* (n 69).
[225] See, eg, Case C-294/97 *Eurowings Luftverkehrs* (n 91); Case C-422/01 *Försäkringsaktiebolaget Skandia v Riksskatteverket* [2003] ECR I-6817.
[226] See, eg, Case C-158/96 *Kohll* (n 144) [45]–[49].

a national rule will not be deemed to be disproportionate simply because it is stricter than rules applicable in other Member States.[227] Further, EU secondary legislation which implements the provisions on free movement of services in particular sectors or for particular activities must also be interpreted in the light of the fundamental principles laid down in the Treaty and in the case law, including the principles relating to the scope of permissible exceptions and imperative requirements.[228] Finally, the likely interaction of the derogation provisions contained in Article 16(1)(b) and (3) of the Services Directive, discussed below,[229] with the more general public interest justifications developed by the Court raises interesting questions.[230]

ARE NON-DISCRIMINATORY RESTRICTIONS COVERED BY ARTICLE 56?

It has been increasingly clear in recent years that, in the field of free movement of services, even genuinely non-discriminatory obstacles, as opposed to indirectly discriminatory restrictions, are likely to fall within the scope of Article 56 and to be subjected to the 'objective justification' test. While many of the early cases appeared to involve measures which imposed a heavier burden or a dual burden and thus could have been described as indirectly discriminatory,[231] there were also cases involving rules which did not burden established providers of services any less than non-established providers, and yet which were found to be incompatible with Article 56. In more recent years, the Court has explicitly declared that it is not necessary for any kind of discrimination to be established, but simply an impediment to free movement or a restriction on access to the market of another Member State. At the same time, the ECJ has emphasized the commonality of the principles underpinning all of the internal market freedoms in this respect.[232]

The judgment in *Säger* was the first to address the issue of non-discrimination directly.[233] The case concerned German legislation which reserved activities relating to the maintenance of industrial property rights to patent agents.[234] The UK government, citing earlier case law,[235] argued that in the absence of any discrimination, a restriction on the provision of services would not breach Article 56. Advocate General Jacobs responded:

> It does not seem unreasonable that a person establishing himself in a Member State should as a general rule be required to comply with the law of that State in all respects. In contrast, it is less easy to see

[227] Case C-108/96 *MacQuen* (n 67); Case C-67/98 *Zenatti* (n 172).

[228] See, eg, Case C-205/99 *Analir v Administración General de l'Estado* [2001] ECR I-1271.

[229] De Witte (n 271).

[230] In Case C-458/08 *Commission v Portugal*, 18 Dec 2010, [88] the ECJ ruled that the obligation on Member States in Art 16(1) of the Services Dir to ensure access to a service activity within its territory by subjecting it only to non-discriminatory and objectively justified requirements 'stems directly from Article 49 EC' (now Art 56 TFEU).

[231] Marenco (n 68); Case C-379/92 *Peralta* (n 137) [51], where, in the absence of any direct or indirect discrimination or any advantage for domestic interests, Art 56 TFEU was held not to apply to a prohibition on discharging harmful chemicals at sea.

[232] Case C-55/94 *Gebhard* (n 14) [37]; Case C-390/99 *Canal Satélite* (n 6) in which the case law on goods and services was treated as being the same. On the convergence of the freedoms see C Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw' (2001) 26 ELRev 35; T Connor, 'Goods, Persons, Services and Capital in the European Union: Jurisprudential Routes to Free Movement' (2010) 11 German LJ 159.

[233] The first signs were already visible in the *Lawyers' Services* case, concerning the implementation by Germany of Dir 77/249 on the exercise by lawyers of freedom to provide services. See Case 427/85 *Commission v Germany* [1988] ECR 1123; Case 292/86 *Gullung* (n 61); Case C-294/89 *Commission v France* [1991] ECR I-3591; Case C-289/02 *AMOK* (n 69).

[234] Case C-76/90 (n 13).

[235] Case 15/78 *Koestler* (n 139); AG Gulman in Case C-275/92 *Schindler* (n 19).

why a person who is established in one Member State and who provides services in other Member States should be required to comply with all the detailed regulations in force in each of those States. To accept such a proposition would be to render the notion of a single market unattainable in the field of services.

For this reason, it may be thought that services should rather be treated by analogy with goods, and that non-discriminatory restrictions on the free movement of services should be approached in the same way as non-discriminatory restrictions on the free movement of goods under the '*Cassis de Dijon*' line of case-law. That analogy seems particularly appropriate where, as in the present case, the nature of the service is such as not to involve the provider of the service in moving physically between Member States but where instead it is transmitted by post or telecommunications....

[I]I do not think that it can be right to state as a general rule that a measure lies wholly outside the scope of [*Article 56 TFEU*] simply because it does not in any way discriminate between domestic undertakings and those established in other Member States. Nor is such a view supported by the terms of [*Article 56 TFEU*]: its expressed scope is much broader. If such a view were accepted, it would mean that restrictions on the freedom to provide services would have to be tolerated, even if they lacked any objective justification, on condition that they did not lead to discrimination against foreign undertakings. There might be a variety of restrictions in different Member States, none of them intrinsically justified, which collectively might wholly frustrate the aims of [*Article 56 TFEU*] and render impossible the attainment of a single market in services. The principle should, I think, be that if an undertaking complies with the legislation of the Member State in which it is established it may provide services in another Member State, even though the provision of such services would not normally be lawful under the laws of the second Member State. Restrictions imposed by those laws can only be applied against the foreign undertaking if they are justified by some requirement that is compatible with the aims of the Community.[236]

The Advocate General's approach is a strongly liberalizing one, since almost any national law which regulates the domestic market even in pursuance of important national policies is potentially subject to rigorous scrutiny by the ECJ for justification. Yet this approach has been confirmed by the ECJ in several judgments, beginning with *Alpine Investments*.[237] The case concerned a Dutch prohibition on cold-calling, ie on the making of unsolicited telephone calls without the prior written consent of the individuals concerned in order to offer financial services, and the prohibition applied both to calls made within the Netherlands and to calls made to other Member States. According to the ECJ the prohibition deprived the operators of a rapid and direct technique for marketing and for contacting potential clients in other Member States, thus restricting the free movement of services:

35. Although a prohibition such as the one at issue in the main proceedings is general and non-discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States, it can, none the less, as has been held (paragraph 28) constitute a restriction on the freedom to provide services.

36. Such a prohibition is not analogous to the legislation concerning selling arrangements held in *Keck and Mithouard* to fall outside the scope of Article 30 of the Treaty.

[236] Case C-76/90 *Säger* (n 13) 4234–4235.

[237] Case C-384/93 *Alpine Investments* (n 4). For criticism see L Daniele, 'Non-discriminatory Restrictions on the Free Movement of Persons' (1997) 22 ELRev 191; C Hilson, 'Discrimination in Community Free Movement Law' (1999) 24 ELRev 445.

> 37. According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.
>
> 38. A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.

Although the reasoning is not altogether clear, the effect of paragraphs 37 and 38 is that a restrictive regulation will not fall outside the scope of Article 56 or 34 TFEU simply because it is non-discriminatory in law and in fact, unless it is *also* a restriction which does not in any way affect the access of the person in question to the market in goods or services of another Member State. If an effect on an individual's access to the market of another Member State can be shown, then, regardless of the equally restrictive effect on situations wholly internal to a Member State, the measure in question will fall within the scope of EU law and require objective justification.[238]

Further, the ruling in *Gebhard* on freedom of establishment, which suggested that the same rules were applicable to all four freedoms and that discrimination is not necessary for a restrictive measure to constitute an impediment to freedom of movement under the Treaty, has since been repeated in several cases concerning services. In a paragraph in *Arblade*, which has been repeated in a number of other rulings,[239] the ECJ declared:

> It is settled case-law that Article 59 [*now Art 56 TFEU*] of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State 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, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.[240]

It seems therefore that the rules relating to freedom of movement and the internal market have moved away from the earlier emphasis on discrimination and protectionism and focus more on the creation of a single EU market. In that sense any national rules, whether discriminatory or not, which may impede inter-state trade and mobility by affecting the access of goods, persons, or services from one national market to another is in principle caught by EU law and must be justified by the regulating state.

[238] Not every restrictive measure has been held by the Court to fall within the scope of Art 56. Just as in the case of goods, workers, and establishment, some restrictions are said to be insufficiently direct or significant to be considered liable to have an effect on access to the market: see, eg, Cases C-51/96 and 191/97 *Deliège* (n 140), in which the judo Federation selection rules for competitions were held not to determine access to the labour market; Case C-190/98 *Graf* (n 73).

[239] Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, [22]; Case C-49/98 *Finalarte* (n 12) [28].

[240] Cases C-369 and 376/96 *Arblade* (n 64) [33].