Freedom of establishment and free movement of services

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Contents

I. Introduction

The four freedoms – free movement of goods, persons, services and capital – form the core of the internal market project. This report covers services which has two elements:

- Freedom of establishment of natural and legal persons under Article 49 TFEU
- Free movement of services under Articles 56 and 57 TFEU.

The right of establishment, under Article 49 TFEU, implies the migrant person or company has a permanent link with the host Member State, while the freedom to provide services under Articles 56 and 57 TFEU envisages a much more temporary relationship between the provider/receiver and the host state. This distinction is reflected in the approach taken by the EU legislator and the Court of Justice: generally the *host* state controls the activities of the migrant person/company in the case of freedom of establishment, the *home* state (*country of origin*) controls the activities of the migrant person/company in the case of free movement of services.

In the case of both establishment and services, where the services are provided by a natural person, the natural person will be *self-employed*/*independent*. This is the principal distinction between the provisions on services and those on persons (workers) under Article 45 TFEU. Articles 45 TFEU covers *dependent* workers and is the subject of a separate report. As the Court of Justice said in *Gebhard,*[1] the free movement provisions (Articles 45, 49 and 56 TFEU) apply in separate situations: 'the situation of a [Union] national who moves to another Member State of the [Union] in order to pursue an economic activity is governed by the chapter of the Treaty on the free movement of workers, or the chapter on the right of establishment, or the chapter on services, these being mutually exclusive.'

This report is divided into three parts. First it discusses the Treaty provisions on freedom of establishment and free movement of services (section II). These Treaty provisions are essentially *negative*: they prevent Member States from interfering with free movement, subject to the possibility of the state justifying its national rules for various public interest reasons.

Second, the report considers some key piece of secondary legislation adopted in the field of freedom of establishment and free movement of services to facilitate the operation of the freedoms (section III). Some of the legislation, notably the Services Directive 2006/123, builds on the case law of the Court under Article 56 TFEU and requires Member states to *remove* national laws which interfere with the free movement of services and which cannot be justified. Other legislation requires Member States to adapt their rules to accommodate EU obligations. This legislation is harmonising and is seen as imposing *positive* obligations on states. There is, for example, extensive (but not comprehensive) harmonisation in the field of company law and this is considered below. Finally, the report concludes with a brief consideration of services of general economic interest (SGEIs), such as telecoms, which lie at the difficult interstice between EU law and national law.

[1] Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 20.

II. The Treaty requirements

1. Freedom of establishment

1.1 Introduction

Article 49 TFEU concerns the establishment of natural persons and companies, branches and agencies in other Member States on a permanent or semi-permanent basis. It provides:

> *Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.*

Article 54 TFEU talks specifically about companies:

> *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.*

Article 55 TFEU adds:

> *Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.*

1.2 Personal scope and material scope of Articles 49 and 54 TFEU

An examination of Articles 49 and 54 TFEU shows that they cover three situations:

- the right for natural persons to take up and pursue activities on a self-employed basis in another Member State, often as a professional person

- the right for natural or legal persons to set up and manage undertakings, in particular companies and firms in another Member State
- the right for legal persons to set up agencies, branches or subsidiaries in another Member State. This is known as *secondary establishment*. Case law has extended this right to natural persons. This means they have the right to have an office in State A (usually the home state) and to set up another office in state B (the host state)[2]

We shall look at these in turn. In respect of the free movement of natural persons, Article 49 TFEU applies to the self-employed. There is no Treaty definition of 'self-employed', but in a number of cases the Court has said that the beneficiaries of the Article 49 TFEU rights are individuals who:

- Are engaged in economic activity;
- Have autonomy over their work (the requirement of autonomy distinguishes Article 49 TFEU from Article 45 TFEU on free movement of workers); and
- Are in the host state on a stable and continuous basis (indefinite period).[3]

In addition, individuals can retain their status as self-employed persons, even after they have stopped working, in the circumstances laid down by Article 7(3) of the Citizens' Rights Directive 2004/38 (discussed in the free movement of workers report).

As far as the establishment of corporations are concerned, *Cadbury's Schweppes v Commissioners of the Inland Revenue*[4] provides that Article 49 TFEU presupposes:

- actual establishment of the company in the host state (i.e., permanent presence), and
- the pursuit of a genuine economic activity there

Finally, in respect of the establishment of 'agencies, branches or subsidiaries', the Treaty does not define these terms but in *Somafer*,[5] a case on the interpretation of similar terms in the then Brussels Convention, the Court ruled: 'the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.

The fact that the Treaty encourages secondary establishment raises questions as to whether those wishing to form a company can take advantage of EU rules by incorporating a company in State A which has lenient incorporation rules and then, relying on Articles 49 and 54 TFEU, set up a branch or agency in State B, thereby avoiding State B's more onerous rules of incorporation. Early cases on

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[2] Case 107/83 *Ordre des Avocats au Barreau de Paris* v. *Klopp* [1984] ECR 2971

[3] Case C-268/99 *Jany* [2001] ECR I-8615, paras. 48-49, 71; Case C-221/89 *Factortame* [1991] ECR I-3905, para. 20; Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 27

[4] Case C–196/04 *Cadbury's Schweppes v Commissioners of the Inland Revenue* [2006] ECR I–7995

[5] Case 33/78 *Somafer SA* v *Saar-Ferngas AG* [1978] ECR 2183.

services suggested that this tactic would fail since it is a well-established principle that EU law cannot be relied on for abusive or fraudulent ends.6 However, in Centros,7 considered in section 6.3 below, the Court reached the opposite conclusion. The Court said the fact that 'a national of a Member State who wished 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.

Centros was part of a more general trend by the Court to use Articles 49 and 54 TFEU to achieve freedom of establishment more generally, without attempting to shoehorn the facts into one of the three situations identified in the Treaty.[8] The decision in the important case of *Viking,* discussed below, provides a good example of this.

In conclusion, the concept of establishment is wide. The key feature of establishment is that it requires a degree of permanence by the individual/company in the host state. The Court made this clear in *Gebhard*:[9]

> the concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Union 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 social and economic penetration within the Union in the sphere of activities as self-employed persons.

2. Free movement of services

2.1 Introduction

Article 56(1) TFEU provides:

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

Article 57 TFEU then gives a partial and negative definition of services:

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[6] See, e.g., Case 33/74 *Van Binsbergen* v. *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, para. 13; Case C–23/93 *TV10* v. *Commissariaat voor de Media* [1994] ECR I–4795.

[7] Case C–212/97 [1999] ECR I–1459.

[8] Case C–411/03 *Sevic Systems* [2005] ECR I–10805. His case is considered in section C. 4 below.

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

> *Services shall be considered to be 'services' within the meaning of this Treaty 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; activities of the (d) 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.*

The principle of non-discrimination emphasised in Article 57(3) TFEU is repeated in Article 61 TFEU:

> *As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.*

Finally, Article 58 TFEU adds:

> *1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.*
>
> *2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.*

Transport, banking and insurance are not covered in this general report. The reader is referred to the separate sector reports on these topics.

2.2 The personal scope of the services provisions

For Articles 56 and 57 TFEU to be engaged three conditions must be satisfied. First, there must be a *service*. Article 57 TFEU (cited above) provides some examples of services; the case law has gone considerably beyond this traditional definition and has said that 'services' includes:

- the provision of people by an employment agency[10]
- medical services such as the termination of a pregnancy[11]
- tourism[12]
- education[13]
- business the provision of a television signal[14]

[10] Case 279/80 *Webb* [1981] ECR 3305
[11] Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685
[12] Case 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377
[13] Ibid.
[14] Case 62/79 *Coditel v Cine Vog Films* [1980] ECR 881

- the transmission of programmes and advertisements from broadcasters in one Member State to cable networks in another[15]
- lotteries[16]
- building loans provided by banks[17]
- judicial recovery of debts[18]

Second, the services must *normally be provided for remuneration***.** This excludes voluntary services from the scope of the Directive.[19]

Third, the services must be *temporary* (although services providers can equip themselves with the necessary infrastructure to enable them to do the work[20]). The case law has not, however, provided an clear guidance as to how temporary is 'temporary'.

Finally, despite the suggestion in Article 57 TFEU that services is a residual category, this idea has been roundly rejected by the Court.[21]

2.3 The material scope of Articles 56 and 57 TFEU

Articles 56 and 57 TFEU apply in three situations:

The freedom to (travel to) provide services. This was the classic situation envisaged by the Treaty.[22] It also a company to bring its own staff to perform the contract. These staff are referred to as posted workers and the rules governing the terms and conditions of employment are laid down in the Posted Workers Directive 96/71.[23] This is discussed in detail in the report on social policy and referred to below in section II.6.5.

The freedom to travel to receive services. This situation was not envisaged by the Treaty but it was covered by early secondary legislation[24] and was subsequently confirmed by the case law.[25]

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[15] Case 352/85 *Bond van Adverteerders v Netherlands* [1988] ECR 2085, Case C-23/93 *TV10* [1994] ECR I-4795

[16] Case C-275/92 *Schindler* [1994] ECR I-1039

[17] Case C-484/93 *Svensson* [1995] ECR I-3955.

[18] Case C-3/95 *Reisebüro v Sandker* [1996] ECR I-6511.

[19] Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685 (Irish students' union handbook contained details of availability of abortion in the UK. Collision between Irish constitutional ban on abortion and the provisions on freedom to travel to receive services. Court said that since there was no economic link between the abortion clinics and the students' union the services provisions did not apply.

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

[21] Case C-452/04 *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521.

[22] Case 33/74 *Van Binsbergen* [1974] ECR 1299.

[23] OJ [1997] L18/1.

[24] Article 1(b) of Directive 73/148 requires the abolition of restrictions on the movement and residence of "nationals wishing to go to another Member State as recipients of services"

Neither provider nor recipient travels. This was also not covered by the original Treaty but since the Court has ruled that service provision includes electronic provision of services (where the service moves but not the provider or recipient) this situation is also covered by the Treaty.[26]

3. The relationship between Articles 49 and 56 TFEU and the other freedoms

We have seen from *Gebhard* that Articles 45 (workers), 49 (establishment) and 56 (services) are mutually exclusive. However, as the brief review of Articles 49 and 56 TFEU has shown it is not always easy to distinguish between the application of the two provisions given the elastic nature of the term 'temporary'. There are two other treaty provisions with which Articles 49 and 56 TFEU have a close affinity, Article 34 TFEU on the free movement of goods and Article 63 on the free movement of capital.

3.1 The relationship between Articles 34 and 56 TFEU

Goods are defined as products which 'can be valued in money and which are capable, as such, of forming the subject of commercial transactions'.[27] As Advocate General Fennelly put it in *Jägerskiöld*,[28] goods 'possess tangible physical characteristics'. While, at first sight, goods and services are different, in fact there is a grey area. For example, does the sale of the film 'Titanic' on DVD concern the free movement of goods (the DVD itself) or services (the film on the DVD)? Generally, the Court's view has been that where the goods are merely ancillary to the main activity, then other provisions of the TFEU will apply. Therefore, in *Schindler*[29] the Court said that the organization of lotteries did not constitute an activity relating to 'goods', even though lotteries necessarily involved the distribution of advertising material and tickets. Because the main activity was a service, the Treaty provisions on services applied instead.

This is significant for states. While there are similarities between the Court's approach to goods and services in that there is a principle of home state control underpinning both, there is a potentially important carve out for states, established by the Court in *Keck*, for 'certain selling arrangements'. According to *Keck*,[30] non-discriminatory certain selling arrangements which do not hinder market

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[25] Case 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377 (Italians travelling to Germany to receive medical and tourism services); Case 186/87 *Cowan v Le Tresor Public* [1989] ECR 195 (Englishman mugged on French metro. As a recipient of a service he was entitled to receive criminal injuries compensation as a French man would). See also Case C-157/99 *Geraets Smits v Stichting Ziekenfonds* [2001] ECR I-5473

[26] See for example, Case C-384/93 *Alpine Investments BV v Minister van Financien* [1995] ECR I-1141 (cold calling by Dutch company offering financial services in other Member States).

[27] Case 7/68 *Commission* v. *Italy (the art treasures case)* [1968] ECR 423, 428–9.

[28] Case C–97/98 *Jägerskiöld* v. *Gustafsson* [1999] ECR I–7319, para. 20.

[29] Case C–275/92 *Customs Excise* v. *Schindler* [1994] ECR I-1039. See also Case C–97/98 *Jägerskiöld* v. *Gustafsson* [1999] ECR I–7319: while fish are goods, fishing rights and angling permits derived from them did not constitute 'goods'; the services provisions applied instead. Cf. Case C–124/97 *Läärä* v. *Kihlakunnansyyttäjä* [1999] ECR I–6067, where the Court said that slot machines constituted goods.

[30] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

access do not breach Article 34 TFEU. In other words, such rules are not caught by the Treaty at all. There is no direct equivalent in the field of services, although the Court does have analogous tools at its disposal should it decide that the Treaty provisions do not apply.[31] There are suggestions, too, that Recital 9 of the Services Directive 2006/123 (the Directive itself is considered in Section III below) tries to achieve a *Keck*-style carve out from the Services Directive and thus the Treaty:

> This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.

In fact, the scope of *Keck* has been limited in recent years, although it is likely still to apply to national rules on Sunday trading,[32] but it remains symbolically important as a statement that there are areas of regulation – concerning the ambiguous 'certain selling arrangements' - which fall exclusively in the Member States' competence. So it is constitutionally significant when the Court decides that a case falls within the free movement of services, not goods, because *Keck* itself will not apply. Further, Recital 33 of the Services Directive indicates that 'distributive trades' fall within services, not goods, and so national restrictions on distribution (including restrictions on Sunday trading?) may now fall within the scope of Article 56 TFEU and not benefit from any *Keck* exemption.

3.2 The relationship between Articles 49, 56 and 63 TFEU

(a) Introduction

The relationship between the rules on the free movement of services and those on free movement of capital is complicated by the fact that the territorial scope of the provisions is different:

- Articles 49 and 56 TFEU apply only to movements of the self-employed and companies within the EU/EEA
- Article 63 TFEU applies to movements of capital within the EU/EEA and between the EU/EEA *and* third countries.

Yet, the provisions on capital have a close link with the free movement of services, a link recognised in Article 58(2) TFEU which provides that the liberalisation of banking and insurance services connected with movement of capital are to be effected in step with the liberalisation of movement of capital. It has fallen to the Court to distinguish between the material scope of the three fundamental freedoms but the guidance it has offered has not always been clear.

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[31] See eg Case C-190/98 *Graf v. Filzmozer Maschinenbau GmbH* [2000] ECR I-493. See also Case C–602/10 *SC Volksbank România* v. *CJPC* [2012] ECR I–000, para. 81.

[32] Joined cases C-69/93 and C-258/93 *Punto Casa* [1994] ECR I-2355.

In the past, the Court has favoured deciding cases without reference to the capital provision, where possible.[33] In others the Court considered the rule under two provisions.[34] This is fine so long as there is no third country element to the problem.

(b) Services and capital

The Court was forced to address the services/capital divide in *Fidium Finanz* where it was asked whether a company established in a non-member state (Switzerland) could, in the context of granting credit on a commercial basis to residents of Germany, rely on the free movement of capital laid down in Article 63 TFEU, or whether the preparation, provision and performance of such financial services were covered solely by the freedom to provide services laid down in Article 56 TFEU.

The Court recognised that the rules on granting credit on a commercial basis could equally involve service provision and capital movement. However, having looked at the context of the German rules (namely they formed part of the German legislation on the supervision of undertakings which carried out banking transactions and offered financial services) the Court found that 'the predominant consideration is freedom to provide services rather than the free movement of capital'. Therefore a company in a non-Member State could not rely on Article 56 TFEU to challenge the detail of those rules, in particular the requirement to be authorised before trading in Germany.

(c) Establishment and capital

The borderline between freedom of establishment and free movement of capital has also proved difficult. Generally, the Court looks at the object and purpose of the rule;[35] where that does not work, it will consider the facts of the case.[36] It has said:

- National legislation privatising sensitive undertakings, where the state retains a 'Golden Share' in the new company, giving it rights to, for example, approve the acquisition of certain larger shareholdings in the company, are now generally dealt with under the rules on capital rather than establishment;[37]
- National legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls (ie where the voting rights go beyond the 10% threshold within the scope of Article 49 TFEU on freedom of establishment;[38]

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[33] Case C-1/93 *Halliburton Services* [1994] ECR I-1137; Case C-410/96 *Criminal Proceedings against André Ambry* [1998] ECR I-7875, para.40; Case C-118/96 *Safir* [1998] ECR I-1897, para. 35; Case C-200/98 *X and Y* [1999] ECR I-8261.

[34] See eg Case C-484/93 *Svensson and Gustafsson* [1995] ECR I-3955 (capital and services)

[35] Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paras 31 to 33; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paras 37 and 38; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paras 26 to 34.

[36] Para. 94.

[37] Case C-98/01 *Commission v UK (Golden Share)* [2003] ECR I-4641.

[38] Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para. 37; Case C-81/09 *Idrima Tipou* [2010] ECR I-10161, para. 47.

- National provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (so-called portfolio investment) must be examined exclusively in light of the free movement of capital.[39]

The cases establishing these propositions concerned intra-EU movement. What about the situation where there is EU-third country movement? This was at issue in *FII (No.2).*[40] The question was raised which of the Treaty provisions (Articles 49 or 63 TFEU) applied to UK legislation on the tax treatment of dividends emanating from subsidiaries resident in third countries, subsidiaries in which the UK parent exerted a definite influence on a company's decisions and to determine its activities.

The Advocate General suggested two ways of dealing with the situation.[41] The first was to propose parallelism with intra-EU situations. In other words, when the influence in a company established in a third country was decisive, the assessment should be made in the framework of freedom of establishment. The application of the free movement of capital would thus be excluded. Because no right to freedom of establishment exists in third country relations, the situation would not be covered by the Treaty. This is what the Member States proposed.

The second option was to hold that the division between freedom of establishment and free movement of capital was only relevant to intra-EU situations. In third-country relations no such distinction was necessary, or even required. Thus the provisions relating to free movement of capital would be applicable in third-country relations not only for portfolio investments, but also for situations where there was decisive influence over the dividend paying subsidiary in a third country. He favoured the latter approach.

The Court seems to have followed the Advocate General. Emphasising that the UK legislation did not apply exclusively to situations in which the UK parent exercised decisive influence over the third country subsidiary paying the dividends, it said the UK rules had to be assessed in the light of Article 63 TFEU. It continued 'A company resident in a Member State may therefore rely on that provision in order to call into question the legality of such rules, irrespective of the size of its shareholding in the company paying dividends established in a third country'.[42]

However, the Court added an (opaque) caveat.[43] It said, obiter, that its ruling on Article 63(1) TFEU should not 'enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from [Article 63(1) TFEU]'. In other words, its decision in *FII (No.2)* should not allow third country operators to circumvent the territorial restrictions on Article 49 TFEU (and presumably Article 56 TFEU). This was not the case on the facts in *FII (No.2)* because

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[39] Joined Cases C-436/08 and 437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I-305, para. 35.

[40] Case C-35/11 *FII (No.2) v Commissioners of Inland Revenue* [2012] ECR I-000.

[41] Paras. 111-113.

[42] Para. 99.

[43] For criticism, see E. Nijkeuter and M.F de Wilde, '*FII 2* and the applicable freedoms of movement in Third country situations' [2013] *EC Tax Review* 250.

UK law 'does not relate to the conditions for access of a company from that Member State to the market in a third country or of a company from a third country to the market in that Member State. It concerns only the tax treatment of dividends which derive from investments which their recipient has made in a company established in a third country'. This might suggest that the Court was trying to draw a distinction between a *Fidium*-style situation (which did concern a third country company trying to get access to the EU market), to which (the territorial limitations in) Articles 49 or 56 TFEU would continue to apply, and tax cases such as *FII (No.2)* where a broader approach to Article 63 TFEU is applied.

4. To whom/what do Articles 49 and 56 TFEU apply?

Articles 49 and 56 TFEU have vertical direct effect. This means that they apply to the Member States[44] and also to regulatory bodies.[45] Less clear is the extent to which these Treaty provisions apply to private bodies (horizontal direct effect). There are hints in the *Viking*[46] that the rules do have horizontal application:

> 58. The Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively (see, to that effect, Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 31 and 39).
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> 59. Such considerations must also apply to Article [49 TFEU] which lays down a fundamental freedom.

However, the Court then recognised that the problem in this case was not the behaviour of individuals but the collective power of the trade union (the Finnish trade union (FSU) was threatening strike action when it learned that the Finnish shipping company was planning to reflag its vessel in Estonia):

> 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.

So the Court concluded that Article 49 TFEU could be relied on by a private undertaking against a trade union or an association of trade unions. Thus the question is still open whether Articles 49 and 56 TFEU have full horizontal direct effect or only an extended form of vertical direct effect.

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[44] Case 33/74 *Van Binsbergen* [1974] ECR 1299 [26]-[27]

[45] Case 36/74 *Walrave & Koch* [1974] ECR 1405 [17].

[46] Case C-438/05 *Viking Line ABP v The International Transport Workers' Federation, the Finnish Seaman's Union* [2007] ECR I-10779.

5. Establishing a breach

5.1 From the discrimination to the restrictions approach

(a) Discrimination approach

In the early days, the Court, following the language of the Treaty, prohibited direct and indirect discrimination on the grounds of nationality both in respect of initial access to the market in the host state and to exercise of the activity once on that market.[47] In the case of a company its 'nationality' equates with the location of its seat.[48]

Direct discrimination concerns less favourable treatment on the grounds of origin. So a rule which refused to allow a non-national to practise as a lawyer in the host state would contravene Articles 49 and 56 TFEU. According to the orthodox view, direct discrimination can be saved by the express derogations only (see 6.1 below).

Direct discrimination was at issue in the well known case of *Factortame.*[49] Under the British Merchant Shipping Act 1988, a fishing vessel could be registered and thus entitled to fish in UK waters only if (a) the vessel was British-owned,[50] (b) the vessel was managed, and its operations directed and controlled from within the United Kingdom; (c) any charterer, manager, or operator of the vessel was a qualified (British) person or company.[51] Inevitably the Court found these rules breached Article 49 TFEU and could not be justified. The Spanish fishermen subsequently brought claims for damages against the UK government for breach of their Treaty rights. In a ground-breaking case, *Factortame (No.3)*[52] the Court ruled that the UK government could be liable in damages for a breach of a Treaty provision where:[53]

> the rule of [Union] law breached is intended to confer rights upon [individuals] the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of [Union] law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic

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47 Case 197/84 *Steinhauser* v. *City of Biarritz* [1985] ECR 1819

48 Case 270/83 *Commission v France (tax credits)* [1986] ECR 273, para. 18.

49 Case C-246/89 *Commission v UK (Factortame)* [1991] ECR I-3125; Case C-221/89 *Factortame* [1991] ECR I-3905.

50 According to s.14(2), a fishing vessel was deemed to be British-owned if the legal title to the vessel was vested wholly in one or more qualified persons or companies and if the vessel was beneficially owned by one or more qualified companies or, as to not less than 75%, by one or more qualified persons.

51 According to s.14(7) 'qualified person' meant a person who was a British citizen resident and domiciled in the UK and 'qualified company' meant a company incorporated in the UK and having its principal place of business there, at least 75% of its shares being owned by one or more qualified persons or companies and at least 75% of its directors being qualified persons.

52 Joined cases C-46/93 and C-48/93 *Factortame (No.3)* [1996] ECR I-1029.

53 Para. 74.

> claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

Indirect discrimination concerns a rule, such as a residence requirement which, on its face, applies to all self-employed but in fact disadvantages migrants. A rule specifying language requirements is also indirectly discriminatory. Such rules can, however, be objectively justified/justified on public interest grounds as well as saved by the express derogations (see 6.2 below).

In the context of the free movement of services, direct discrimination covers not only less favourable treatment on the grounds of nationality but also on the basis of establishment. This was confirmed by the Court in *Svensson and Gustafsson:*[54]

> [T]he rule in question entails *discrimination based on the place of establishment*. Such discrimination can only be justified on the general interest grounds referred to in Article [46 TFEU], to which Article [62 TFEU] refers, and which do not include economic aims.

This decision has caused problems because a rule which concerns discrimination based on the place of establishment (direct discrimination and so can be saved only by the express derogations) could equally be cast as a rule requiring residence in the host state which has been considered indirectly discriminatory and so can be objectively justified.

The corollary of the discrimination approach is that rules which do not discriminate do not breach the Treaty. However, the principle of non-discrimination may itself be an obstacle to free movement. If an individual has taken six years to qualify as a lawyer in State A, the principle of non-discrimination would probably allow the authorities in State B to permit the individual to practise but on the same terms as nationals (i.e., by recommencing their studies in State B, thus taking several further years to qualify). For this reason, in the seminal case of *Vlassopoulou*[55] the Court shifted the emphasis to mutual recognition. A Greek lawyer who worked in Germany advising on Greek and EU law had her application to join the local German Bar rejected on the ground that she had not pursued her university studies in Germany, had not sat the two German state exams, and had not completed the preparatory stage, although she did hold a German doctorate. The Court ruled that:[56]

> national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article [49 TFEU]. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.

In other words, the Court required the host state to apply the principle of *mutual recognition*: the host state had to compare a migrant's qualifications and abilities with those required by the national system to see whether the applicant had the appropriate skills to join the equivalent profession. If

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[54] Case C-484/93 *Svensson and Gustafsson* [1995] ECR I-3955.
[55] Case C–340/89 [1991] ECR I–2357.
[56] Para. 15, emphasis added. See also Case C–19/92 *Kraus* [1993] ECR I–1663, para. 32.

the comparison revealed that the holder had the knowledge and qualifications which were, if not identical, then at least equivalent to the national diploma, then the host state was obliged to recognize the diploma. If, on the other hand, the comparison revealed that the applicant only partially fulfilled the necessary qualifications, then the host Member State could require the applicant to demonstrate that she had acquired the relevant knowledge and qualifications which then had to be taken into account. The Court added that to ensure that the Member States complied with the obligations inherent in the principle of mutual recognition, the decision-making body had to give reasons for its decisions which also had to be reviewable by the courts to verify compatibility with Union law. The principle of mutual recognition formed the basis of the Mutual Recognition of Professional Qualifications Directive 2005/36 considered in Section III below.

(b) Restrictions/market access approach

The mutual recognition approach did not address the problem with other non-discriminatory rules which hindered market access but which escaped scrutiny under the pure non-discrimination approach. This prompted the Court eventually to move towards the so-called 'market access' or 'restrictions' or 'obstacles' approach. This change first appeared in the context of free movement of services. In the seminal case, *Säger*,[57] the Court said that Article 56 TFEU required:

> ... *not only* the elimination of all discrimination against a person providing services on the ground of his nationality *but also* the abolition of any *restriction*, even if it applies without distinction to national providers of services and to those of other Member States, when *it is liable to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services.

This ruling has subsequently been extensively applied by the Court. The leading case which extended the restrictions approach to freedom of establishment is *Gebhard* where the Court said:[58]

> 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.

It seems that the Court generally uses phrases such as 'liable to prohibit or otherwise impede the activities of a provider of services' (*Säger*), 'liable to hinder or make less attractive the exercise of fundamental freedoms' (*Gebhard*) interchangeably and they are often referred to as the 'market access' or 'restrictions' approach for short.

Sometimes, the Court uses slightly different language for services, particularly when the rule being challenged is the home, not host, state rule. So, for example, in *Skandia*[59] the Court said:

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[57] Case C-76/90 *Säger* [1991] ECR I-4221, para. 12.

[58] Para. 37.

[59] Case C-422/01

> In the perspective of a single market and in order to permit the attainment of the objectives thereof, Article [56 TFEU] precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.

The effect of this case law is that the Court now looks at a particular rule from the perspective of the migrant service provider/company: is there a rule in the home or host state which is liable to interfere with its access to the market? The fact that the rule treats national service providers in just the same way is irrelevant: the question is the impact the rule has on the out of state provider.

In subsequent cases the Court simplified its language to reflect that of the Treaty: it says the Treaty prohibits 'obstacles' or 'restrictions' to free movement. This change of approach can be seen in *Viking* where the Court said that proposed strike action to be taken by members of the Finnish Seamen's union in protest at the Finnish company's decision to reflag its vessel as Estonian was a 'restriction' on freedom of establishment and so in principle contrary to Article 49 TFEU. It can also be seen in *Carpenter*[60] where the Court found that the deportation of a Filipino spouse of UK national service provider who had overstayed her visa but looked after his children when he was working abroad, was an obstacle to her husband's freedom to provide services under Article 56 TFEU:

> It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.

These cases demonstrate that while the restrictions approach is effective at challenging any national rules which interfere with free movement it also reaches deeply into the national systems and challenges legitimate regulatory choices and policy decisions taken by democratically elected national governments. The Court is alert to this problem and has some tools which it has deployed to limit the reach of the restrictions approach, notably:

- That the effect of the national rule on free movement is too uncertain and indirect (ie a remoteness test)[61]
- Some sort of *de minimis* test (ie an economic threshold)[62]

However, the Court has not applied these tools consistently and generally the Court finds that most national rules do, in principle, interfere with free movement and so need to be justified by the state and shown to be proportionate (see section 6 below). This has proved to be particularly problematic

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[60] Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279.

[61] Case C-190/98 *Graf v. Filzmozer Maschinenbau GmbH* [2000] ECR I-493. See also Case C–602/10 *SC Volksbank România* v. *CJPC* [2012] ECR I–000, para. 81 where the Court found that the effect of a national rule prohibiting credit institutions from levying certain bank charges was too indirect and uncertain to be regarded as liable to hinder intra-Union trade.

[62] Case C-565/08 *Commission v Italy (maximum fee for lawyers)* [2011] ECR I–2101.

in the field of taxation where it was proving almost impossible for finance ministries to be able to draft any tax laws which could not be potentially challenged under the restrictions model. The justification for tax policy and its proportionality proved particularly problematic. This caused serious problems for the Member States and generated significant criticism of the Court. In this field the Court seems generally to be reverting to a discrimination based approach.[63]

5.2 Examples of restrictions

The Court has recognised a range of rules as constituting restrictions on freedom of establishment and free movement of services. These include:

- rules restricting the number of establishments in a particular area[64]
- rules setting compulsory minimum fees, or at least permitting control by the relevant authorities of the fees charged[65]
- advertising restrictions[66]
- residence requirement[67]
- authorisation requirements[68]

6. Derogations and Justifications

Once a rule has been classified as a restriction or an obstacle to free movement, the question is whether Member States can justify those rules. The Treaty lays down an exhaustive list of derogations which apply across all four freedoms; the case law has supplemented those with judicially developed justifications.

6.1 Express derogations

(a) General derogations

Articles 52(1) and 62 TFEU allow Member States to derogate from the free movement rights on the grounds of public policy, public security and public health. For natural persons the detail of these rules is fleshed out in the CRD 2004/38/EC (see further the report on free movement of workers). The general rules which apply are set out in *Église de Scientologie*:[69]

- derogations from the fundamental principle have to to be interpreted strictly, so that their scope could not be determined unilaterally by each Member State without any control by the Union institutions;
- derogations could not be misapplied so as, in fact, to serve purely economic ends;
- any person affected by a restrictive measure based on such a derogation had to have access to legal redress;

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[63] See eg Joined Cases C-544/03 *Mobistar SA v Commune de Fléron* [2005] ECR I-7723.
[64] Case C–134/05 *Commission* v. *Italy (extra-judicial debt recovery)* [2007] ECR I–6251, para. 64
[65] Ibid., para. 127.
[66] Case C–405/98 *Gourmet* [2001] ECR I–1795, para. 39.
[67] Case C-370/05 *Festersen* [2007] ECR I-1129, para. 25
[68] Case C–189/03 *Commission* v. *Netherlands (private security firms)* [2004] ECR I–9289, para. 17.
[69] Case C-54/99 *Église de Scientologie* [2000] ECR I-1335.

- derogations were subject to the principle of proportionality.

To this list we should also add that fundamental rights, where appropriate, need also to be taken into account.[70]

(b) Exercise of official authority

There is a special exception for the 'exercise of official authority' (Article 51(1) TFEU on establishment, Article 62 TFEU extends this to services). The nature of what constitutes official authority was considered in *Reyners*[71] where the Court said that Article 51 TFEU had to be narrowly construed: it applied only to those activities which had a 'direct and specific connection with official authority'.[72] It continued that Article 51 TFEU would justify the exclusion of a whole profession only where those activities were linked to that profession in such a way that freedom of establishment would require the host Member State to allow the exercise by non-nationals, even occasionally, of functions related to official authority.[73] This would not be the case with, for example, the legal profession where contacts with the courts, although regular and organic, did not constitute the exercise of official authority because it was possible to separate tasks involving the exercise of official authority from the professional activity taken as a whole.[74]

In subsequent cases the Court has also rejected arguments based on Article 51 TFEU. It has found that none of the following jobs involve the exercise of official authority:

- road traffic accident expert, whose reports were not binding on the courts[75]
- the technical job of designing, programming, and operating data-processing systems[76]
- transport consultant[77]
- vehicle inspector[78]
- court translators[79]
- notaries[80]

In *Commission* v. *Belgium (security guards)*[81] the Court said that the activities of private security firms, security-systems firms, and internal security services were not normally directly and specifically connected with the exercise of official authority.

Thus it seems that the derogations under Articles 51 and 62 TFEU must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority;

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[70] Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279, paras. 40–1.
[71] Case 2/74 [1974] ECR 631.
[72] Para. 45.
[73] Para. 46.
[74] Para. 51.
[75] Case C–306/89 *Commission* v. *Greece* [1991] ECR I–5863, para. 7.
[76] Case C–3/88 *Commission* v. *Italy* [1989] ECR I–4035, para. 13.
[77] Case C–263/99 *Commission* v. *Italy* [2001] ECR I–4195.
[78] Case C–438/08 *Commission* v. *Portugal (road safety)* [2009] ECR I–10219. In Case C–160/08 *Commission* v. *Germany (ambulance service)* [2010] ECR I–3713.
[79] Joined Cases C-372/09 and C-73/09 *Peñarroja Fa* [2011] ECR I-1785, para. 45.
[80] See, e.g., Case C-47/08 *Commission* v. *Belgium (notaries)* [2011] ECR I-000.
[81] Case C–355/98 *Commission* v. *Belgium* [2000] ECR I–1221, para. 26. See also Case C–283/99 *Commission* v. *Italy* [2001] ECR I–4363, para. 20; Case C–465/05 *Commission* v. *Italy* [2007] ECR I–11091, para.40.

functions that are merely auxiliary and preparatory, especially when carried out by a private body which are supervised by an entity which effectively exercises official authority by taking the final decision, are excluded from the definition of the exercise of official authority.[82]

6.2 Public Interest Justifications

'Public interest' or objective justifications exist for indirectly discriminatory and non-discriminatory national measures which impede the activities of a provider of services and any other measure which hinders market access. Also known as 'imperative reasons in the public interest', the main ones were listed in *Gouda*:[83]

- professional rules intended to protect the recipients of a service[84]
- protection of intellectual property[85]
- protection of workers[86]
- consumer protection[87]
- fair trading and the protection of consumers in general are overriding requirements of public interest
- conservation of the national historic and artistic heritage
- turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country[88]

This list is not exhaustive. Other justifications have been recognised:

- the need to safeguard the reputation of the Netherlands financial markets and to protect the investing public[89]
- preventing gambling and avoiding the lottery from becoming the source of private profit[90]
- avoiding the risk of crime or fraud[91]
- avoiding the risk of incitement to spend, with damaging individual and social consequences[92]
- maintenance of pluralism of the press[93]
- fiscal cohesion[94]

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[82] Case C–404/05 *Commission* v. *Germany (inspection of organic production)* [2007] ECR I–10239, para. 38; Case C–438/08 *Commission* v. *Portugal (vehicle inspection)* [2009] ECR I–10219, para. 37.

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

[84] Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35

[85] Case 62/79 *Coditel* [1980] ECR 881.

[86] Case 279/80 *Webb* [1981] ECR 3305

[87] Case C-180/89 *Commission v Italy (Tourist Guides)* [1991] ECR I-709.

[88] Case C-154/89 *Commission v France* [1991] ECR I-659, Case C-198/89 *Commission v Greece* [1991] ECR I-727, Case C-23/93 *TV10* [1994] ECR I-4795.

[89] Case C-384/93 *Alpine Investments* [1995] ECR I-1141

[90] Case C-275/92 *Customs Excise v Schindler* [1994] ECR 1039.

[91] Case C-275/92 *Customs v Excise v Schindler* [1994] ECR 1039.

[92] Case C-275/92 *Customs Excise v Schindler* [1994] ECR 1039.

[93] Case C-288/89 *Gouda* [1991] ECR I-4007, para.23.

- Combating money laundering[95]
- Protection of the interests of creditors, minority shareholders and employees[96]
- The effectiveness of fiscal supervision[97]

Once a Member State has made out a justification it must then show that the steps taken to achieve that objective are proportionate (ie suitable and no more restrictive than necessary) and, where appropriate, are compatible with human rights. An illustration of how these principles fit together in the context of a freedom of establishment case can be seen in section 6.3 below.

In the context of free movement of services one extra factor needs to be taken into account: the extent to which the interest at stake in the host state is already protected in the home state. The Court made this clear in *Gouda*[98] where it said that national restrictions came within the scope of Article 56 TFEU

> if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.

This is a weak form of the country of origin principle (considered in Section I and also in the discussion on the Services Directive in Section III below).

6.3 Case study on the application of the restriction/justification/proportionality approach

To see how these EU rules on restriction/obstacle, justification and proportionality fit together we shall consider the important decision of *Centros*[99] by way of example. Centros Ltd was a private company incorporated in the UK by two Danish citizens, Mr and Mrs Bryde, who were its sole shareholders. With a view to trading in Denmark, they applied to have a branch of the company registered in Denmark. At the time of the registration request, Centros had never traded in the UK, and for this reason the Danish registrar of companies refused to register the branch. He considered that the company was actually seeking to register its principal business establishment in Denmark and not just a branch, and that the Brydes were seeking to evade Danish law on minimum capital requirements. In Denmark companies had to have at least DKr 200,000 (approximately £20,000) when they were formed; the UK had no rules on minimum capital requirements.

The Court ruled that the registrar's refusal to grant the registration request constituted an *obstacle* to the freedom of establishment,[100] saying that it was 'immaterial' that the company was formed in

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[94] Case C-300/90 *Commission v Belgium* [1992] ECR I-305, paragraph 14.
[95] Case C-212/11 *Jyske Gibraltar* [2013] ECR I-000.
[96] Case C-208/00 *Uberseering* [2002] ECR I-9919, para. 92.
[97] Case C-55/98 *Bent Vestergaard* [1999] ECR I-7641, para. 23.
[98] Case C-288/89 *Gouda* [1991] ECR I-4007, para.13.
[99] Case C–212/97 [1999] ECR I–1459.
[100] Paras. 29–30.

the UK only for the purpose of establishing itself in Denmark where its main or entire business was to be conducted.[101] It also said that this was not a case of abuse because the national rules which the Brydes were trying to avoid were rules governing the formation of companies and not rules concerning the pursuit of certain trades, professions, or businesses.[102] In other words, they were not fraudulently taking advantage of the provisions of Union law[103] because they were doing what the Treaty expressly permits, namely incorporating in one Member State and setting up a secondary establishment in another.[104]

The Danish government sought to *justify* the refusal to register on the ground of the need to maintain its rules on minimum capital requirements. It said that the rules served two purposes: first, to reinforce the financial soundness of companies in order to protect public creditors against the risk of seeing the debts owed to them become irrecoverable (since, unlike private creditors, they could not secure debts by means of guarantees); and secondly, the law aimed at protecting all creditors from the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capitalization was inadequate.

The Court ruled that the first justification offered was inadequate because it was inconsistent—the vital factor in the registrar's refusal to grant the registration request was the failure of the company to trade in the UK. This was immaterial to the protection of creditors since they would have been no better off had the company previously traded in the UK and been able to register its branch in Denmark.[105] Furthermore, EU company information disclosure directives put Danish creditors on notice that Centros Ltd was not a company governed by Danish law. The refusal to register was not only unjustifiable, it was also *disproportionate*. The Court said that the Danish authorities could have adopted less-restrictive measures by, for example, making it possible in law for public creditors to obtain the necessary guarantees.

The Court did, however, recognize the validity of the second justification put forward by the Danish government about abuse. It said that its ruling did not prevent Denmark from adopting measures for preventing or penalizing fraud, either in relation to the company itself or to its members, where it had been established that the members were in fact attempting to evade their obligations towards private or public creditors by means of the formation of the company. However, the Court added that combating fraud did not justify a practice of refusing to register a branch of a company which had its registered office in another Member State[106]—but did not suggest what steps states could take to combat fraud, which would be compatible with Union law.

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[101] Para. 17, citing Case 79/85 *Segers* [1986] ECR 2375.
[102] Para. 26.
[103] Para. 24.
[104] Para. 27. See also Case C–196/04 *Cadbury's Schweppes* v. *Commissioners of the Inland Revenue* [2006] ECR I–7995, para. 36.
[105] Para. 35.
[106] Para. 38.

6.4 The special case of gambling

All Member States impose significant controls on gambling: who can offer it, who can participate, what happens to the winnings. This is widely regarded as an area of great sensitivity for Member States and the Court has therefore applied a fairly relaxed level of scrutiny to national rules. Indeed in the first case major case which came before it, *Schindler,*[107] a reference from the UK, the Court so fell over itself to be accommodating to the UK (which was trying to defend its blanket ban on national lotteries despite the fact that the National Lotteries Bill was going through Parliament) that it failed to consider the question of proportionality at all.

Since then, the cases have followed a more orthodox pattern, albeit still with a light touch review. So the Court tends to find that the rules imposing limitations on gambling is a restriction on free movement. So, for example, the Court has found the following rules to be restrictions on free movement:

- rules restricting the right to operate games of chance or gambling solely to casinos in permanent or temporary gaming areas[108]
- rules prohibiting the installation of computer games in venues other than casinos[109]
- national rules restricting the provision of gambling activities to public and private monopolies[110]
- rules confining off-course betting to a single company which was closely controlled by the state[111]
- rule prohibiting—on pain of criminal penalties—the pursuit of activities in the betting or gaming sector without a licence or police authorization constituted a restriction on the freedom to provide services[112]
- rules prohibiting Italian intermediaries from facilitating the provision of betting services on behalf of a British supplier.[113]

Having brought the rules within the purview of Article 49 or 56 TFEU the Court then considers whether they can be justified on the grounds of various public interests outlined above (eg protection of public order, protection of morals).

The focus then shifts to proportionality. As we saw in *Centros*, the proportionality review can be fairly rigorous. This has not been so with the gambling cases. As we saw in *Schindler*, the Court did

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[107] Case C-275/92 *Customs Excise v Schindler* [1994] ECR 1039.

[108] Case C–6/01 *Anomar* v. *Estado português* [2003] ECR I–8621, para. 66.

[109] Case C–65/05 *Commission* v. *Greece* [2006] ECR I–10341, para. 56.

[110] Case C–46/08 *Carmen Media Group* v. *Land Schleswig Holstein* [2010] ECR I–8149 and Case C–258/08 *Ladbrokes Betting & Gaming* v. *Stichting de Nationale Sporttotalisator* [2010] ECR I–4757, respectively.

[111] Case C–212/08 *Zerturf Ltd* v. *Premier Ministre* [2011] ECR I–000. Rules prescribing the legal form and amount of share capital or the holder of a company may also constitute restrictions: Case C–347/09 *Dickinger* [2011] ECR I–000; Case C–64/08 *Engelmann* [2011] ECR I–8219.

[112] Joined Cases C–338/04, C–359/04 and C–360/04 *Placanica* [2007] ECR I–1891, paras. 42 and 44. See also Case C–433/04 *Commission* v. *Belgium (tax fraud)* [2006] ECR I–10653, para. 32.

[113] See also Joined Cases C–316/07, C–358/07 to C–360/07 *Stoß* v. *Wetteraukreis* [2010] ECR I–8069.

not consider proportionality at all when upholding the national rule banning lotteries; in *Läärä*[114] it did examine proportionality but its approach was remarkably hands-off.[115] The case concerned a Finnish law granting exclusive rights to run the operation of slot machines to a public body, with the revenue raised going into the public purse. This rule had the effect of preventing a British company from operating its slot machines in Finland. The Court said the Finnish rules could be justified on the grounds laid down in *Schindler*,[116] and the steps taken were proportionate.[117] The Court said that it was for the Member States to decide whether to prohibit the operation of such machines or only to restrict their use.

However, the Court has increasingly insisted that Member States at least be consistent in the application of their policies towards gambling. So where, as in *Carmen*, a Member State justified the restriction on free movement by reference to the need to prevent incitement to squander money on gambling and to combat gambling addiction, while at the same time encouraging the development of other games of chance which posed higher risks of addiction with a view to maximizing revenue, the Court said that the restriction was 'not suitable for attaining the objective in 'a consistent and systematic manner'.[118] Similarly, in *Lindman*[119] the Court ruled that a Finnish law, which taxed lottery wins when the lottery took place in another Member State but not when they occurred in Finland, was not appropriate to achieve the objective of preventing wrongdoing and fraud, the reduction of social damage caused by gaming, the financing of activities in the public interest, and ensuring legal certainty. The Court said that the file transmitted by the referring court disclosed 'no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, *a fortiori*, the existence of a particular causal relationship between such risks and participation by nationals . . . in lotteries organised in other Member States'.[120]

Generally, however, the Court will intervene only if the value judgments of the Member State appear manifestly unfounded. This might help to explain why, in *Gambelli*,[121] the Court indicated that an Italian law imposing criminal penalties, including imprisonment, on private individuals in Italy who collaborated over the web with a British bookmaker to collect bets—an activity normally reserved to the Italian state monopoly CONI—was disproportionate, although the Court said it was ultimately for the national court to decide bearing in mind that betting was encouraged in the

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[114] Case C–124/97 [1999] ECR I–6067.

[115] See also Case C–36/02 *Omega* [2004] ECR I–9609 and Joined Cases C–94/04 and C–202/04 *Cipolla* v. *Fazari* [2006] ECR I–2049; Case C–250/06 *United Pan Europe Communications* v. *Belgium* [2007] ECR I–11135.

[116] Para. 33.

[117] Para. 42. See also Case C–42/07 *Liga Portuguesa de Futebol Profissional (CA/LPFP) v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I–7633 where the Court found the Portuguese ban on operators established in other Member States from offering gambling over the Internet was also proportionate to the objective of the fight against crime.

[118] Case C–46/08 *Carmen* [2010] ECR I–8149, para. 71. However, controlled expansion may be consistent: Case C–212/08 *Zerturf* [2011] ECR I–000.

[119] Case C–42/02 *Lindman* [2003] ECR I–13519.

[120] Para. 26.

[121] Case C–243/01 *Gambelli* [2003] ECR I–13031. See also Joined Cases C–338/04, C–359/04 and C–360/04 *Placanica* [2007] ECR I–1891, para. 58. Cf. Case E–1/06 *EFTA Surveillance Authority* v. *Norway* [2007] *EFTA Ct Rep*. 8, para. 51.

context of games organized by licensed *national* bodies[122] and that the British supplier was already regulated in the UK.[123]

6.5 Justifications and the EU Social Model

One of the most controversial issues facing the Court of Justice in recent years has been the collision between the EU's goal of attaining the four freedoms, including free movement of services, and national social policy. The original Treaty, the Treaty of Rome, did contain a Title on Social Policy but its substance was limited. This is because, as Article 117 EEC famously put it, 'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers ...They believe that such a development will ensue not only from the functioning of the common market, ... but also from the procedures provided for in this Treaty'. In other words, social policy, delivered at national level, would develop as a result of the successful realisation of the four freedoms.

But this strong statement of neo-liberal principle disguised a fudge in the original Treaty. The absence of substantive provisions in the Treaty of Rome on social matters was largely due to a conscious decision by the Treaty drafters to leave social policy to the Member States, at a time when generous social protection was being increasingly provided at national level. The implications of the neo-liberal model for national social policies was not thought through and it has been left largely to the Court to work out how to strike the balance between the Treaty's market-creating orientation and the need to protect national social policies. Much of this has been done through the worker protection justification (see section 6.2 above) and an assessment of whether the national measures taken to achieve the worker protection objective are proportionate.

The general perception is that the Court favours the EU economic rights of free movement over individual (national) social rights. This view was crystallised by the Court's decisions in *Viking* and *Laval*.[124] These rulings are discussed more fully in the social policy report. However, in brief, both cases concerned strike action, which was lawful under national law, to be taken (*Viking)* or had been taken (*Laval)* by national trade unions, which employers argued was contrary to Article 49 TFEU (*Viking)* and Article 56 TFEU (*Laval*). Although the Court recognised (for the first time) that the right to take collective action, including the right to strike, was a fundamental right, and that the social interests of trade unions to call their members out on strike had to be balanced against the economic interests of the employers, the Court's subsequent analysis, based on the standard internal market case law (namely the *Säger*[125] market access approach), in fact favoured employers. The Court easily found that the collective action did constitute a restriction on free movement and so breached Articles 49 and 56 TFEU. This put the trade unions on the back-foot: not only did they have to show that the strike action was justified (on a limited range of grounds (namely the strike

[122] Para. 72.
[123] Para. 73.
[124] 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 and Case 341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.
[125] Case C-76/90 *Säger* [1991] ECR I-4221, para. 12

was due to the fact that jobs or conditions of employment were jeopardised or under serious threat)) but they also had to satisfy a strict form of the proportionality test, unmitigated by any references to 'margin of appreciation' (*Viking*).

For the trade union movement, especially in the Northern European states, these decisions came as a body blow: when it came to the crunch, a Court, which had traditionally been sympathetic to social claims, prioritised economic interests. Although a certain softening towards the position of the social interests may be detected in some subsequent decisions,[126] the perception was created that the European social model, largely based on national social rules but supplemented by EU legislation, was being undermined.

Supporters of the Court would, however, offer a different perspective: by prioritising the economic interests of free movement over the social rights of Northern European workers, the Court was in fact supporting the interests of posted workers, often from the EU-8, to work in other Member States, unhindered by the application of onerous host state rules. This was also the overwhelming tenor of its jurisprudence prior to *Viking* and *Laval* but in cases which were significantly lower profile. Recent research has shown that since 1957 there have been 26 cases involving free movement of workers, freedom of establishment, free movement of services and free movement of capital where the state invoked worker protection or its analogues as a justification to restrict free movement.[127] Of those 26 cases, there were nine enforcement proceedings and 17 preliminary references. Of those 17 preliminary references, the Court gave an answer itself on the justification or proportionality of the rule in 10 cases. So in the 19 cases in which the Court gave a definitive ruling on whether the claim of worker protection was made out, in only one case, Case C-290/04 *Commission v Germany* did the state win on two points (but lost on a third). In all the other 17 cases the host state lost. Quantitatively, this would suggest that national laws on worker protection are being undermined in favour of free movement.

However, it can also be argued that in these cases the Court has effectively used the Treaty provisions to remove redundant national laws which impeded the development of the internal market without having any genuine worker protection purpose, or at least any purpose that could not be achieved by any less restrictive means. This can be seen in *Seco*[128] where, when posting workers to Luxembourg, the employer was liable for its share of social security contributions, even though these contributions did not entitle the posted workers to any social security benefit. The Court found the Luxembourg rules breached Article 56 TFEU and could not be justified on the grounds of worker protection since the Luxembourg rules did not confer any worker protection. And in Case C-493/99 *Commission v Germany*[129] German law required, inter alia, that companies could not provide trans-frontier services on the German market as part of a consortium unless they had

[126] Case C-271/08 *Commission v Germany (occupational pensions)* [2010] ECR I-7091.

[127] C. Barnard, 'The (Janus) face of the worker in the Court of Justice's case law on justifications' in P. Koutrakos, N. Nic Shuibhne, P.Syrpis, *Exceptions from EU Free Movement Law*, (Oxford, Hart Publishing, 2015), forthcoming

[128] [1982] ECR 223.

[129] [2001] ECR I-8163.

their seat, or at least an establishment in Germany employing their own staff, and had concluded a company-wide collective agreement for those staff. Such rules were egregious breaches of the Treaty provisions on free movement of services and again were condemned by the Court.

Since the adoption of the Posted Workers Directive 96/71 which provides, in Article 3(1), for an exhaustive list of which host state rules can be applied to posted workers when they are working in that Member State, the Court has taken a strict line in *Laval* and the subsequent case law, requiring host states to comply with the terms of the Directive to the letter. Read in this light, *Laval* looks less threatening to the national social policy. *Viking*, however, continues to be particularly problematic. As one commentator put it, 'The Court has stumbled into the shaping of collective labour law and policy, an area in which it has little expertise and in which it has adopted a test which significantly favours corporate interests over worker protection.'[130] He continues that the Court did not follow the model regularly preferred in its earlier case law where economic rights were pitted against social and political fundamental rights, a model based on giving the states a margin of appreciation. The inability of the EU legislator to act to address this problem, through the failure of the Monti II proposal,[131] leaves the EU vulnerable to the accusation that it undermines social rights.

6.6 Conclusions

As the Court's case law on social matters shows, it is motivated primarily by the desire to attain of the single market. Yes, states can raise a range of justifications to defend their policy interests but the ever more onerous requirements of proof on the part of the defendant Member State to show that there is a link between its legislation and the justification proposed,[132] and then to show that its legislation is also proportionate, means that defendant Member States often have to face an uphill battle. This means that the EU interests of market integration, and thus deregulation, tend to prevail over national social interests. The result of this is, as the social policy cases make clear, the Court's approach has done much to clear away the dead wood of national legislation and open up national markets to companies from other Member States and their workers. The decision in *Viking* does, however, remain the exception.

Sometimes the case law throws up surprises: *Cipolla*[133] is a good example. The case concerned Italian rules laying down a scale of minimum fees for lawyers from which no derogation was permitted. The Court said that such a rule was a restriction on free movement but it left it up to the national court to decide on the question of justification and proportionality. However, it gave a strong hint that such market partitioning rules could be justified: 'Although it is true that a scale imposing minimum fees cannot prevent members of the profession from offering services of mediocre quality, it is conceivable that such a scale does serve to prevent lawyers, in a context such as that of the Italian market which, as indicated in the decision making the reference, is characterised by an extremely

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[130] S. Weatherill, 'The Court's case law on the Internal Market: "A Circumloquacious Statement of the Result, rather than a Reason for Arriving at it"' in M. Adams et al (eds), *Judging Europe's Judges: The Legitimacy of the case law of the European Court of Justice* (Oxford, Hart Publishing, 2013).

[131] COM(2012) 130.

[132] Case C-208/00 *Uberseering* [2002] ECR I-9919.

[133] Joined Cases C-94/04 and C-202/04 *Cipolla v Rosaria Fazari* [2006] ECR I-11421.

large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided.' The Court continued that account had to be taken of the specific features both of the market in question and the services in question and, in particular, of the fact that, in the field of lawyers' services, there is usually an asymmetry of information between 'client-consumers' and lawyers. We also saw this sector sensitivity in respect of gambling.

More generally, where the Member States have crafted proportionate legislation, backed by an evidence base, addressing a genuine problem, the Court tends to be more sympathetic to the state's interest and uphold the national rule. This can be seen in *Jyske Gibralter*[134] which concerned a Spanish rule requiring credit institutions providing services in its territory, without being established there, to forward directly to the Spanish financial intelligence unit (FIU) its reports on suspicious operations and any other information requested by the FIU. The Court found this rule was a restriction on the free movement of services. However, the Court said the breach could be justified inter alia, on the grounds of combating of money laundering and terrorist financing,[135] and the steps taken were proportionate. They were suitable because, since the Spanish authorities had exclusive jurisdiction with regard to the criminalisation, detection and eradication of offences committed on its territory, it was justified that information concerning suspicious transactions carried out in Spain be forwarded to the Spanish FIU. The rules were also no more restrictive than necessary because, although there was provision in EU secondary law for the credit institution to provide information to the FIU of its home state which could then be shared with the FIU in the host state, there were deficiencies in the procedure. Therefore, the Court said that even though disclosure to the Spanish FIU gave rise to additional expenses and administrative burdens on the part of service providers, those burdens were relatively limited given that the credit institutions already had to establish infrastructure necessary for information to be forwarded to the home state´s FIU.

[134] Case C-212/11 *Jyske Bank Gibralter* [2013] ECR I–000.
[135] Para. 62.

III. The secondary legislation in the field of freedom of establishment and the free movement of services

A. Introduction

So far we have considered the application of the Treaty provisions on free movement of services and how, outside the gambling sector, they are often used to strike down national law which interferes with free movement. We turn now to consider the extent to which the EU has (re) regulated at EU level, laying down EU rules to facilitate freedom of establishment and free movement of services.

There is an extensive range of secondary legislation in the field of free movement of services. Some of the legislation, like the Services Directive 2006/123, is horizontal ie it applies common principles across sectors. It also draws on the case law of the Court of Justice and is intended to codify it. Other legislation is sector specific. This basic divide will form the structure of this section of the report. First, however, we shall consider the various legal bases for the EU to act in the field of freedom of establishment and free movement of services. These are summarised in Table 1.

Legal basis	Coverage	Legislative Procedure	Examples of legislation adopted under this basis	Other comm-ents
Art.114 TFEU	For the 'approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'	Ordinary	E-commerce Dir. 2000/31 (adopted in part under this basis) The telecoms package including the framework Dir. 2002/21	General legal basis
Art. 115 TFEU	Directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'	Special (unanimity in Council)	Dir. 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares	General legal basis
Art. 352 TFEU	'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, ... shall adopt the appropriate	Special (unanimity in Council); Commission must draw national parliaments' attention to the	EEIG Reg 2137/85 SE Reg. 2157/2001 SCE Reg	Residual legal basis

	measures'.	proposals. Measures based on this Article must not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.	1435/2003	
Art. 50 TFEU	Various provisions on freedom of establishment (full text is in Annex 1). Of particular importance is Art. 50(2)(g): by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;	Ordinary	For examples, see Table 3	Specific legal basis
Art. 51(2) TFEU*	The EP and Council may rule that certain provisions of the chapter on establishment do not apply to certain activities	Ordinary		Specific legal basis
Art. 52(2) TFEU*	The EP and Council shall issue directives for the coordination of the rules on public policy, public health and public security	Ordinary		Specific legal basis
Art. 53(1) TFEU*	In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self- employed persons. Art. 53(2) TFEU makes special provision for medical, allied and pharmaceutical professions	Ordinary	E-commerce Dir. 2000/31 (adopted in part under this basis) MRPQ Dir 2005/36 (adopted in part under this basis) Services Dir. 2006/123 AVMS Dir. 2010/13	Specific legal basis
Art. 56(2) TFEU	The European Parliament and the Council may extend the provisions of the Chapter to nationals of a third country who provide services	Ordinary		Specific legal basis

	and who are established within the Union.			
Art. 59 TFEU	In order to achieve the liberalisation of a specific service, the European Parliament and the Council shall issue directives. Priority must, as a general rule, be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods. Art. 60 adds 'The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit. To this end, the Commission shall make recommendations to the Member States concerned.'	Ordinary	The Citizens' Rights Dir. 2004/38 was based in part on this	Specific legal basis

Table 1: Legal bases for the EU to act in the field of freedom of establishment and the free movement of services

*refers to provisions which will equally apply to the free movement of services under Art. 62 TFEU.

Having looked at the EU's competence to act, we shall now turn to consider certain examples of EU legislation, starting with the horizontal legislation.

B. Horizontal legislation

1. The Services Directive 2006/123

1.1 Introduction

The Services Directive 2006/123,[136] adopted under the first and third sentence of Article 47(2) and Article 55 EC (now Article 53(1) and 62 TFEU), was intended to open up the market in services, which accounts for over two thirds of Europe's GDP. There were two main drafts of the directive: the controversial 'Bolkestein' draft of 2004,[137] and then the McCreevy draft of 2006 which reflected the significant changes introduced by the European Parliament. Chapter III of the directive, which concerns the establishment of service providers, codifies much of the Court's case law. Chapter IV of the directive specifically concerns the free movement of services and was subject to major revision in the McCreevy draft.

The Directive is built round four pillars:

- to ease freedom of establishment and the freedom of provision of services in the EU;
- administrative simplification (requiring states to simplify all the procedures used in creating and establishing a service activity. Formal requirements such as the obligation to submit original documents, certified translations or certified copies must be removed, except for certain cases. From December 2009, undertakings and individuals must be able to carry out all the necessary formalities on-line using points of single contact) and administrative cooperation (requiring states to cooperate with each other);
- to strengthen rights of recipients of services as users (the rights here are fairly rudimentary, reiterating simply that consumers have the right to receive services and the right to information about those services);
- to promote the quality of services (this is the least well developed part of the Directive and focuses mainly on encouraging voluntary certification of activities or drawing up quality charters and European codes of conduct).

We shall focus on the first, and for the purposes of this report, most important, pillar of the Directive (see section 1.4 below). However, we begin by looking at the vexed question of the scope of the directive and the exclusions from that scope.

1.2 Scope

According to Article 2(1), the directive applies to 'services supplied by providers established in a Member State'. Services are defined in accordance with the GATS definition: '"Service" means any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU]'.[138] The list of services found in Article 57 TFEU has been updated by the Directive to include:

[136] OJ [2006] L376/36.
[137] COM(2004) 2 final/3.
[138] Art. 4(1).

- business services such as management consultancy, certification, and testing; facilities management, including office maintenance; advertising; recruitment services; and the services of commercial agents
- services provided both to businesses and to consumers, such as legal or fiscal advice; real estate services such as estate agencies; construction, including the services of architects; distributive trades; the organization of trade fairs; car rental; and travel agencies
- consumer services such as those in the field of tourism, including tour guides; leisure services, sports centres, and amusement parks; and, to the extent that they are not excluded from the scope of application of the directive, household support services, such as help for the elderly.[139]

The striking feature about this list is that the services identified are relatively uncontroversial and are often provided by small operators (SMEs). It is estimated that the Directive covers a wide group of service activities which represent around 40 % of the EU's GDP and employment.

Assuming the activity is a service within the meaning of the directive then the directive can be used to challenge 'requirements which affect access to or the exercise of a service activity'.[140] The word 'requirement' is broadly construed by Article 4(7) of the directive:

> any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy . . .

Thus, the Directive is underpinned by notions of market access rather than discrimination (see section II above).

1.3 Exclusions

Although the potential scope of the Directive is broad, in fact the effectiveness of the Directive is limited by the significant derogations. The principal exclusions can be found in Articles 2(2)–(3). The list is long and broad, and includes important sectors such as healthcare services,[141] financial services,[142] electronic communication services and networks,[143] temporary work agencies,[144] and private security services.[145] Most importantly, from the perspective of this report, services of general interest,[146] audiovisual services,[147] and gambling activities,[148] including lotteries, gambling in casinos

[139] 33rd recital.
[140] 9th recital.
[141] Art. 2(2)(f).
[142] Art. 2(2)(b).
[143] Art. 2(2)(c).
[144] Art. 2(2)(e).
[145] Art. 2(2)(k).
[146] Art. 2(2)(a).
[147] Art. 2(2)(g).
[148] Art. 2(2)(h). See also the 25th recital of the preamble.

and betting transactions, are excluded from the scope of the directive. In addition, Article 2(3) adds that 'This Directive shall not apply to the field of taxation.' Specific provision is also made in respect of social policy, including strike action which is intended to fall outside the Directive (but not the Treaty). All of these excluded sectors and activities remain subject to specific legislation, where it exists, or the Treaty rules.

1.3 Cross-border element

There is a debate as to whether Chapter III on establishment applies not only to out-of-state providers wishing to establish themselves in the host state but also to in-state providers wishing to establish themselves, either as primary or secondary establishment, in their own state.149 In other words, does the establishment chapter apply not merely to cross-border service provision but also to wholly internal situations? This is of particular relevance to the UK with its devolved administrations. Some support for a reading of Chapter III which sees it applied to internal situations comes from the Preamble which says that the concept of the provider should 'not be limited solely to cross-border service provision … but should also cover cases in which an operator establishes itself in a Member State in order to develop its service activities there.'150 Further, Chapter III on establishment, unlike Chapter IV on Services, makes no reference to the need to be established in another Member State. Similarly, Article 2(1), on scope, does not refer to an inter-state element. It merely provides: 'This Directive shall apply to services supplied by providers established in a Member State' (emphasis added).[151]

The argument against the Directive applying to internal situations is twofold. First, the Court, albeit somewhat uncertainly, is holding the line that Union law on free movement of persons does not apply to wholly internal situations.[152] The counter argument to this is that the Services Directive achieves for establishment what harmonisation directives do for goods: product standard Directives cover all manufactured or marketed goods even though Article 34 TFEU applies only to cross-border situations. Secondly, the legal bases of the Directive were the first and third sentences of Article 47(2) and Article 55 EC (now Article 53(1) and 62 TFEU). Unlike Article 49 TFEU, what is now Article 53(1) TFEU does not contain any reference to transnational situations. It merely provides that the Council shall issue directives on the coordination of provisions laid down by the Member States concerning the 'taking up and pursuit of activities as self-employed persons'. On the other hand, Article 47 is in the same chapter as Article 49 TFEU and Article 49 TFEU refers to cross-border situations only. Further, Article 62 TFEU also makes no reference to cross-border situations, referring

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149 Handbook on the Implementation of the Services Directive, http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf, 31.

150 36th Recital. Emphasis added.

151 The same language is used in the 16th Recital. Cf 5th Recital: 'Since the barriers in the internal market for services affect operators who wish to become established in *other* Member States as well as those which provide a service in another Member State without being established there'.

152 Joined Cases C–64–65/96 *Uecker and Jacquet* [1997] ECR I–3171, para. 23; Case C-212/06 *Government of the French Community and Walloon Government* v. *Flemish Government* [2008] ECR I-1683. See also 12th Recital 'This Directive aims at creating a legal framework to ensure the freedom of establishment and the free movement of services *between* the Member States'.

back only to Article 62 on services, yet it is clear that temporary service provision needs to be transnational.

1.5 Screening

Member States also had to screen existing legislation to remove legal and administrative barriers to the provision of services. This had to be done by December 2009. The UK undertook this process with commendable vigour.[153] Different obligations apply depending on whether the rules concern establishment (Chapter III) or services (Chapter IV).

Establishment

The establishment chapter specifically deals with two groups of rules: (1) authorization schemes, and (2) 'other' requirements which are either prohibited or subject to evaluation.

Under Article 9, authorisation schemes are permitted provided that:

- they do not discriminate (either directly or indirectly) against the provider in question
- the scheme is justified by an overriding reason relating to the public interest (ORRPI)[154]
- the objective pursued cannot be attained by means of a less restrictive measure (e.g., monitoring the activities of the service provider or making a simple declaration).

According to Article 10, criteria for granting authorisation must also satisfy these requirements, together with the obligations to be clear and unambiguous, objective, made public in advance, transparent and accessible.[155]

The authorisation rules raise a particular issue in the UK. Article 10(4) provides that 'The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory'. However, in the UK the devolved authorities may be responsible for operating different licensing/authorisation regimes for their respective territories. Article 10(4) does contain an exception, allowing a limitation on the authorisation to a certain part of the territory where this is 'justified by an overriding reason relating to the public interest'. Although recognising the internal division of competences is not recognised in the non-exhaustive list of ORRPI found in the Directive, Article 10(7) would lend support to the view that limited internal territorial competence should be respected. It provides: 'This Article shall not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations'.

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[153] See further COM(2011) 20.

[154] According Article 4(8) ORRPI, reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy (which includes issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare); public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives.

[155] Art. 10(2).

The directive concerns not only authorization schemes but also 'other requirements'. In respect of 'other requirements', the directive distinguishes between (1) those which are prohibited, and (2) those which are 'suspect' and need to be evaluated. Article 14 lists eight requirements which are *prohibited*. This means that there are no overriding reasons in the public interest (ORRPI) justifications or derogations provided by the directive available to Member States. The prohibited requirements include nationality requirements for the provider, its staff, individuals holding the share capital, or members of the provider's management or supervisory bodies;[156] or a rule forbidding a provider from having an establishment in more than one Member State.[157]

Article 15(2) identifies a further eight requirements, a number of which have already been considered 'restrictions' on freedom of establishment in the Court's case law, which are 'suspect'. These include quantitative or territorial restrictions, and an obligation on a provider to take a specific legal form. Unlike the prohibited requirements, the directive requires Member States to evaluate whether these suspect requirements are compatible with the conditions laid down in Article 15(3) (ie (1) non-discriminatory, (2) necessary[158]; and (3) proportionate). Only if they satisfy these tests will they be allowed to continue.

New legislation introduced after 2009 has to be notified to the Commission.[159]

Services

The provisions on services proved to be the most controversial aspect of the Directive. The Bolkestein version of the Directive contained a strong country of origin principle ('Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field'). This meant that services should be regulated by the country in which the service provider was established and only exceptionally by the country in which the service was being provided (the host country), as provided by the derogations. For the Commission, the use of the country of origin principle in the Bolkestein version of the Services Directive was a logical extension of, for example, the Television Without Frontiers (TWF) Directive 89/552,[160] now AVMS Directive 2010/13, and the E-commerce Directive 2000/31[161] (considered in section C below), both of which had the country of origin principle at their core.

However, the Services Directive was considerably more ambitious than its sectoral forebears, since its horizontal approach meant that it covered all the sectors in its scope[162] not just specific sectors. Further, while the TWF/AVMS Directive contained a mix of deregulation (country of origin principle) and re-regulation through minimum harmonisation (eg rules on protection of minors, prohibition of racism), the Bolkestein proposal concerned only deregulation (country of origin principle) and very

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[156] Case C–221/89 *Factortame II* [1991] ECR I–3905.
[157] Case 96/85 *Commission* v *France* [1986] ECR 1475.
[158] Confusingly so-called when what is actually meant is objective justification, the language used in, e.g., Art. 10(2)(b).
[159] Art. 15(7).
[160] OJ [1989] L298/23.
[161] OJ [2000] L178/1
[162] See eg COM(2004)2, 8.

limited re-regulation in the chapter on quality; given the broad and unidentified nature of services covered, more extensive re-regulation was not possible.

Such overt recognition of the country of origin principle proved to be too controversial for some Member States and the language of the final, McCreevy version of the Directive was changed and it was this version that made it into the final draft. Article 16 now provides

> Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.
>
> The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

This is followed by a list of 7 particularly suspect requirements largely based on the Court's case law (including an obligation on the provider to have an establishment in the territory of the host state;[163] a ban on the provider setting up a certain form or type of infrastructure, including an office or chambers;[164] the application of specific contractual arrangements between the provider and the recipient preventing or restricting service provision by the self-employed). These requirements, while frowned upon can, however be saved by the express derogations in Article 17, the case-by-case derogations in Article 18[165] and by a narrow list of public interest requirements provided for by the Directive.

But how great, in fact, is the difference between the CoOP and the freedom to provide services? Under the country of origin principle, the principal regulator would have been the home state; reinforced by the presumption that the host state could not impose any additional requirements unless there were very good reasons for this. The current approach appears to reverse this: it accepts that the host state can impose its own restrictions on the service provider, where there are good reasons for so doing, account being taken of the protection already provided in the home state.

The current approach therefore broadly reflects the case law of the Court where, as section II. 6.2 shows, the CoOP is not as firmly embedded in respect of services as it is in goods. It does exist, but not in terms of establishing the breach (as is the case for goods), but in terms of justifying the breach where the Court requires the host state to take into account requirements already imposed by the home state.[166] In practice, the difference may well be one of emphasis rather than substance: the

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163 Case 33/74 *J.H.M. van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; Case C-393/05 *Commission* v *Austria* [2007] ECR I-000.

164 Case C–55/94 *Gebhard* [1995] ECR I–4165.

165 This leads to the result that the physical safety of consumers can be protected under Article 18 but the economic interests of consumers cannot be protected under Article 16(1) or 16(3).

166 See e.g. Case C–76/90 *Säger* [1991] ECR I–4221, para. 15 'the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, *in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established*.' (emphasis added).

country of origin principle raises a strong presumption of illegality of the host state measure; the current approach raises a weaker presumption of illegality. In practical terms, it means that service providers will continue to have to investigate the rules in each state in which they provide services.

After the 2009 deadline, Member States must inform the Commission of any changes in their requirements or any new requirements, together with the reasons for them (presumably based on Articles 16(1) and (3), although this is not stated). The Commission must inform the other Member States but the Member States remain free to adopt the provisions in question. The Commission is then to provide annual 'analyses and orientations on the application of these provisions in the context of this Directive.'

1.6 Conclusions

As the Commission noted, the UK engaged in an extensive screening exercise in the process of implementing the Directive: ´it identified around 280 pieces out of several thousands to be assessed for their compliance with the Directive. 24 of those legislative acts were finally amended to comply with the Services Directive. However, it seems that only one piece of legislation, namely the Companies Act was modified in order to ensure compliance with the freedom to provide services clause.´ The Commission does note the UK´s view of its ´traditionally light touch regulatory regime´.[167]

In other states the Services Directive has served to force states to reconsider the rules they apply to service providers. However, significant problems remain, especially in states where the regions have significant powers. Germany and Italy provide good examples. In respect of Germany, the Commission noted that it seems that ´many requirements have been maintained which might not comply with the core provisions of the Directive concerning cross-border trade´, especially in the crafts, construction and certification services sector. The Commission identified particular problems with differences in practices between the Länder. Whereas some have rendered authorisation procedures for cross-border services providers less stringent, others have maintained the rules and apply authorisation procedures without taking into consideration whether comparable authorisations have been obtained by service providers in their Member States of establishment.[168]

There are similar problems in Italy. The Commission cites the example of the tourism sector, which falls within the scope of regional competences, where the national implementing law has had little impact. The Commission identified a number of regional instruments containing requirements which are prohibited by the Directive. For example, residency within the region where the service is provided is required for ski instructors, and travel agencies need to prove that their activity is insured and that they have obtained financial guarantees for reimbursing consumers. As for requirements to be evaluated, the Commission found examples of territorial or quantitative restrictions and fixed tariffs which were difficult to justify. For example, obtaining an authorisation to open a ski school can sometimes depend on the number of ski schools existing in the region, or the amount of tourists coming in the region. Fixed tariffs in the field of ski instructors and mountain

[167] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0148:FIN:EN:PDF

[168] Ibid.

guides and restrictions connected to the distribution of ski schools and resorts are especially common (Veneto, Trento, Emilia Romagna, Lazio).[169]

Given such problems, the European Council continues to call on the Member States to improve their performance:[170]

> Services are a fundamental part of the Single Market. To reap the full economic benefits, Member States urgently need to improve implementation of the Services Directive and thus speed up the opening of services markets. All opportunities should be seized in this respect; unjustified or disproportionate barriers should be removed in order to ensure a level playing field on the services market.

2. The Mutual Recognition of Professional Qualifications Directive 2005/36

2.1 Introduction

The other horizontal directive that we shall consider is the complex Mutual Recognition of Professional Qualifications (MRPQ) Directive 2005/36,[171] adopted under Article 40 EC, Article 47(1) EC, the first and third sentences of Article 47(2) EC, and Article 55 EC (now Articles 46 TFEU, Article 53(1) TFEU, as amended and Article 62 TFEU). This Directive has been amended by Directive 2013/55, adopted under the same legal bases as Directive 2005/36. This is due to be implemented by 18 January 2016. A summary of the changes to be introduced by this Directive is found in Table 2 below.

Directive 2005/36 applies to all nationals of a Member State wishing to pursue a 'regulated profession' in a Member State other than that in which they obtained their professional qualifications on either a self-employed or employed basis.[172] A regulated profession involves the pursuit of a 'professional activity'[173] access to which is subject to the possession of specific professional qualifications[174] which, in turn, are defined as qualifications attested by evidence of formal qualifications, an 'attestation of competence' and/or professional experience.[175] In principle,

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[169] Ibid.

[170] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139197.pdf. See also the report by Open Europe, "Kick-starting growth: How to reignite the EU's services sector", 'Despite the economic problems in the eurozone and throughout the EU, Europe is sitting on a huge amount of untapped potential growth and employment in the services sector. Further liberalisation of services by fully implementing the existing Services Directive and implementing a new "country of origin" principle would massively boost cross-border trade and produce a permanent increase to EU-wide GDP of up to 2.3% or euro 294bn, in addition to the euro□101bn already gained under the Services Directive (0.8% of EU GDP).' http://www.openeurope.org.uk/Content/Documents/kickstartinggrowthEUservices-OE.pdf.

[171] Dir. 2005/36 ([2005] OJ L255/22).

[172] Art. 2(1).

[173] Art. 1(c).

[174] Art. 3(1)(a).

[175] Art. 3(1)(b).

the host state must recognize qualifications obtained in one or more states which allow their holder to pursue the same qualification there.[176] Article 4(1) adds:

> The recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home state and to pursue it in the host Member State under the same conditions as its nationals.

The directive then distinguishes between those providing services on a temporary basis (Title II) and those wishing to establish themselves on a permanent basis (Title III).

2.2 Free provision of services

According to Article 5(1), any Member State national legally established in a Member State (State A) may provide services on a temporary and occasional basis,[177] account being taken of the duration, frequency, regularity, and continuity of the provision of services, in another Member State (State B) *under their original professional title* without having to apply for recognition of their qualifications. However, if service providers relocate outside of their Member State of establishment (State A) in order to provide services, they must also provide evidence of two years' professional experience if the profession in question is not regulated in State A.[178] Conversely, if the profession is regulated, then the two years' practice cannot be required.[179]

The directive lays down a number of administrative provisions, including the possibility for the host state, State B, to require the service provider to make a declaration prior to providing any services on its territory, to renew it annually, and to give details of any insurance cover or other means of personal or collective protection with regard to professional liability.[180] State B can also require that the first application be accompanied by certain documents, such as proof of nationality, of their legal establishment, and of their professional qualifications. In addition, State B can require that, where the service is provided under the professional title of the Member State of establishment or under the formal qualification of the service provider, service providers furnish the recipient of the service with certain information, particularly with regard to insurance coverage against the financial risks connected with any challenge to their professional liability.[181]

2.3 Freedom of establishment

The directive also makes provision for a professional to become established in another Member State in order to conduct a professional activity there on a stable basis. The directive comprises the three existing systems of recognition:

- the general system for the recognition of professional qualifications (Chapter I)

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[176] Art. 1.
[177] Art. 5(2).
[178] Art. 5(1)(b).
[179] Art. 5(1)(b).
[180] Art. 7(1).
[181] Art. 9.

- the system of automatic recognition of qualifications attested by professional experience in certain industrial, craft and commercial sectors (Chapter II)
- the system of automatic recognition of qualifications for specific professions (doctor, nurse, dentist, vet, midwife, pharmacist and architect (Chapter III)).

However, as the Court has made clear in *Commission v. Spain (pharmacists)*, 'the right to recognition of diplomas is guaranteed as an expression of the fundamental right of freedom of establishment',[182] so any interpretation of the directive must be read subject to Article 49 TFEU.

We shall now consider in outline the three situations identified by the directive.

(i) The general system for the recognition of professional qualifications

This 'general' system in Chapter I applies as a fallback to all the professions not covered by specific rules of recognition (Chapters II and III considered below), and to certain situations where the migrant professional does not meet the conditions set out in other recognition schemes.[183] This general system is based on the principle of mutual recognition, subject to the application of compensatory measures if there are substantial differences in the levels of training between the home and host states. The Directive lays down detailed rules as to how the system of mutual recognition works. In *Colegio de Ingenieros*[184] the Court noted that compensatory measures had to be restricted to those cases where they were proportionate to the objective pursued because, due to the time and effort involved, they could be a 'highly dissuasive factor for a national of a Member State exercising his right under the Directive'.

The directive also introduces the concept of 'common platforms', drawn up by representative professional associations, which are suitable for compensating for substantial differences which have been identified between the training requirements existing in the various Member States for a given profession.[185] If such a platform is likely to make the mutual recognition of qualifications easier, the Commission can submit it to the Member States and adopt an implementing measure.[186] In these circumstances, the host state must waive the imposition of compensatory measures on applicants who meet the platform's conditions.

(ii) System of automatic recognition of qualifications attested by professional experience in certain industrial, craft, and commercial activities

As we have seen, Chapter I of the directive offers a qualified version of mutual recognition: mutual recognition applies subject to the application of compensatory measures if there are substantial differences between the training acquired by the migrant and the training required in the host Member State. Chapter II contains the second approach to mutual recognition. The industrial, craft, and commercial activities listed in the directive are subject to the automatic recognition of qualifications attested by professional experience provided that conditions concerning the duration

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[182] Case C–39/07 *Commission* v. *Spain (pharmacists)* [2008] ECR I–3435, para. 37.
[183] Art. 10.
[184] Case C–330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos* v. *Adminstración del Estado* [2006] ECR I–801, para. 24. See also Case C–197/06 *Van Leuken* [2008] ECR I–2627, paras. 40–1.
[185] Art. 15(1).
[186] Art. 15(2).

and form of professional experience (in a self-employed or employed capacity) are satisfied.187 Account is also taken of previous training and this may reduce the amount of professional experience required. All previous training should, however, be proven by a certificate recognized by the Member State or judged by a competent professional body to be fully valid. Thus, Chapter II of the directive offers an unqualified version of mutual recognition. This provision has been replaced in the revised directive by common training principles which confer automatic recognition: common training framework and common training tests.[188]

(iii) System of automatic recognition of qualifications for specific professions

Chapter III deals with specific professions. Once again, each Member State must automatically recognize certificates of training, on the basis of coordination of the minimum training conditions, covering the professions of doctors, nurses responsible for general care, dental practitioners, specialized dental practitioners, veterinary surgeons, midwives, pharmacists, and architects. For the qualification to be recognized, the directive lays down minimum training conditions and the minimum duration of studies for each of these professions. The formal qualifications conforming to the directive issued by the Member States are listed in an annex (Annex V). Holders of these qualifications can practise their profession in any Member State. The effect of Chapter III is therefore unqualified mutual recognition combined with partial harmonization (of the training requirements).

(iv) Common provisions

Chapter IV of Title III contains the procedure for submitting a request for mutual recognition of professional qualifications.[189] It also permits migrant professionals to use the title conferred on them by the home state as well as the professional title of the corresponding host Member State.[190] If a profession is regulated in the host Member State by a private association or organization, the migrant must also be able to become a member of that organization or association and thus be able to use the corresponding title.[191]

Title IV contains detailed rules for pursuing the profession, including the possibility for the host state to require migrants to have knowledge of the relevant language necessary for practising the profession.[192] It also requires close collaboration between the competent authorities in the host Member State and the home Member State,[193] by, for example, requiring each Member State to designate a coordinator to facilitate the uniform application of the directive[194] and to designate contact points which must provide citizens with information on the recognition of professional qualifications and to assist them in enforcing their rights, particularly through contact with the competent authorities to rule on requests for recognition.195

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187 Arts. 17–19.
188 Arts 49a and 49b.
189 Arts. 50–1.
190 Art. 52(1).
191 Art. 52(2).
192 Art 53.
193 Art. 56(1).
194 Art. 56(4).
195 Art. 57.

Table 2: Revisions introduced by Directive 2013/55

(1) The introduction of a European professional card will offer interested professionals the possibility to benefit from easier and quicker recognition of their qualifications. It should also facilitate temporary mobility. The card will be made available in respect of particular professions on the basis of implementing acts adopted by the Commission according to the needs expressed by the professions. The card is linked to an optimised recognition procedure carried out within the existing Internal Market Information System (IMI) and will take the form of an electronic certificate, allowing the professional to provide services or become established in another Member State.

(2) Better access to information and access to e-government services: Member States will make available all information about recognition of qualifications (in particular, a list of competent authorities and of documents required) through the Points of Single Contact which were created under the Services Directive. Professionals will also have the possibility to complete recognition procedures online. In addition, the existing national contact points will become assistance centres, responsible for providing advice and assistance on individual cases.

(3) Modernisation of harmonised minimum training requirements: the revised Directive introduces changes in the definition of the minimum training requirements for the professions benefiting from automatic recognition (doctors, nurses, midwives, dentists, pharmacists, veterinary surgeons and architects).

(4) An alert mechanism is set up for all professions with patient safety implications and professions involved in the education of minors, including childcare and early childhood education (where the profession is regulated). The competent authorities of a Member State must inform the competent authorities through the IMI of all other Member States about a professional who has been prohibited, even temporarily, from exercising his professional activity or who made use of falsified documents.

(5) Common training principles: the modernised directive introduces the possibility to set up "common training frameworks" and "common training tests", aimed at offering a new avenue for automatic recognition. A common training framework should be based on a common set of knowledge, skills and competences necessary to pursue a profession. A common training framework or test could be set up if the profession concerned or the education and training leading to the profession is regulated in at least one third of the Member States.

(6) Mutual evaluation exercise on regulated professions: a new mechanism is introduced in the Directive to ensure greater transparency and justification of regulated professions. Member States will have to provide a list of their regulated professions and the activities reserved for them, and justify the need for regulation.

(7) Rules on partial access to a regulated profession: the principle of partial access – access to part of the activities reserved to a particular profession - is included in the new directive. It can benefit professionals who engage in a genuine economic activity in their home Member State which does not exist, in its own right, in the Member State to which they wish to move. The principle of partial access derives from the Court of Justice´s case law.

(8) Application of the Directive to professionals whose traineeship is carried out in another Member State: professionals who completed their professional traineeship in another Member State are entitled to have that traineeship recognised by the competent authority of the host Member State. This professional traineeship is required under the law of some Member States, for example for lawyers, architects and teachers.

(9) Exempting notaries from the Directive: the new Directive clarifies that the Directive should not apply to notaries appointed by an official act of government. Accordingly, the provisions of the Treaty on the Functioning of the European Union continue to apply.

(10) Improving temporary mobility: the amended Directive reduces the professional experience requirement for professionals coming from non-regulating Member States and clarifies document requirements and the procedural steps.

(11) Comparison of qualifications and use of compensation measures under the general system: the new Directive amends the classification of education levels set out in Article 11 of the current Directive (classification of qualifications based on five levels of education) and the requirements for compensation measures.

(12) Rules on language skills: the revised Directive clarifies that the checking of the language knowledge of a professional should take place only after the host Member State has recognised the qualification but it might intervene before the professional accesses the profession. In the case of professions with implications for patient safety, competent authorities may carry out systematic language controls.

(13) Continuous professional development: according to the new Directive, Member States will have to ensure that sectoral professions (doctors, nurses, midwives, dentists, pharmacists, veterinary surgeons and architects) can update their knowledge, skills and competences via continuous professional development. **Source: this is adapted from Commission Memo/13/867**

Source: this is adapted from Commission Memo/13/867

C. Examples of Sector specific legislation

So far we have looked at two important pieces of 'horizontal' legislation, ie legislation which applies across all sectors. We now consider to piece of sector specific legislation, the Audio Visual and Media Services Directive 2010/13 and the E-Commerce Directive 2000/31, before looking at the more general topic of EU Company law which reveals a more complex interplay between the Treaty and secondary legislation.

1. Audio Visual and Media Services Directive 2010/13

1.1 Basic Rules

The Audiovisual Media Services (AVMS) Directive 2010/13/EU,[196] originally called the Television without Frontiers (TWF) Directive 89/552,[197] was adopted under Articles 53(1) and 62 TFEU. It is intended to secure the freedom to provide television services.[198] It covers linear (TV transmissions) and non-linear (e.g., web clips) services. While there are certain common rules, non-linear services are subject to greater self-regulation.

The directive is based on the 'transmitting-state' principle[199] which means, according to *De Agostini*,[200] that the transmitting state has the primary responsibility for ensuring that 'media service providers' (broadcasters[201]) established in that state comply with national rules coordinated by the directive on the 'organisation and financing of broadcasts and the content of programmes'.[202] In other words, the Directive is based on the country of origin principle.

The corollary of the transmitting-state principle is that the receiving state must allow programmes received from the transmitting state to be shown in its territory without restriction.[203] Therefore, the principle of mutual recognition underlies Directive 2010/13: a television programme legitimately

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196 OJ [2010] L95/1.

197 [1989] OJ L298/23.

198 Case C–412/93 *Leclerc-Siplec* [1995] ECR I–179, para. 28.

199 Art. 2(1) provides that 'Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.' See also Case C–11/95 *Commission* v. *Belgium* [1996] ECR I–4115, para. 42; Case C–14/96 *Criminal Proceedings against Paul Denuit* [1997] ECR I–2785, para. 32. In addition Art. 4(6) makes the transmitting state responsible for ensuring that the media service provider complies with the provisions of the directive.

200 Joined Cases C–34–36/95 [1997] ECR I–3843, para. 28.

201 See Case C–89/04 *Mediakabel BV* v. *Commissariaat voor de media* [2005] ECR I–4891 on the meaning of television broadcasting services.

202 Art. 2(2)–(5) lays down the rules to determine which media service providers are under the jurisdiction of a Member State.

203 Art. 3(1) provides that 'Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields co-ordinated by this Directive.'

broadcast in one Member State can be rebroadcast in another without restriction. Even if the receiving Member State considers that the transmitting state is not exercising proper control, the receiving state cannot unilaterally adopt corrective or protective measures but must bring infringement proceedings under Article 259 TFEU or request the Commission to take action under Article 258 TFEU.[204]

However, there are circumstances in which the receiving state can derogate from the rule of home-state control.[205] Apart from public policy grounds, [206] the Directive provides that if a television broadcast comes from another Member State which 'manifestly, seriously and gravely' infringes Article 27 concerning programmes which might seriously impair the physical, mental, or moral development of minors[207] and/or Article 6 concerning audiovisual media services containing 'incitement to hatred based on race, sex, religion or nationality', and the broadcaster has infringed Article 27 and/or Article 6 on at least two occasions in the previous 12 months, then the Member State must notify the broadcaster and the Commission. If attempts at seeking an amicable settlement fail then the receiving state can provisionally suspend retransmission until the Commission determines whether the suspension is compatible with Union law. The UK has made use of this provision. In particular, it banned reception of the Red Hot Dutch channel, broadcast initially via satellite from the Netherlands and then from Denmark.[208] The UK also relied on it to suspend the transmission of Eurotica Rendez-Vous by a Danish satellite television company. The Commission upheld the UK's decision as being compatible with the directive.

1.2 Obligations on media services providers

The Directive contains some general obligations on all media services providers including the provision of information about the identity of the provider,[209] that Audiovisual media services may not contain any incitement to hatred based on race, sex, religion or nationality,[210] and the requirement to improve the accessibility of their services for people with a visual or hearing disability.[211] In addition, in order to protect minors against the negative effects of pornographic or violent programmes, such programmes, when broadcast, must be preceded by an acoustic warning

[204] Case C–11/95 *Commission* v. *Belgium* [1996] ECR I–4115, paras. 36–7.
[205] Article 3(2).
[206] Member States can derogate from on-demand audiovisual media services on the grounds of public policy, public health, public security and the protection of consumers (Art. 3(4)).
[207] See also Rec. 2006/952/EC on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line services industry [2006] OJ L378/72.
[208] *R*. v. *Secretary of State for National Heritage, ex p. Continental Television* [1993] 3 CMLR 387 and referred to the Court in Case 327/93 *Red Hot Television*. The reference was removed from the register on 29 Mar. 1996 because Red Hot Dutch went bankrupt.
[209] Art. 5.
[210] Art. 6.
[211] Art. 7.

or identified by the presence of a visual symbol throughout the broadcast.[212] There must also be a right of reply in television broadcasting.[213]

In addition, the Directive lays down rules which apply to 'commercial communications' (advertising), in particular that it must be recognisable as such and not use subliminal techniques, and that it must not include tobacco advertising and should not promote excessive drinking.[214] Provision is also made for sponsored programmes. These are permitted but subject to certain conditions (they must not affect the editorial independence of the media service provider; they must not directly encourage the purchase or rental of goods; viewers must be informed of the sponsorship agreement).[215] Generally product placement is prohibited.[216] The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising or teleshopping on the condition that the interruption only takes place once for each programme period of 30 minutes.[217]

In addition, the Directive contains some specific obligations which apply on to non-linear (on-demand) AVMS including an obligation to promote the production of and access to European works. This means that audiovisual service providers can contribute financially to the production of European works, or they can reserve a share and/or prominence for European works in their catalogue of programmes.[218]

1.3 Public service obligations

The directive contains three public service obligations which reflect the importance of audio visual services to public life. First, Member States may take measures aimed at ensuring that certain events, which it considers are of major importance for society, cannot be broadcast exclusively in such a way as to deprive a substantial proportion of the public in that Member State. Each Member State may draw up a list of events and implementation procedures.[219] Second, for the purpose of short news reports, any broadcaster established in a Member State has the right to access short extracts of events of high interest to the public which are broadcast on an exclusive basis.[220] Third, broadcasters must devote a majority of their transmission time to European works[221] and at least 10% of their transmission time, or 10% of their programming budget, to European works created by producers who are independent of broadcasters.[222]

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[212] Art. 27.
[213] Art. 28.
[214] Art. 9.
[215] Art. 10.
[216] Art. 11.
[217] Art. 20.
[218] Art. 13.
[219] Art. 14.
[220] Art. 15.
[221] Art. 16.
[222] Art. 17.

2. E-commerce Directive 2000/31

2.1 Introduction

The e-commerce Directive 2000/31/EC,[223] properly known as the Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, was adopted under Articles 47(2), 55 and 95 EC (now Articles 53(1), 62 and 114 TFEU). It was based on the guidelines in the Commission communication on electronic commerce[224] which set the objective of creating a legal framework for electronic commerce in Europe by the year 2000. It is mainly a coordination measure, rather than a harmonisation directive. In principle, information society services are subject to the law of the Member State in which the service provider is established, and the Member State can set requirements with which the service provider has to comply in respect of taking up of the activity of information society services (eg requirements concerning qualification, authorisation, notification) and the exercise of those services (eg requirements as to behaviour of the service provider, quality, liability).[225] However, the Directive does establish harmonised rules on issues such as the transparency and information requirements for service providers, commercial communications, contracts concluded by electronic means and the liability of intermediary service providers.

2.2 Scope

The Directive covers all information society services defined as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'[226] ie:

- services between enterprises,
- services between enterprises and consumers, services provided free to the recipient which are financed, for example, by advertising income or sponsoring, and
- services allowing on-line electronic transactions (interactive telesales of goods and services and on-line purchasing centres in particular).

In particular, the Directive covers the following on-line sectors and activities: newspapers, databases, financial services, professional services (solicitors, doctors, accountants, estate agents), entertainment services (video on demand, for example), direct marketing and advertising and Internet access services. It applies solely to service providers established in the European Union (EU).

The case law has provided some clarification as to the meaning of information society service. It does include Google's 'Adwords' referencing service[227] but, according to *Ker-Optika*, it does not

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[223] OJ [2000] L178/1.

[224] COM(97) 157.

[225] Art. 2(h).

[226] Art. 1(2) of Dir. 98/34/EC (OJ [1998] L204/37 as amended by Dir. 98/48 (OJ [1998] L217/18.

[227] Joined Cases C-236/08 to 238/08 *Google* v *Louis Vuitton* [2010] ECR I-000. Google offers a paid referencing service called 'AdWords'. That service enables any economic operator, by means of the reservation of one or more keywords, to obtain the placing, in the event of a correspondence between one or more of those words and that/those entered as a request in the search engine by an internet user, of an advertising link to its site.

cover conditions applicable to the supply of goods, such as the location of the supply (in casu contact lens could be sold only in a specialist shop and not online) in respect of which a contract has been concluded by electronic means.[228]

The Directive does not, however, apply to

- the field of taxation;
- questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;
- questions relating to agreements or practices governed by cartel law;
- the following activities of information society services:
    - the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority
    - the representation of a client and defence of his interests before the courts,
    - gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

2.3 The coordinated field: home state control

Under Article 3, providers of information society services (Internet site operators, for example) are subject to the legislation of the Member State in which they are established (the country of origin principle, also known at the internal market clause). The Directive defines a provider's place of establishment as the place in which a service provider effectively pursues an economic activity using a fixed establishment for an indefinite period.[229] Thus, it is the host state which is responsible for supervising the activities of the service provider and this is the coordinated field.[230]

The corollary of the country of origin principle is that the host state may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State, including imposing a prior authorisation requirement,[231] unless four conditions are satisfied:

- the measure is necessary for public interest reasons(public policy, public health, public security, protection of consumers)
- the measure is taken against a given information society service which prejudices one of those public interests or which presents a serious and grave risk of prejudice to those interests
- the host state's actions are proportionate to those objectives
- except in the case of urgency, the following procedural steps have been taken, namely
    - asking the home state to act and the host state failed to respond adequately

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That advertising link appears under the heading 'sponsored links', which is displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above the natural results (para. 23).

[228] Case C-108/09 *Ker-Optika* [2010] ECR I-000.

[229] Art. 2(c).

[230] Joined Case C-509/09 and C-161/10 *edate Advertising v X and Martinez* [2011] ECR I-10269.

[231] Art. 4

- the Commission and the home state notified

2.4 The harmonised field

While principally a coordinating directive, the Directive does lay down some important issues on which there is harmonisation. These include information provisions with which the service provider is required to comply (including various contact details),[232] rules on commercial communication (including unsolicited adverts),[233] and a requirement that Member States must ensure that their legal systems 'allow contracts to be concluded by electronic means'. Exceptions to this general rule are, however, permitted with respect to certain types of contracts, including those relating to the transfer of real property, certain contracts with public authorities, certain contracts relating to suretyship and contracts governed by family law or the law of succession.[234]

The most controversial provisions of the Directive concern the liability of intermediary services, like Internet Service Providers, in transmitting, 'caching'[235] and storing information. Liability for service providers is *excluded* in respect of information which they transmit where the service provider has acted as a mere conduit without initiating the communication, selecting the receiver of the information or modifying the information.[236] Similar protection is provided for temporary caching of information in the course of carrying out the service providers' activities.[237] Additionally those responsible for longer term storage of information by a host site ('hosting') are to be excluded from liability in respect of information which they store as long as:[238]

> a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
>
> b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

In *Google* the Court ruled that 'the exemptions from liability established in the E-commerce directive cover only cases in which the activity of the information society service provider is 'of a mere technical, automatic and passive nature', which implies that that service provider 'has neither knowledge of, nor control over the information which is transmitted or stored'. The Court of Justice left it up to the national court to decide whether the role played by Google satisfied these conditions.

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[232] Art. 5-6, 10.
[233] Art. 7.
[234] Art. 9.
[235] This form of storage is undertaken by the service provider with a view to enhancing the performance and the speed of digital networks. It does not constitute as such a separate exploitation of the information
[236] Art. 12.
[237] Art. 15.
[238] Art. 14.

D. EU Company law

1. EU legislation

1.1 Harmonisation directives

Public and private limited companies are generally established under national law. The national law rules on the establishment of companies have now been subject to extensive, but not comprehensive, harmonisation by EU law. Article 50 TFEU provides the main legal basis to adopt Directives harmonising EU company law. Company law directives have concerned:

- the disclosure of companies and their branches
- validity of their obligations and their nullity;
- the maintenance and alteration of the capital of public limited-liability companies;
- the merger and divisions of public limited-liability companies;
- the single-member private limited-liability companies;
- take-over bids,
- cross-border merger of companies
- certain rights of shareholders of listed companies.

A summary of those directives, together with their relevant legal basis, is found in Table 3 below. It should, however, be noted that while the Directives are numerous, they are not comprehensive. Key areas of national company law remain largely unaffected by EU law, notably the fiduciary liability of directors.

Subject area	Directives	Legal basis mentioned in text
Formation, maintenance of capital, supervision	Directive 2012/30/EU on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 TFEU, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent; (Before 4 December 2012: Second Council Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of	Article 50(1) and (2) (g) TFEU

	members and others, are required by Member States of companies in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent	
	Directive 2012/17 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers	Art. 50 TFEU
	Directive 2010/76/EU amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies	Art. 53(1) TFEU
	Directive 2009/102/EC of the European Parliament and of the Council of in the area of company law on single-member private limited liability companies; (Before 21 October 2009: Twelfth Council Company Law Directive 89/667/EEC on single-member private limited-liability companies)	Art. 44 EC (Art. 50 TFEU)
	Eleventh Council Directive 89/666/EEC concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State. Partial repeal by Directive 2013/34 (see below)	Art. 54 EEC (Art. 50 TFEU)
Mergers and divisions	Directive 2011/35/EU concerning mergers of public limited liability companies; (Before 1 July 2011: Third Council Directive 78/855/EEC based on concerning mergers of public limited liability companies)	Art. 50(2)(g) TFEU
	Directive 2009/109/EC amending	Art. 44(2)(g) EC (Art.

	Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions. Partial repeal by Directives 2011/35 and 2012/30 above.	50(2)(g) TFEU)
	Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States	Art. 94 EC (Art. 115 TFEU)
	Directive 2007/63/EC of the European Parliament and of the Council amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies. Partial repeal by Dir. 2011/35 above.	Art. 44(2)(g) EC (Art. 50(2)(g) TFEU)
	Tenth company law Directive 2005/56/EC on cross-border mergers of limited liability companies as amended by Directives 2009/109 and 2012/17 above	Art. 44 EC (Art. 50 TFEU)
	Sixth company law Directive 82/891/EEC concerning the division of public limited liability companies, amended by Directives 2007/63 and 2009/109 (see above)	Art. 54(3)(g) EEC (Art. 50(2)(g) TFEU)
Takeovers	Thirteenth company law **Directive 2004/25/EC** on takeover bids	Art. 44(2)(g) EC ((Art. 50(2)(g) TFEU)
Company accounts	Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the	Art. 50(1) TFEU

	Council and repealing Fourth Council Directive 78/660/EEC on the annual accounts of certain types of companies and Seventh Council Directive 83/349/EEC on consolidated (group) accounts	
	Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Eighth Council Directive 84/253/EEC on the approval of persons responsible for carrying out the statutory audits of accounting documents. This Directive has been partially repealed by Directive 2013/34.	Art. 44(2)(g) EC (Art. 50(2)(g) TFEU)
Corporate Governance/transparency	Directive 2009/101/EC on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent; (before 21 October 2009: First Council Directive 68/151/EEC on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community)	Art. 44(2)(g) EC (Art. 50(2))(g) TFEU)
	Directive 2007/36/EC of the European Parliament and of the Council on the exercise of certain rights of shareholders in listed companies	Arts. 44 and 95 EC (Arts. 50 and 114 TFEU)

Table 3: EU Company law harmonisation directives and their legal basis

1.2 EU corporate forms

In addition to this harmonisation, EU company law has introduced its own EU company law forms, in particular SEs, SCEs and EEIGs (see below). These instruments are referred to as the '29th regime' to the extent that they introduce new legal forms, in addition to the national forms, that do not harmonise, modify or substitute the existing national legal forms, but provide an additional alternative legal form.

Of these new legal forms, the most important, established by Council Regulation 2157/2001,[239] is the Statute for a European company (SE), adopted under Article 352 TFEU. Under this Regulation the EU has introduced its own type of EU public company, Societas Europea (SE), which can register in any Member States of the EU. There are over 2000 such companies in existence.[240] The Regulation is complemented by an Employee Participation Directive 2001/86[241] that sets rules for participation by employees on the company's board of directors.

There is also a statute allowing for European Cooperative societies (SCE),[242] a European corporate form in the not-for-profit sector, also with accompanying employee participation requirements.[243] The SCE Regulation was adopted under Article 352 TFEU, and not under the general internal market legal basis Article 114 TFEU as the Commission and Parliament had advocated. This choice of legal basis was upheld by the Court[244] because, the Court said, the contested regulation, 'which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms.'

In addition, Council Regulation 2137/85[245] makes provision for an European Economic Interest Grouping (EEIG), also adopted under Article 352 TFEU. An EEIG is designed to 'facilitate or develop the economic activities of its members by a pooling of resources, activities or skills. It is not intended that the grouping should make profits for itself. If it does make any profits, they will be apportioned among the members and taxed accordingly. Its activities must be related to the economic activities of its members, but cannot replace them.'[246] It is not liable for corporation tax but its members have unlimited liability. Several thousand such EEIGs now exist, including the French-German television channel ARTE.

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239 OJ [2001] L294/1.

240 http://ecdb.worker-participation.eu/

241 OJ [2001] L294/22.

242 Reg. 1435/2003 (OJ [2003] L 207/1.

243 Dir. 2003/72 (OJ [2003] L207/25).

244 Case C-436/03 *Commission v Council* [2006] ECR I-3733

245 OJ [1985] L199/1.

246 http://europa.eu/legislation_summaries/internal_market/businesses/company_law/l26015_en.htm

More recently, there was a proposal for a Private Company Statute (SPE).[247] The aim of the proposal was to avoid private companies having to reincorporate in each Member State in which they operate. The proposal was withdrawn in 2013 because agreement could not be reached.

2. Company law and the four freedoms

2.1 Introduction

As the discussion above has indicated, there is now extensive secondary legislation in the field of company law. However, there are some significant gaps in the EU legislation and it is in these areas where national law applies. This raises the question whether the application of the national law rules has the effect of interfering with the operation of the Treaty, ie Articles 49 and 54 TFEU. Since the Treaty envisages that natural and legal persons are equal it might be thought that there would be direct parallels in the case law and its application to natural and legal persons. In fact this is not quite the case.

There is a further problem. Different approaches can be found in the Member States to determining the seat of a company. The majority of Member States, including France and Germany, have adopted the *real seat theory* (*siège réel*) which says that a company is to be established under the law of the State in which its operational headquarters is situated, even though it might be formally incorporated in another Member State. A minority of Member States, including the UK, adopt the incorporation theory which says that a company is governed by the law of the State in which it is formally incorporated, regardless of whether it is connected to that state in any other way (eg plant, premises, staff etc). Can a company incorporated in the UK, but with the bulk of its operations in Germany, argue that if Germany does not recognise its legal form, Germany is in breach of Articles 49 and 54 TFEU?

2.2 The Right of Exit

In the leading case of *Daily Mail*[248] the Court refused to recognise an unrestricted right of exit for companies, at least where rules of taxation are at stake. A company incorporated in the UK and having its registered office there transferred its central management and control to the Netherlands. The reason for this was to enable it, after establishing its residence for tax purposes in the Netherlands, to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy its own shares without having to pay the tax to which such transactions would make it liable under UK tax law (since under UK tax law only companies which are resident for tax purposes (ie their central management and control is located there). The tax would have been much higher in the UK, where the company had made a substantial capital gain, than in the Netherlands where the transactions would be taxed but only on the basis of any capital gains which accrued after the transfer of its residence for tax purposes. In anticipation of such manoeuvres, UK law prohibited companies resident for tax purposes in the United Kingdom from ceasing to be resident but retaining

[247] COM(2008) 396.
[248] Case 81/87 [1988] ECR 5483.

the status as a UK company, without the consent of the Treasury. Did this requirement of prior consent interfere with the company's free movement rights?

Having pointed to the wide variety of national laws on the factors providing a connection between the company and the national territory and the absence of coordination directives, the Court concluded that neither Article 49 TFEU nor Article 54 TFEU conferred on companies incorporated in State A the right to transfer—without any restriction or impediment from State A—their central management, control, and administration to State B while at the same time retaining their status as companies in State A.[249] This judgment does not mean that companies cannot move their residence but that—at the present stage of development of Union law—restrictions can be imposed on emigrating companies by the home state.

With the development of the 'restrictions' case law (see section II.5.1 above), some commentators wondered whether the position might now be different. However, in *Cartesio*[250] the Court essentially upheld the decision in *Daily Mail* but nuanced it. It drew a distinction between two situations:

> (1) where the seat of a company incorporated under the law of one Member State is transferred to another Member State with *no* change as regards the law which governs that company (the situation in *Daily Mail* and *Cartesio* itself); and
>
> (2) where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable (reincorporation).[251]

In respect of the first situation, the Court said the matter fell outside the scope of Union law because the company no longer satisfied the pre-conditions of being a company formed under national law. In the absence of harmonization, it was for *national law* to define the connecting factor (i.e., registered office only (for those states applying the incorporation theory) or registered office and real seat (for those states applying the *siège réel* theory)) required for a company to be regarded as incorporated under the law of that Member State[252]

By contrast, in the second situation the Court said that the company is *converted* into a form of company which is governed by the law of the Member State to which it has moved. The Court said that the power of Member States to determine the connecting factor did not justify the Member State of incorporation (State A) preventing that company from converting itself into a company governed by the law of the new Member State (State B) to the extent that it was permitted by State B's law to do so, by requiring the company's winding-up or liquidation. The Court said that a barrier (such as the requirement by State A for the company to be wound up in state A and then reincorporated in State B) to the actual conversion of a company 'constitutes a restriction on the

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[249] Para. 24.
[250] Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–9641.
[251] Para. 111.
[252] Para. 109.

freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited under Article [49 TFEU]'.[253]

VALE[254] added an important gloss to this. The case concerned a cross-border conversion: an Italian company, VALE Costruzioni Srl, wanted to convert into a Hungarian company. It successfully applied to be removed from the Italian register of companies, but the Hungarian court refused the subsequent application for the new Hungarian company, VALE Epítési Kft, to be registered as the 'successor in law' of VALE Costruzioni Srl. Under Hungarian law conversion was possible for domestic companies. In other words Hungarian law was interfering with the VALE's freedom of establishment and was discriminating against foreign companies by prohibiting their conversion. While *Cartesio* suggested that it was for the host state to determine the rules for incorporation ('to the extent that it is permitted under [the new state's] law to do so'),[255] the Court said the new state's law had to comply with the principles of Article 49 and 54 TFEU, including the principle of equal treatment. Because Hungarian law allowed Hungarian companies to convert but not companies governed by the law of another Member State there was a breach of the Treaty which could not be justified given the blanket nature of the rule.

Thus, while *Daily Mail* remains good law, the Court in *SEVIC* (on the right to cross-border mergers, considered in section II above) and *VALE* (on the right to cross-border conversions) in particular seems keen to limit its scope.

2.3 Recognition of companies established under a different legal regime

What about the situation, seen in *Centros*, where a company established in the UK but doing all of its business in Denmark through a branch, wants to have that branch recognised in Denmark? English law permits companies to be incorporated in the UK but with their residence or main operations in another Member State. This outcome would not be permitted by Member States which operate the siège réel doctrine. The Court, by ruling, as we saw in section II.6.3 above, that the Danish registrar's refusal to recognise the branch constituted an unjustified obstacle to the UK company's freedom of establishment, implicitly called into question the status of the siège réel doctrine under EU law.

The question was confronted more directly by the Court in *Überseering*.[256] Überseering, a Dutch company, sued a German company, NCC, for defective work carried out by NCC on Überseering's behalf in Germany. Prior to bringing the proceedings, all the shares in Überseering were acquired by two German nationals. The German court found that, since Überseering had transferred its centre of administration to Germany, as a company incorporated under Dutch law it did not have legal capacity in Germany because it had not been formed according to German law and so could not bring proceedings.[257] German law thus refused to recognize the legal personality which Überseering enjoyed under Dutch law (and continued to enjoy under Dutch law even after its centre of

[253] Para. 113.
[254] Case C-378/10 *VALE Epítési kfti* [2012] ECR I-000, noted T. Biermeyer (2013) 50 *CMLRev.* 571.
[255] Para. 112.
[256] Case C–208/00 *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I–9919.
[257] Para. 9.

administration had been moved),[258] with the result that the German courts effectively denied the company access to justice in Germany.

The Court said that this case concerned an immigrating company and, the recognition (or rather lack of it) by one Member State (Germany) of a company incorporated under the law of another Member State (the Netherlands).[259] The Court said that because Überseering was a company validly incorporated under the law of the Netherlands, where its registered office was established, the company had no alternative under German law but to reincorporate in Germany if it wished to enforce its rights under a contract before a German court.[260] This contravened Articles 49 and 54 TFEU because '[t]he requirement of reincorporation of the same company in Germany is therefore tantamount to outright negation of freedom of establishment'.[261] The Court then considered whether the restriction on freedom of establishment could be justified. It said that while it was conceivable that overriding requirements relating to the general interest (e.g., the protection of the interests of creditors, minority shareholders, employees, and even the taxation authorities) could—in certain circumstances and subject to certain conditions—justify restrictions on freedom of establishment, they could not justify an outright negation of freedom of establishment.[262]

The effect of this judgment may be to erode the siège réel doctrine still further. It requires German courts to recognize companies validly formed under Dutch law, even though they would not be recognized under German law. Indeed, a company with its 'registered office, central administration or principal place of business within the [Union]' cannot be denied access to any other Member State. This does not necessarily mean that the Court is privileging the incorporation theory; rather that it is paying more attention to the state in which the company has been incorporated.

Together these cases show a powerful form of judicially induced harmonisation taking place. However, as *Daily Mail* and *Cartesio* show, the process is taking place more carefully and slowly than advocates of a full scale application of the market access approach might expect.

[258] Paras. 63 and 71.
[259] Para. 66.
[260] Para. 79.
[261] Paras. 80–1.
[262] Paras. 92–3.

E. Services of General Interest (SGIs)

1. Introduction

While Article 57 TFEU contains a definition of services, a definition expanded on by the case law and the Services Directive 2006/123, the Treaty contains no definition of *public* services. Public services are usually considered to be services that supply some public good, that is a good the consumption of which is in the general interest, which would be undersupplied or would not be supplied at all if purely left to market forces.[263] Yet these services are extremely important to everyday life: healthcare, education, refuse, water, sewerage. The EU tends to describe such services as *services of general economic interest* (SGI).[264] The category of SGI can be subdivided into two:

(1) SGEIs which are services of general economic interest. This would cover the network industries such as telecommunications, broadband, energy, railways
(2) SSGIs which are social services of general interest. This category overlaps with the first category when the SSGIs are economic in nature (eg undertakings providing publicly defined long term care services). EU law applies only when SSGIs are economic in nature.

SGEIs can be provided be directly by the state itself or the state can contract with a private undertaking to perform the service. In this latter situation the state may impose public service obligations on the contractors providing the service, as well as granting exclusive rights (ie monopoly rights on the provider) or special rights to that contractor (ie limiting the number of providers in the field). If the state is providing the service itself the case law is not clear to the extent to which EU law applies. A number of cases suggest that any activity consisting in the offering of goods and services on a market, even by the state, is an economic activity and so EU law applies. Other cases have carved out a 'solidarity' exception via the definition of 'undertaking', or have used the definition of 'services' at Article 57 TFEU to exclude services organized by the State, such as public higher education, from the ambit of the Treaty rules on state aid and competition.[265]

2. The Treaty provisions

The fundamental issue with SGEIs is that they go to the heart of what citizens expect their nation states to deliver. They are often connected to the welfare state, traditionally an area of national competence, and Member States want to be free to choose how, and at what level, those services

[263] L. Hancher and W. Sauter, 'Public Services and EU law' in C. Barnard and S. Peers, *EU Law*, (Oxford, OUP, 2014) forthcoming.
[264] In 2006 the Commission published a paper on Social Services of General Interest (COM (2006) 177, 26 April 2006). In 2007 it published yet another Communication on Services of General Interest including social services of general interest (COM (2007) 725, 20 Nov. 2007). Finally, the Commission has recently published a 'FAQ' on this subject (SWD(2013) 53 final/2, 29 April 2013)
[265] Case 263/86 *Humbel* [1988] ECR 5365.

are to be provided. Any EU control interferes with Member State sovereignty. On the other hand, from the EU's point of view, public services constitute a significant part of state expenditure and if EU law did not apply at all then the effectiveness of EU law, together with the economic benefits of competition in the public sector, would be significantly impaired. The Treaty has tried to square this circle.

Article 14 TFEU contains a legal basis for the EU to act. It provides:

> Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Thus Article 14 TFEU, as amended by the Treaty of Lisbon, confers a legislative competence on the EU to establish 'principles and conditions' enabling SGEIs to fulfill their mission. This power has so far not been used. However, Article 14 TFEU expressly recognises the continued competences of the Member States 'to provide, to commission and to fund such services', albeit without prejudice to the state aid rules.

Protocol 26 on services of general interest (SGIs) – which has equal legal status to the Treaty itself – consists of two Articles. The first recognises:

> the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights

According to Article 2 of the Protocol: 'The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest'.

This would suggest that SGIs generally are very much a matter for the Member States. That is especially the case for SSGIs.

The main substantive Treaty provision with regard to SGEI is Article 106 TFEU:

> 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure

> contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
>
> 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
>
> 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

Thus, Article 106 TFEU states that special and exclusive rights will not breach the provisions of the Treaty, which is to be understood as referring especially to the rules on competition and free movement. Article 106(2) TFEU says that an exception for SGEI is warranted with regard to the Treaty rules, in particular on competition, to the extent this is proportional to the public interest pursued. As Hancher and Sauter note, in theory this could lead to a restricted application of the exemption, and could in turn interfere with the competence of Member States to define SGEIs, as recognized by the Treaty (Article 14 TFEU). This has not happened in practice provided strict criteria are satisfied. They conclude:

> It follows that the concept of SGEI occupies an uneasy place in EU law, since it is an EU concept, subject to the powers of interpretation and monitoring of EU institutions, with a view to ensuring a uniform application throughout the EU, but at the same time it falls within the express province of Member States to decide which services are classed as SGEIs. The Commission (as well as the Courts) has sought to square this circle by professing to exert only marginal control on the way Member States organize SGEIs; on a closer look at the Commission decision practice,[266] however, one can argue that the control is more than just marginal.

Much of that control has been done through the application of the EU rules on competition law and, in particular, state aid (see separate report).

Other areas, notably the network industries, have been subject to extensive EU regulation which has had a major impact on areas previously seen as core public service provision.

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[266] See for instance in public service broadcasting – where the position of Member States is further bolstered by TFEU Protocol (No 29) on the system of public broadcasting in the Member States (OJ 2010 C 83/312) – where under the guise of marginal control, the Commission reviews the scope of the public mission of public broadcasters in great detail: Commission Communication on the application of State aid rules to public service broadcasting (OJ 2010 C 257/1) at para 43-49 and for a good illustration, Case E-3/05 *Financing of public broadcasting in Germany* (OJ 2007 C 185/1) at 237-242.

3. Network Industries: Telecoms

The network industries provide a good example of SGEIs. We shall take telecoms by way of illustration. Originally, the limited set of analog telephone services (known as POTS (Plain Old Telephony Services)) were provided as a public service in all Member States by national monopolists (whose networks were deemed to be 'natural monopolies' eg British Telecom in the UK, France Telecom in France etc). POTS have now been replaced by a constantly expanding range of competing digital services and service providers. The EU wanted to open up this market to competition in order to contribute to improving the efficiency, affordability and choice of these services. It did this through the Telecoms package (see below). However, in recognition of the special function of these services, public service obligations – now more commonly known as universal service obligations (USOs)[267] - have been built into the Telecommunications package to protect the public in case the market fails to deliver.[268]

The telecoms package comprises a framework Directive 2002/21,[269] adopted under Article 95 EC (now Article 114 TFEU), plus four specific Directives, namely:

- Directive 2002/20[270] on the authorisation of electronic communications networks and services (the authorisation Directive);
- Directive 2002/19[271] on access to, and interconnection of, electronic communications networks and associated facilities (the access directive);
- Directive 2002/58[272] on the processing of personal data, (the privacy and electronic communications directive.
- Directive 2002/22[273] on the universal service (the Universal Service Directive)

All five directives have been adopted under adopted under Article 95 EC (now Article 114 TFEU). To the original telecoms package, there has been added the Radio Spectrum Decision 676/2002.[274] The

[267] According to the Commission's Communication on Services of General Economic Interest in Europe, 2001 2001/C 17/04, 'Universal service, in particular the definition of specific universal service obligations is a key accompaniment to market liberalisation of service sectors such as telecommunications in the European Union. The definition and guarantee of universal service ensures that the continuous accessibility and quality of established services is maintained for all users and consumers during the process of passing from monopoly provision to openly competitive markets. Universal service, within an environment of open and competitive telecommunications markets, is defined as the minimum set of services of specified quality to which all users and consumers have access in the light of specific national conditions, at an affordable price. These provisions set the starting point for competition-driven improvements in service quality and price.

[268] See J. Davies and E. Szyszczak, 'Universal Service Obligations' in E. Szyszczak, J. Davies, M.Adenaes and T. Bekkedal, *Developments in Services of General Interest* (The Hague, TMC Asser, 2011).

[269] OJ [2002] L108/33.

[270] OJ [2002] L108/21.

[271] OJ [2002] L108/7.

[272] OJ [2002] L251/37.

[273] OJ [2002] L108/51.

[274] OJ [2002] L108/1.

"Telecoms Package" was amended in December 2009 by the so-called "Better law-making"[275] and the "Citizens' rights"[276] Directives as well as by a body of European regulators for electronic communications (BEREC).[277] More radical reforms are proposed.[278]

The Universal Service Directive, as amended by the Citizens Rights Directive, is the most striking in terms of the scope of its universal service obligations. These include:

- All reasonable requests for connection at a fixed location to the public telephone network at a fixed location are met by at least one undertaking[279]
- the provision of public pay phones[280]
- special measure for disabled users[281]
- affordability of tariffs[282]

Thus, the USO was based on the idea of a product available to all, independent of geography and at an affordable price, with quality of service and reporting obligations placed on service providers, together with financial transparency and a simple complaints process.

4. Contracting out of public services

If a contracting authority proposes to contract out, for example, public services this may engage the public procurement directives and/or the Treaty. The current Procurement Directives are:-

- The General Directive (GD), the Public Contracts Directive 2004/18/EC,[283] adopted under Articles 47(2) and Article 55 and Article 95 EC (Articles 53(1), 62 and 114 TFEU), on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
- The Utilities Contracts Directive 2004/17/EC,[284] adopted under Article 47(2) and Article 55 and Article 95 (Articles 53(1), 62 and 114 TFEU)

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[275] Directive 2009/140/EC amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ [2009] L337/37).

[276] Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ [2009] L337/11).

[277] Regulation (EC) 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (OJ [2009] L337/1).

[278] http://europa.eu/rapid/press-release_IP-13-828_en.htm.

[279] Art. 4.

[280] Art. 6.

[281] Art. 7.

[282] Art. 9.

[283] OJ [2004] L134/114.

[284] OJ [2004] L134/1.

- The Remedies Directives 89/665[285] and 92/13,[286] as amended by Directive 2007/66/EC,[287] all adopted under Article 114 TFEU.

The Directives apply only in respect of contracts with a value over a certain financial thresholds.[288] Once the procurement regime applies, there are five main stages in the process:

(1) the pre-procurement stage;

(2) the specification stage, setting out the technical specifications for the contract (Arts. 23-27 GD);

(3) the supplier selection stage (Arts. 45-48 GD);

(4) the contract award stage (Arts 53-55 GD); and

(5) the performance stage (Art. 26 GD).

'Services' are in special position under the Directive. They are split into two categories, Part A services and Part B services. A contract for a Part A service[289] is subject to the full requirements of the Directive. However, Part B services,[290] including SGIs, are not seen as a priority and so are subject

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[285] OJ [1989] L395/33.

[286] OJ [1989] L76/14.

[287] OJ [2007] L335/1.

[288] http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm#maincontentSec2.

[289] Priority (Part A) Services

1. Maintenance and repair of equipment.
2. Land transport, other than of mail, but not rail including armoured cars and courier services.
3. Air transport other than of mail.
4. Transport of mail by land or air but not rail.
5. Telecommunications, but not voice, telex, radio telephony, paging and satellite.
6. Financial Services.
7. Computer and related services.
8. Purchase of Research and Development.
9. Accounting, Auditing and Book-keeping services.
10. Market research and public opinion polling.
11. Management consultancy and related services, but not arbitration or conciliation.
12. Architectural services, engineering, urban planning and landscape services, related consultancy services, technical testing and analysis.
13. Advertising services.
14. Cleaning of buildings and property management.
15. Publishing and printing on a fee or contract basis.
16. Sewage and refuse disposal, sanitation and similar services.

[290] Residual, non-priority (Part B) Services

17. Hotel and restaurant services.
18. Transport by rail.
19. Transport by water.
20. Supporting and auxiliary transport services.
21. Legal services.
22. Personnel placement and supply of services.
23. Investigation and security services, except armoured cars.
24. Education and vocational education services.
25. Health and social services.

to reduced obligations. They do not have to be advertised in the EU's Official Journal (OJEU), but public bodies are obliged to place a notice in OJEU once the contract has been awarded. However, case law has established that there must still be adequate publicity of such contracts, such as advertising in the national press or website.

The General Directive also does not apply to service concession contracts whereby the supplier provides services of general economic interest (e.g. energy, water and waste disposal, management of sports and leisure facilities) or development of infrastructure (eg car parks, toll roads). The key feature of concession contracts is that the private firm must bear a substantial part of the economic risk stemming from executing the contracted services. The firm does not usually acquire property rights to the infrastructure object that it builds or operates, but it may receive revenue from it and even an additional annual payment from the public authority.[291] However, again the Court has made clear that the Treaty requirements still apply, in particular the principle of non-discrimination on the grounds of nationality and transparency.[292] This means advertisement in the national or trade press may still be required, even where the sums involved are small.[293]

The general framework directive and the utilities directives are both due to be repealed and replaced by new directives. Under this new regime, social services, especially, social, health and education services, will benefit from a specific and simpler regime. They will be subject to a higher threshold (€500,000). Below that threshold, services are not deemed to have a cross border interest. Above that threshold, Member States will remain free to determine the procedural rules applicable, while respecting the basic principles of transparency and equal treatment. The only obligations will consist in the publication of a contract notice and of a contract award notice. In addition, Member States will have to make sure that contracting authorities may take into account *inter alia* all quality and continuity criteria they consider necessary for the services in question. Member States may also eliminate the price as sole award criterion for such services. In respect of the other Part B services, they will be subject in future to the full public procurement regime.

Finally, there will also be a directive covering service concessions.[294] It will require the obligatory publication of concessions in the Official Journal of the European Union. It also proposes specifying the obligations of the contracting authorities as regards the choice of selection and award criteria, imposing certain basic guarantees which should be respected during the award procedure and extending the benefits of the Remedies Directive regarding public procurement to any person interested in obtaining a concession, as well as adopting certain clarifications on, for example, the concession amendments currently under way. The provisions will apply only to large concessions in cases with an evident cross-border interest.

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26. Recreational, cultural and sporting services.
27. Other services.

[291] Art. 17.

[292] Case C-324/98 *Teleaustria Verlag* [2000] ECR I-10745, para. 60-1.

[293] Case C-458/03 *Parking Brixen* [2005] ECR I-8585.

[294] http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm

Annex I The TFEU text of the relevant Treaty provisions

Article 14 (ex Article 16 TEC)

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

CHAPTER 2

RIGHT OF ESTABLISHMENT

Article 49 (ex Article 43 TEC)

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

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

Article 50 (ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;

(b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;

(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;

(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

(h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

Article 51 (ex Article 45 TEC)

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

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

Article 52 (ex Article 46 TEC)

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

2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

Article 53 (ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

Article 54 (ex Article 48 TEC)

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.

Article 55 (ex Article 294 TEC)

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

CHAPTER 3

SERVICES

Article 56 (ex Article 49 TEC)

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 57 (ex Article 50 TEC)

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 58 (ex Article 51 TEC)

1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.

2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

Article 59 (ex Article 52 TEC)

1. In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.

2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Article 60 (ex Article 53 TEC)

The Member States shall endeavour to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

Article 61 (ex Article 54 TEC)

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.

Article 62 (ex Article 55 TEC)

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

COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1

RULES ON COMPETITION

Article 106 (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.