

# RIGHT OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES

Articles 43 *et seq.* and 49 *et seq.*  
of the Treaty establishing the EC  
(TEC)

# Overview

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# I: Right of establishment



# EC Treaty provisions

- Restrictions on the freedom of establishment of nationals of a MS in the territory of another MS shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any MS established in the territory of any MS.
- ...shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the country where such establishment is effected,...

(a.43 TEC)

# ECJ case-law: principles

- Fundamental principle of Community law – freedom of establishment, equal treatment. (*Case C-55/94 Gebhard, C-2/74 Reyners*)
- Direct application of Treaty – on relations between MSs and individuals. (*Case C-53/95 Inasti, C-6/64 Costa*)
- MSs cannot escape from their obligation to amend national law in accordance with the requirements of the Treaty by relying on the direct applicability of the provisions of the Treaty. (*Case C-168/85 COM v. Italy*)

# ECJ case-law: definition

- As regards Art.43 TEC, read in conjunction with Art.48 TEC, it must be borne in mind that the right of establishment with which those provisions are concerned is **granted both to natural persons** who are nationals of a MS of the Community **and to legal persons** within the meaning of Art. 48 TEC. Subject to the exceptions and conditions laid down, it allows **all types of self-employed activity to be taken up and pursued** on the territory of any other MS, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up. (*Case C-55/94 Gebhard*)
- This rule is capable of being directly invoked by nationals of all other MSs. (*Case C-2/74 Reyners*)

# ECJ case-law: definition

- ...the concept of establishment within the meaning of Art. 43 TEC involves the **actual pursuit of an economic activity through a fixed establishment in another MS for an indefinite period.** (*Case C-221/89 Factortame*)

# ECJ case-law: scope

- ...a situation in which a company formed in accordance with the law of a MS in which it has its registered office desires to set up a branch in another MS falls within the scope of Community law. In that regards, **it is immaterial that the company was formed in the first MS only for the purpose of establishing itself in the second**, where its main, or indeed entire, business is to be conducted. (*Case C-212/97 Centros*)



# ECJ case-law: permanent activity

(of a stable and continuous nature)

- In order to determine whether an undertaking engaged in providing temporary personnel habitually carries on significant activities in the MS in which it is established, the competent institution of that MS must **examine all the criteria characterising the activities carried on by that undertaking.**
- Those criteria include **the place where the undertaking has its seat and administration, the number of administrative staff working in the MS in which it is established and in the other MS, the place where posted workers are recruited and the place where the majority of contracts with clients are concluded, the law applicable to ... contracts concluded by the undertaking ... and the turnover during an appropriately typical period in each MS concerned.** That list cannot be exhaustive; the choice of criteria must be adapted to each specific case. (*Case C-202/97 Fitzwilliam*)



# ECJ case-law: cross-border character

- **Art.45 TEC does not apply in a situation ... in which all the facts are confined to within a single MS and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the freedom of movement for persons and freedom to provide services.** (*Case C-108/98 RI.SAN.*)
- **According to settled case-law, Arts. 39, 43 and 49 TEC cannot be applied to activities which are confined in all respects within a single MS.** (*Case C-134/95 USSL*)

# ECJ case-law: types of establishment

## Primary establishment

- Natural persons – possibility of an employee in one MS working in a self-employed capacity in another MS (*Case C-143/87 Stanton*)
- Legal persons – transfer of central management and control of a company to another MS (*Case C-81/87 Daily Mail*)



# ECJ case-law: types of establishment

Secondary establishment (right to maintain more than one place of work within the EC)

- Natural persons – not confined to the right to create a single establishment within the EC (*Case C-53/95 Inasti*)
- Legal persons – a person may be established in more than one MS, in particular in the case of companies, through the setting-up of agencies, branches or subsidiaries (*Case C-55/94 Gebhard*)



# ECJ case-law: corollaries of the freedom of establishment

- Entry and residence – under EC law, every national of a MS is assured of freedom both to enter another MS in order to pursue an employed or self-employed activity and to reside there after having pursued such an activity (*Case C-151/96 COM v. Ireland*)
- Right to purchase, exploit and transfer real and personal property and the right to obtain loans and to have access to the various forms of credit. (*Case C-63/86 COM v. Italy*)

# ECJ case-law: restrictions

- A MS **cannot** make the exercise of the right to free establishment by a national of a MS subject to an **exceptional authorisation** in so far as he **fulfils the conditions laid down by the legislation of the country of establishment** for its own nationals (*Case C-11/77 Patrick*)
- Art.43 TEC prohibits a MS from hindering the establishment in another MS of nationals of MSs residing in its territory. (*Case C-251/98 Baars*)



# ECJ case law: non-discriminatory measures

- Rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. (*Case C-1/93 Halliburton*)
- ...although direct taxation falls within the competence of the MS, the latter must none the less exercise that competence consistently with EC law and therefore **avoid any overt or covert discrimination on grounds of nationality.** (*Case C-250/95 Futura & Singer*)

# ECJ case-law: prohibitions

- ... the requirement specifying that the only acceptable evidence is the original of the diploma or a **certified copy** is clearly disproportionate to the objective pursued, in that it precludes any other form of evidence which might establish with the same degree of certainty the existence of the diploma in question, such as a certified statement or recognition of the applicant's diploma by the authorities or professional organisations of the MS of origin. The obligation to submit a certificate of nationality and to provide **certified translations** of all documents relating to the application for recognition cannot be regarded as necessary or be justified by overriding reasons in the public interest. (*Case C-298/99 COM v. Italy*)



# ECJ case-law: business model

A measure prohibiting qualified opticians from operating more than **one optician's shop** effectively amounts to a restriction on the freedom of establishment of natural persons within the meaning of Art. 43 TEC, notwithstanding the alleged absence of discrimination on grounds of the nationality of the professionals concerned. (*Case C-140/03 COM v. Greece*)

Art. 43 TEC requires the elimination of restrictions on the freedom of establishment. **All measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as such restrictions.** A prohibition on the **remuneration of sight accounts** such as that laid down by the French legislation constitutes, for companies from Member States other than the French Republic, a serious obstacle to the pursuit of their activities via a subsidiary in the latter Member State, affecting their access to the market. That prohibition is therefore to be regarded as a restriction within the meaning of Art. 43 TEC. (*Case C-442/02 CaixaBank*)

# ECJ case-law: company law

- It is contrary to Arts. 43, 48 TEC for national legislation to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another MS certain conditions provided for in domestic company law in respect of company formation **relating to minimum capital and directors' liability**. The reasons for which the company was formed in that other MS, and the fact that it carries on its activities exclusively or almost exclusively in the MS of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis. (*Case C-167/01 Kamer*)



# ECJ case-law: competitors

- Provisions which make the organisation of trade fairs subject to the **involvement of bodies made up of operators already in the territory concerned** or representatives of such operators for the purposes of recognition and approval of the organiser and granting public financing to the latter, it must be observed that the requirement of approval or official recognition constitutes a restriction on the freedom to provide services or freedom of establishment. An adverse effect of that kind may derive from provisions requiring the involvement of bodies made up of competing operators already present in the territory concerned. (*Case C-439/99 COM v. Italy*)

# ECJ case-law: higher education

- An administrative practice, under which degrees awarded by a university of one MS cannot be recognised in another MS when the courses of preparation for those degrees were provided in the latter MS by another educational establishment in accordance with an agreement made between the two establishments, is incompatible with Art. 43 TEC. (*Case C-153/02 Neri*)

# ECJ case-law: associations' restrictions

- Art. 48 TEC not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.
- The abolition as between MSs of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the **exercise of their legal autonomy by associations or organisations not governed by public law.** (*Case C-415/93 Bosman*)



# ECJ case-law: measures justified by overriding reasons of general interest

The overriding reasons relating to the public interest are those recognised by the ECJ in its case-law relating to Arts. 43 and 49 TEC. In addition to, notably public policy, public security, public health, provided for in Art. 46 TEC, the ECJ has already recognised, for example, that the protection of workers, consumers, recipients of services - including patient safety and ensuring high standards in education - environment, health of animals, intellectual property, conservation of the national historic and artistic heritage, social policy objectives, cultural policy - including the safeguard in the audio-visual sector of the freedom of expression of the various components (in particular social, cultural, religious and philosophical) existing in MSs - maintenance of press diversity and promotion of the national language constitute overriding reasons relating to the public interest.

# EC Treaty provisions: exceptions

- The provisions of this chapter shall not apply, so far as any given MS is concerned, to activities which in that State are connected, even occasionally, with the **exercise of official authority. (a. 45 TEC)**
- 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. **(a. 46 TEC)**

# Exceptions: be interpreted restrictively

- National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:
  - Applied in a non-discriminatory manner
  - Be justified by imperative requirements in the general interest
  - Be suitable for securing the attainment of the objective which they pursue
  - Not go beyond what is necessary in order to attain it (proportionate). (*Case C-55/94 Gebhard*)



# ECJ case-law: exercise of official authority

- The derogation must be restricted to activities which in themselves are **directly and specifically connected with the exercise of official authority**. Merely making a contribution to the maintenance of public security does not constitute exercise of official authority. (*Case C-114/97 COM v. Spain*)
- It is not possible to give this description to activities such as consultation and legal assistance or the representation and defence of parties in court. (*Case C-2/74 Reyners*)

# II: Freedom to provide services



# EC Treaty provisions

- ...restrictions on **freedom to provide services** within the Community shall be prohibited in respect of nationals of MSs who are established in a State of the Community other than that of the person for whom the services are intended. (a.49 TEC)
- As long as restrictions...have not been abolished, each MS shall apply such **restrictions without distinction on grounds of nationality or residence** to all persons providing services (a.54 TEC)

# EC Treaty provisions

- Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally **provided for remuneration**; insofar as they are not governed by the provisions relating to the freedom of movement of 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....the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals. (a.50 TEC)



# ECJ case-law: definition

- Economic activity - The essential characteristic of remuneration lies in the fact that it constitutes **considerations for the service** in question, and is normally agreed upon between the provider and the recipient of the service. (*Case C-263/86 Humbel*)
- Cross-border character – The provisions of the Treaty on freedom of establishment and freedom to provide services do not apply to purely internal situations. (*Case C-17/98 Gervais*)

# ECJ case-law: definition

- Temporary character – the temporary nature of the provision of services is to be determined in the light of its **duration, regularity, periodicity and continuity**. (*Case C-55/94 Gebhard*)
- Recipients – the right to exercise freedom to provide services includes the **freedom for the recipients of services to go to another MS** in order to receive a service. (*Case C-55/98 Vestergaard*)

# ECJ case-law: recognition rules MS of establishment

- The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the MS where the service is provided, **in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the MS where he is established.**

*(Case 355/98 COM v. Belgium)*



# ECJ case-law: host MS's rules

- ...those provisions **do not mean that all national legislation applicable to nationals of that MS** and usually applied to the permanent activities of persons established therein **may be similarly applied in their entirety to the temporary activities of persons who are established in other MSs.** (*Case C-294/91 COM v. France*)



# ECJ case-law: general application

- Art. 49 TEC prohibits restrictions on freedom to provide services within the Community in general. It covers not only **restrictions laid down by the State of destination, but also those laid down by the State of origin**. The right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another MS. (*Case C-384/93 Alpine Investments*)

# ECJ case-law : specific restrictions

- Nationality – abolition of all discrimination against a person providing a service on grounds of his nationality (*Case C-279/80 Webb*)
- Residence – national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other MSs. (*Case C-224/97 Ciola*)

# ECJ case-law: licence/register

- National legislation which makes the provision of certain services on the national territory by an undertaking established in another MS subject to the issue of an **administrative licence** for which the possession of certain professional qualifications is required, constitutes a restriction on the freedom to provide services. (*Case C-76/90 Säger*)
- The requirement imposed on an undertaking established in a MS which wishes, as a provider of service, to carry on a skilled trade activity in another MS to be entered on the latter's **trades register** constitutes a restriction. (*Case C-58/98 Corsten*)

# ECJ case-law: authorisation

- The requirement of **authorisation** in the State in which the service is provided is not justified where the undertaking providing the services **already satisfies equivalent conditions in the MS in which it is established** and where there exists a system of co-operation between supervisory authorities of the MSs concerned ensuring effective supervision of compliance with such conditions also as regards the provision of services. (*Case C-205/84 COM v. Germany*)

# ECJ case-law: conditions of pursuit

- The provider of services may equip himself in the host MS with the **infrastructure necessary** for the purposes of performing the services in question. (*Case C-55/94 Gebhard*)
- National rules which require an employer, as a provider of services, to pay employers' **contributions to the host MS's fund**, in addition to those which he has already paid to the fund of the MS of establishment, constitute a restriction on freedom to provide services. (*Case C-376/96 Arblade*)

# ECJ case-law: mandatory legal form of employment relationship

- The rules of a MS which, by **prescribing a mandatory legal form of employment relationship** between the parties, prevent tourist and travel agencies from concluding a contract for the provision of services with a tourist guide from another MS who is licensed to pursue his profession in the first State, constitute barriers for the purposes of Art.49 TEC. (*Case C-398/95 SETTG*)



# ECJ case-law: third country nationals

- Art. 49 TEC must apply in all cases where a person providing services offers those services in a MS other than that in which he is established, **wherever the recipients of those services may be established.** (*Case C-198/89 Tourist Guides Greece*)
- Arts. 49, 50 TEC preclude a MS from requiring undertakings established in another MS which lawfully and habitually **employ nationals of non-MSs**, to obtain work permits for those workers and to pay costs. (*Case C-43/93 Vander Elst*)



# EC Treaty provisions: restrictions

- The provisions of this chapter .... shall not prejudice the applicability of provisions ..... providing for special treatment for foreign nationals on grounds of **public policy, public security or public health.** (*a. 46 TEC*)
- Restrictions also **interpreted very narrowly** by the ECJ.



# ECJ case-law: restrictions

- Discriminatory measures: (Arts 45,46 TEC) It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects, unless those rules fall within the derogating provision contained in Art. 46 TEC to which Art. 55 refers. It follows from Art. 46, which **must be interpreted strictly**, that discriminatory rules may be justified on grounds of public policy, public security or public health. (*Case C-260/89 ERT*)

# ECJ case-law: restrictions

- Non-discriminatory measures: ... Art. 49 TEC precludes the application of any national rules which have the **effect of making the provision of services between MSs more difficult** than the provision of services purely within one MS. (*Case C-158/96 Kohll*)
- ...Arts. 49 and 50 TEC require not only the elimination of all discrimination on the grounds of nationality against providers of services who are established in another MS but also the **abolition of any restriction, even if it applies without distinction to national providers of services and to those of other MSs, which is liable to prohibit, impede or otherwise render less advantageous the activities** of a provider of services established in another MS where he lawfully provides similar services. (*Case C-58/98 Corsten*)

# ECJ case-law: restrictive interpretation of exceptions

- Such a restriction on the fundamental principle of freedom to provide services can be based only on rules **justified by overriding requirements relating to the public interest** and applicable to all persons and undertakings operating in the territory of the State where the service is provided, **in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the MS where he is established.** (*Case C-58/98 Corsten*)

# ECJ case-law: admissible justifications

- Overriding reasons of general interest: efficient administration of justice; cohesion of the tax system; protection of recipient of services; consumer protection; protection of workers; protection of creditors; professional ethics; intellectual property; cultural policy, historic and artistic treasures; diversity of opinion; language requirements,...

# ECJ case-law: inadmissible justifications

- Economic justifications
- Administrative justifications
- Technical differences between mechanisms intended to protect the same public interest

# ECJ case-law: conditions for justified restrictions

- Appropriateness of measure
- Necessity of measure
- Indispensability of measure
- Proportionality of measure
- Priority for less restrictive measures



# ECJ case-law: proportionality

In determining whether national legislation complies with the principle of proportionality, the following considerations must be taken into account:

- for a prior administrative authorisation scheme to be justified even though derogates from the fundamental freedoms, it must, in any event, be **based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily;**
- a measure introduced by a MS cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another MS;
- a prior authorisation procedure will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued;
- a prior authorisation procedure does not comply with the fundamental principles of the free movement of goods and the freedom to provide services if, **on account of its duration and the disproportionate costs to which it gives rise, it is such as to deter the operators concerned from pursuing their business plan.** (*Case C-390/99 Canal Satellite*)



# ECJ case-law: specific restrictions

- The requirement that a trade-fair organiser must have a **particular legal form or status**, the requirement that he conduct his business of trade-fair organiser on an **exclusive basis** and the **prohibition of pursuing profit** also constitute significant restrictions on the freedom to provide services. It is difficult to envisage reasons in the public interest which might justify such restrictions. (*Case C-439/99 COM v. Italy*)

# ECJ case-law: specific professions

- Tourism – service provided by the tourist guide to the tourist agency. (*Case C-398/95 SETTG*)
- Medicine – doctors and dentists established in other MSs must be afforded all guarantees equivalent to those accorded to doctors and dentists established in national territory. (*Case C-158/96 Kohll*)
- Media – rules which limit the possibility for TV broadcasters established in the MS of transmission to broadcast advertisements for the benefit of advertisers established in other MSs, involve a restriction on the freedom to provide services. (*Case C-6/98 ARD*)



# ECJ case-law: specific professions

- Lotteries - the importation of lottery advertisements and tickets into a MS with a view to the participation by residents of that State in a lottery operated in another MS relates to a service. National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the MS concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Arts. 43, 49 TEC. (*Case C-243/01 Gambelli*)

# ECJ case-law: specific professions

- Employment agencies
- Security services
- Transport
- Sports
- Insurance
- Law
- ...



# Direct effect

- Individuals may rely on the rights and obligations set out in the relevant provisions before their national courts and the obligation for the national courts to refuse to apply the national rule contrary to these provisions
- Any individual in his or her MS can invoke the principle and right to the free movement of services by bringing a case before the national court.
- Any individual may launch a complaint against the MS concerned before the European Commission, which may launch infringement procedures.
- MSs must modify incompatible national legislation.



# Conclusions (1)

- In order to comply with their future obligations under Articles 43 *et seq.* and 49 *et seq.* TEC and related case-law, Candidate Countries must:
  - screen national legislation for measures that are incompatible with these Treaty provisions;
  - repeal or amend all such incompatible measures.

# Conclusions (2)

- Link with proposed services Directive:
  - Proposal (inter alia) codifies relevant ECJ case-law, so today's case-law will still be relevant after Directive is adopted.
  - Do not wait until Directive is adopted to start work!

# For more information

- DG Internal Market & Services's website:

- [http://europa.eu.int/comm/internal\\_market/services/index\\_en.htm](http://europa.eu.int/comm/internal_market/services/index_en.htm)

Guides to case-law up to 2001:

- [http://europa.eu.int/comm/internal\\_market/services/principles\\_en.htm](http://europa.eu.int/comm/internal_market/services/principles_en.htm)

Proposal for a Directive on services in the IM:

- [http://europa.eu.int/comm/internal\\_market/services/services-dir/index\\_en.htm](http://europa.eu.int/comm/internal_market/services/services-dir/index_en.htm)

- European Court of Justice's website:

- <http://curia.eu.int/en/index.htm>

Database of recent ECJ case law:

- <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

Digest of case-law (in French only):

- [http://curia.eu.int/en/content/juris/index\\_rep.htm](http://curia.eu.int/en/content/juris/index_rep.htm)

