



Freedom of Establishment & Cross-border Provision of Services

Relevant Treaty provisions

- ◆ Arts 49 & 56 TFEU (ex- EC)
- ◆ Distinction between right of establishment & services
- ◆ *Commission v Germany 205/84*
- ◆ *Gebhard 55/94*

Common provisions

- ◆ Right of entry and residence (Dr 73/148 = Dr 68/360 NOW replaced by Dr 2004/38)
- ◆ Right to remain (Directive 75/34)
- ◆ Expressed Treaty derogations

Article 49 1st paragraph

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.

Article 49 2nd paragraph

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 48, 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.

Key points

- ◆ Direct effect of Article 49
 - ◆ *Reyners v Belgium* 2/74
- ◆ What is "establishment"?
 - ◆ *Klopp* 107/83
- ◆ Who is entitled to benefit?

Establishment by Legal Persons

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 Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. (Art 54 para 1)

Cont'd

"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.
(Art 54 para 2)

Segers 79/85

14. As the Court has already stated,....., acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member States would deprive Article [54] of all meaning

Centros C-212/97 [1999]

30. Accordingly, the refusal of a MS to register a branch of a company formed in accordance with the law of another MS in which it has its registered office on the grounds that the branch is intended to enable the company to carry on its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Arts 52 & 58 of the Treaty, in so far as it prevents any exercise of the right freely to set up a secondary establishment which Arts 52 & 58 are specifically intended to guarantee.

Further cases

◆ *Uberseering* C-208/00 [2002]

◆ *Inspired Art* C-167/01 [2003]
(confirmed *Centros*)

Establishment by natural persons

- ◆ No definition of self-employed
 - ◆ Outside the relationship of subordination
 - ◆ Bear risk of success or failure
 - ◆ Paid directly and in full

Jany C-268/99 [2001]

- ◆ Examples: mainly professionals including prostitution

Rights conferred

- ◆ Rights of departure, entry & residence (NB re companies: *Daily Mail* 81/87
 - Dr 73/148 (establishment & services) + family – replaced by Citizens'Rights Directive 2004/38

Rights conferred cont'd

◆ Right of access to self-employment

- ◆ Primary and secondary establishment (*Klopp*)
- ◆ Equal treatment: *Reyners* (direct discrim);
(indirect discrimination often found by the ECJ as justified eg *Gullung* 292/86 Fr law requiring all lawyers to be registered at the Bar)
Emphasis on restriction on access not on whether rule is discriminatory)

Rights conferred cont'd

◆ The exercise of activities as self-employed

- ◆ Equal treatment: *Konstantinidis* C-168/91
- ◆ Social advantages, equal treatment
- ◆ Taxation

Qualifications

◆ No Community legislation

- ◆ *Patrick* 11/77 (architect – qualifications not recognised by France based on discrimination)
- ◆ *Thieffry* 71/76 (shift away from discrimination & to mutual recognition)
- ◆ *Vlassopoulou* C-340/89

◆ Directive 89/48 & Directive 92/51

Qualifications: Lawyers

- ◆ Directive 77/249 on the provision of services
- ◆ Directive 2005/36
- ◆ Directive 98/5 on the right of establishment