

SEMINAR 8: THE FREEDOM TO PROVIDE SERVICES – Article 56 TFEU

Reading

Barnard, 3rd edition, Ch11 up to p 385

Barnard, *Unravelling the Services Directive* (2008) 45 CMLRev 323-394 (very comprehensive)

The Services Directive 2006/123 OJ 2006 L375/26

1. Introduction

Van Binsbergen, Case 33/74 [1974] ECR 1229

Luisi & Carbonne, Case 286/82 and 26/83 [1984] ECR 377 (personal scope – receive services)

Alpine Investment, Case C-384/93 [1995] ECR I- 1141

Cowan v Le Tresor Public, Case 186/87 [1989] ECR 195

What are the rights conferred on service providers and receivers?

- Art 56 TFEU
- Position of provider's workforce - *Rush Portuguesa*, Case C-113/98 [1990] ECR I-1417 – Posted Workers Directive 96/71 OJ 1997 L18/1
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2. The Services Directive 2006/123

• Background

- *Bolkestein* draft – eliminate obstacles to
 - Freedom of establishment of service provider (Chapter III of Directive)
 - Free movement of services between MSs (Chapter IV)

The approach was deregulation through the country of origin principle and no re-regulation

Much controversy: concern re country of origin principle; fears of social dumping; fierce lobbying

- *McCreevy* draft – watered down proposal and at the same time the Commission issued a Communication on Posted Workers' Directive..... thus Services proposal and labour law completely separated
- **Scope of the Directive:** material, personal (excludes third country nationals as providers but not as recipients) and territorial
Exclusions (eg Recital 22: health care and pharmaceutical services) and non-economic activity; goods and non-discriminatory rules of the game. More specific exclusions to be found in **Arts 2(2) and 2(3)**: eg SGIs; financial services; electronic communication services and networks (eg voice telephony and email conveyancing services); temporary work agencies and private security services (eg bodyguards and surveillance of property as well as the depositing, safekeeping, transport and distribution of cash and valuables); services in field of transport including port

services falling within the Transport Title of the Treaty; social services relating to social housing, childcare and support of families and persons permanently or temporarily in need. NB audiovisual services and gambling excluded. Art 2(3) excludes field of taxation.

- **Country of origin principle:** replaced by heading “freedom to provide services” (Article 16)

Article 16(1)

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

Principles to be respected: non-discrimination, necessity and proportionality

- **Issues**

Improvements of Directive: Chapter II concerning administrative simplification and the introduction of a single point of contact through which all procedures and formalities must be completed (Art 6).

Chapter III concerns the establishment of service providers

Chapter V lays down provisions concerning the quality of the service.

Chapter VI concerns administrative cooperation.

- **Meaning of ‘Services’**

Article 57 TFEU and Art 2(1) and art 4(1) Dr.

‘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 freedoms of movement of goods, capital and persons’

- Self-employed
- Economic activity (excludes Services of General Interest (SGIs) eg defence services – contrast with Services of General Economic Interest (SGEIs) eg telecommunications and transport (although subject to derogations)
- ‘referred to in Art 57’

Rush Portuguesa, Case C-113/98 [1990] ECR I-1417

Schindler, Case C-275/92 [1995] 1 CMLR 4 (excludes goods! But less clear re services ancillary to the goods eg retail, maintenance and after-sales services)

Points

(a) remuneration need not come from recipient

Bond van Adverteeders, Case 352/85, [1986] ECR 2085

(b) service provider must have a profit motive

Belgium State v Humbel, Case 263/86 [1988] ECR 5365 (material scope)(contrast with *Grogan*, below)

- (c) Medical Treatment (Services Directive not cover health)
Luisi & Carbonne (cited above) (*Kohl* C-158/96 (1998); *Decker* C-120/95 (1998)
SPUC v Grogan, Case C-159/90 [1991] ECR I-4685 (abortion services)
Ex p. Blood [1997] 2 CMLR 591 (medical treatment)

Requirements, restrictions and barriers

Art 4(7) Dr. very wide definition will encounter similar problems of goods ie
Dassonville, *Vassis*, *Keck* case law??

NB: a national rule not a restriction merely because other Member States have less strict rules (*Peralta* C-379/92 [1994] ECR I-3453)

3. **Article 56 and non-discriminatory provisions**
Schindler, Case C-274/92 [1994] ECR I-1039 (restriction does not have to be discriminatory)
4. **Services offered by Lawyers**
Directive 77/249, OJ 1977 L78/17
Gebhard, Case C-55/93 [1995] ECR I-4165
5. **The Limits to the Freedoms**
Alpine Investments, Case C-384/93 [1995] ECR I-1141 (restriction not outside scope of Article because imposed by home State or state of establishment)
Graf C-190/98 [2000] 1 CMLR 741

EXCEPTIONS TO THE FREEDOMS

Reading

Barnard Ch 13

1. Treaty Exceptions

Article 6 provides services for less than 3 months

- ‘subject to the limitations justified on grounds of public policy, public security or public health.’ Article 45(3) TFEU re workers
- official authority Article 45(4) TFEU re workers

Re public exceptions....

Requirements of Directive 64/221 (which fleshes out these derogations) must be met.

Re Public Service Proviso (only re workers)

Article 45(4) ‘The provisions of this Article shall not apply to employment in the public service’

- Narrow interpretation

- Meaning of “official authority” considered in Reyners, Case 2/74 [1974] ECR 631; Case 152/73 *Sotgiu v Deutsche Bundespost*: CJEU ruled that Article 45(4) applies only to **access** to posts in public sector. Once a worker is in post there must be no discrimination

See Handoll “Article 48(4) EEC and Non-national Access to Public Employment” (1988) 13 ELRev 223

Article 62 TFEU – provisions of Articles 51-54 TFEU apply to services

2. **Secondary Legislation re public policy etc**

Art 2(2)(i) of Dir 2004/38, Citizens Rights Directive, OJ 2004 L158/77 & (Arts 27-31)

Article 27(1) – no limitations for economic ends

Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

Article 27(2) – limitations can be invoked only on the basis of personal conduct

Rutili Case 36/75 [1975] ECR 1219

Van Duyn v HO, Case 41/74 [1974] ECR 1337

Adoui & Cornuaille v Belgium, Cases 115 and 116/81 [1982] ECR 1665

Article 27(2) “*previous criminal convictions shall not in themselves constitute grounds for taking such measures.*”

Bouchereau Case 30/77 [1977] ECR 1999

Bonsignore Case 67/74 [1975] ECR 297

Rogier, Case 48/75 [1976] ECR 497

Public Health: Article 29

Procedural rights when exceptions invoked: Art 31