

SEMINAR 7 THE RIGHT OF ESTABLISHMENT – Article 49 TFEU

Reading

Barnard, 4th edition, Ch 10 up to page 343

1. Introduction

- The freedom of establishment for individuals Art 49 TFEU – *Jany*, Case C-268/99 [2001] ECR I-8615 (self-employed: no subordination; risk of success or failure, paid directly and in full); participating in the formation of a company eg shareholder; direct effect of Art 49 TFEU – *Reyners v Belgium*, Case 2/74 [1974] ECR 631
- Freedom of establishment for companies – Art 54 TFEU: primary and secondary
- Distinction between right of establishment and the freedom to provide cross-border services: *Commission v Germany* (Insurance cases) Case 205/84 [1986] ECR 3755; the “centre of gravity” test: see *Gebhard* case C-55/94 [1995] ECR I-4165 (annotated in (1996) 33 CMLRev 1073)

Establishment/Services – common provisions [Article 49 v Article 56 TFEU]

- Right to entry and residence
- Right of access to self-employment (access and exercise)
- Right to remain for self-employed – Directive 75/34 (Reg 1251/70)
- Treaty derogations

2. Freedom of Establishment: right of access

What is establishment? What is the difference between primary and secondary establishment? *Klopp*, Case 107/83 [1984] ECR 2971 (secondary establishment)

Equal treatment (direct and indirect discrimination): *Reyners v Belgium*, Case 2/74 [1974] ECR 631; *Gullung* Case 292/86 [1988] ECR 111; *Vlassopoulou*, Case 340/89 [1991] ECR 2357

- Non-discriminatory national rules: *Gebhard* case C-55/94 [1995] ECR I-4165; *Wouters* Case C-309/99 [2002] ECR I-1577
- **NB** mere differences in national laws not sufficient to constitute a restriction eg level of fees lawyers can charge (Italian case)

3. Freedom of establishment: the right of exercise

Commission v Italy (dentists) Case C-162/99 [2001] ECR I-541: direct discriminatory rule – loss of registration when transferred residence to another Member State (not apply to Italian nationals).

Konstantinidis C-168/91 [1993] ECR I-1191: indirect discrimination

- Enjoyment of social advantages
 - Art 7(2) of Workers Regulation 492/2011

4. The issue of Professional Qualifications (common to establishment and services)
Art 53 TFEU allows the Council to adopt directives for the mutual recognition of diplomas

- Where no EU legislation up to MS but respect for obligations of cooperation and no discrimination on the grounds of nationality
Patrick (UK architect in France) Case 11/77 [1977] ECR 765
Thieffry, Case 71/76
Vlassopoulou, (Greek lawyer in Germany) Case 340/89 [1991] ECR 2357 – CJEU shifted the emphasis to mutual recognition – pre-empted Directive 89/48 on recognition of higher education diplomas
- Where there is EU legislation
Directive 2005/36 on recognition of professional qualifications (EPQ Directive) repealed and replaced earlier vertical and horizontal directives
- The legal profession: Directive 77/249 re provisions of services by lawyers & Directive 98/5 home title for lawyer

5. Exercise of the Freedom of Establishment by Legal Persons (Art 54 TFEU)

- Right of departure: *R v Treasury ex p Daily Mail*, Case 81/87 [1988] ECR 5483; *Cartesio*, Case C-210/06 [2008] ECR I-9641 – CJEU differentiates between moving seat of a company and reincorporation in another MS
- Right of access to primary and secondary establishment: *Segers*, Case 78/85 [1986] ECR 2375 (Director of company excluded from a national sickness insurance scheme on ground company's registered office in another MS even though not conducted business there); *Factortame II* (issue of substance)
- Regulatory competition: *Centros*, Case C-212/97 [1999] ECR I-1459; *Uberseering*, Case C-208 [2002] ECR I-9919; *Inspired Art* C-167/01 [2003]