SEMINAR 8: THE FREEDOM TO PROVIDE SERVICES – Article 56-57 TFEU

1. Introduction
   Article 62 TFEU – provisions of Arts 51-54 TFEU apply to services

   Van Binsbergen, Case 33/74 [1974] ECR 1229 (Dutchman living in Belgium)
   Cowan v Le Tresor Public, Case 186/87 [1989] ECR 195

2. The 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’

   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)
   SPUC v GROGAN Case C-159/90 [1991] ECR I-4685

3. What are the rights conferred on service providers – Art 56 TFEU

   - Gourmet, Case C-405/98 [2001] ECR I-1795 (prevention of offering advertising space to potential advertisers in other MSs could be challenged as contrary to Art 56)
   - Carpenter, Case C-60/00 [2002] ECR I-6279 (3rd party national’s deportation affect husband’s freedom to provide services)
4. The freedom to travel to receive services


5. Sufficient that the service itself moves (like goods)

- *Bond van Adverteeders*, Case 352/85, [1986] ECR 2085 (facts complex – see page 369 of Barnard – remuneration does not need to come from recipient

6. Other matters

- service provider must have a profit motive: *Belgium State v Humbel*, Case 263/86 [1988] ECR 5365 (material scope)(contrast with *Grogan*) – case about the provision of education provided by the State (NB education services provided privately come within the TFEU)

7. 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.

**EXCEPTIONS TO THE FREEDOMS**

Reading
Barnard, 4th edition, Chapter 13

1. **Treaty Exceptions** – Arts 45(2), 52 and 62 TFEU
   Article 6 CDR 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

2. **Secondary legislation re public policy, etc**
   Requirements of Directive 64/221 (which originally fleshes out these derogations) must be met – replaced by Art 2(2)(i) of Dr 2004/38, CRD, OJ 2004 L158/77 and Arts 27-31

   Article 27(1) – no limitations for economic ends
   Article 27(2) – limitations can be invoked only on the basis of personal conduct

*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.*
Less than 5 years (permanent residence) the decision must consider all factors before making an expulsion order – more than 5 years, consider all factors AND there must be **serious** grounds – more than 10 years. Consider all factors and there must be **imperative** grounds – C-145/09 *Tsakdouridis*

**Proportionality**
Art 35 limits in the event of ‘abuse of rights’ – MSs may refuse, terminate or withdraw any rights in the case of abuse of rights

**Relevant case law**
- **Personal conduct** (Art 27(2) CRD): *Van Duyn v HO*, Case 41/74 [1974] ECR 1337
  *Adoui & Cornuaille v Belgium*, Cases 115 and 116/81 [1982] ECR 1665
- **Criminal convictions** (Art 27(2) CRD): “previous criminal convictions shall not in themselves constitute grounds for taking such measures.” - *Bouchereau Case* 30/77 [1977] ECR 1999; *Bonsignore Case* 6774 [1975] ECR 297
- **Procedural rights when exceptions invoked:** Art 31

3. **Re Public Service Proviso**
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

The right of establishment and provision of services: Arts 51 and 62