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

Reading
Barnard, 5th edition, Ch9 and Ch 11 pp381-428
TFEU Arts 56-57
The Services Directive 2006/123 OJ 2006 L375/26

1. Introduction
Article 62 TFEU – provisions of Arts 51-54 TFEU apply to services
Article 56 TFEU

Restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a State other than that of the person for whom the services are rendered.

- Van Binsbergen, Case 33/74 [1974] ECR 1229 (Dutchman living in Belgium)
- Ciola, Case C-224/97 [1999] ECR I-2517 (barrier from home State)
- Cowan v Le Tresor Public, Case 186/87 [1989] ECR 195
- Alpine Investment, Case C-384/93 [1995] ECR I- 1141 (prior existence of identifiable recipient not necessary; no one travels)
- Bond, Case C352/85 [1988] ECR 2085 (remuneration need not come from recipient)
- Gourmet, Case C-405/98 [2001] ECR I-1795 (prevention of undertakings being able to offer advertising space to potential advertisers from another State can be challenged under Art 56)
- Carpenter, Case C-60/00 [2002] ECR I-6279 (3rd party national’s deportation affect husband’s freedom to provide services)

2. The Meaning of ‘services’ (temporary in nature)
Article 57 TFEU and Art 2(1) and Art 4(1) of Services Directive.
Article 6 Citizens Rights Directive (CRD) provides services for less than 3 months

‘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’

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)

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

3. Scope/coverage
- 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’
• Medical Treatment (Services Directive not cover health)
  \textit{Luisi & Carbonne} (cited above) (\textit{Kohl} C-158/96 (1998); \textit{Decker} C-120/95 (1998)
  \textit{SPUC v Grogan}, Case C-159/90 [1991] ECR I-4685 (abortion services)
• Services offered by Lawyers (own secondary legislation) (\textit{Gebhard}, Case C-55/93 [1995]
  ECR I-4165)
• Transport services
• Education services

4. \textbf{What are the rights conferred on service providers \& receivers?}
• Art 56 TFEU together with Directive 73/148 (mostly replaced by CRD)
• The position of a provider of the workforce: \textit{Rush Portuguesa}, Case C-113/98 [1990]
  ECR I-1417 – Posted Workers Directive 96/71 OJ 1997 L18/1; \textit{Laval} Case C-341/05
  [2007] ECR I-987
• Freedom to travel and receive services: \textit{Luisi & Carbonne}, Case 286/82 and 26/83 [1984]
  ECR 377 (personal scope – receive services)

5. \textbf{Sufficient that the service itself moves} (like goods)
• \textit{Alpine Investment}, Case C-384/93 [1995] ECR I-1141
• \textit{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. \textbf{The Limits to the Freedom}
• Treaty derogations: ‘subject to the limitations justified on grounds of public policy, public security or public health,’
• CJEU justifications: \textit{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);

The Services Directive 2006/123
Barnard, 5\textsuperscript{th} ed, OUP read pp 428 to 447 (not necessary to read in depth)

• \textbf{Background (history)}
\textit{Bolkestein} 2004 draft – eliminate obstacles to
  \begin{itemize}
  \item Freedom of establishment of service provider (Chapter III of Directive)
  \item Free movement of services between MSs (Chapter IV)
  \end{itemize}

  The approach was deregulation through the \textit{country of origin principle} and no re-
  regulation

Much controversy: concern re country of origin principle; fears of social dumping; fierce lobbying (France \& Germany opposed Directive in 2005)
McCreevy 2006 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 [Art 2(2)]
  - meaning of ‘services’: Art 2(1) List of services in Art 57 TFEU increased by Directive
  - 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 audio-visual 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 re justifications: non-discrimination, necessity and proportionality
    - non-discriminatory manner in which applied
    - Justified by imperative requirements in general
    - suitability for securing attainment of objectives
    - not go beyond what is necessary
  - **Rights of recipients of services** (Arts 19 and 20)
  - **One-stop shop** (re formalities of host State)

**Specific Services Sectors**

- Financial services
- Transport services
- Telecommunications
- Postal services
- Broadcasting
- Patient rights and cross border health care
- Educational services
EXCEPTIONS TO THE FREEDOMS

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
   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

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 inpost there must be o discrimination

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