

(Lecture Notes. Code EC18v1. Last Updated Nov02)

European Community Law

Topic: The Fundamental Freedoms of: Free Movement of Workers, Right of Establishment of Self-employed Persons & the Right to Provide and Receive Services.

Lecture 18 (of 21):

The Right of Establishment

Aim:

To outline the principal provisions relating to the rights of natural and legal persons of one Member State who wish to establish themselves, and/or to provide services, in another Member State.

Objectives:

After carefully studying the following notes and other prescribed readings you should be able to:

1. Discuss the principal Treaty provisions and the jurisprudence of the Court of Justice of the European Communities relating to the right of establishment and, in particular, discuss the assertion that once a lawyer is qualified to practise in one Member State he has a right to practise in any Member State;
2. Discuss the principal Treaty provisions and the jurisprudence of the Court of Justice of the European Communities relating to the freedom of natural and legal persons who are nationals of one Member State to provide services in another Member State; and
3. Discuss the derogations from freedom of establishment and freedom to provide services as provided for (principally) in Articles 46 and 55 respectively.

Introduction

As noted¹, in Chapter 1 of *Title III* of the *EC Treaty*, Articles 39-42 EC provided for the free movement of workers. Within the same Title, *Chapter 2*, i.e., *Articles 43-48*, provide for the *Right of Establishment* and *Chapter III*, *Articles 49-55*, provide for the freedom to provide *services* within the Community. The second paragraph of *Art.43* provides that:

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 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.

¹In the last lecture.

In essence, the freedoms of establishment and the provision of services by natural persons are based on the *harmonisation of qualifications* required from the self-employed and the *mutual recognition of diplomas* and other evidence of the required formal qualification.

For an existing company / undertaking to enjoy the right of establishment in one Member State, it must satisfy two conditions, viz; (i) it must be formed in accordance with the laws of that Member State, and (ii) it must have its registered office, central administration or principal place of business within another Member State of the EC. There is no further requirement that it must have been a ‘purely’ national company founded and incorporated in that other Member State.

As noted, **Art.43(2)** does not confer unqualified rights: it provides merely for rights to be regulated “under the [same] conditions laid down for its own nationals by the law of the country where such establishment is effected.” Thus, any impediments to establishment must be justified in a non-discriminatory manner. The ECJ specified four criteria and placed them in context in Case C-55/94, Gebhard, when it was said that:

“when the taking up or pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity, must in principle comply with them. However, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty, must fulfil four conditions:
they must be applied in a non-discriminatory manner;
they must be justified by imperative requirements in the general interest;
they must be suitable for securing the attainment of the objective which they pursue; and
they must not go beyond what is necessary in order to attain it.”

Having noted the parallel with Case 120/78, Cassis de Dijon, **Weatherill & Beaumont**² note that the Gebhard principles align “the court’s approach across the Treaty provisions dealing with the free movement of goods, services, and the right of establishment, **Arts.28, 49** and **43** respectively.”

Variations in the conditions imposed by different Member States don’t mean that those imposed by the ‘stricter’ Member State are disproportionate [condition 4, *supra*] and, so, incompatible with EC law: Case C-3/95, Sandker.

Qualifications Required by Natural Persons for the Right to Establish Themselves in Another Member State

The performance of professional activities are regarded as “regulated” activities and the appropriate qualifications in order to pursue them are required in all Member States. To ensure at least a minimum of harmonisation, there has to be the “mutual recognition of diplomas, certificates and other evidence of formal qualification.” Significant

² *Weatherill, S and Beaumont, P. EU Law*, 3/e. London: Penguin, 1999, p682

Directives, *The Mutual Recognition Directive*, 89/48, and the ‘*lawyers Directive*’, 98/5, are discussed *infra*.

From the secondary legislation and case law on the self-employed – which includes doctors, dentists, pharmacists, vets and architects - this lecture will focus on the right of establishment of lawyers.

Case law on Lawyers Wishing to Exercise the Right of Freedom of Establishment

First, *Case 2/74, Reyners v. Belgian State* which confirmed that, *inter alia*, **Art.43** is *directly effective* (although derogations are provided for in Art.46). In *Reyners*, a Dutch national who was resident in Belgium wished to be admitted to the profession of avocat in Belgium. He was already in possession of a Belgian diploma of docteur en droit. However, under Belgian law only Belgian nationals could be admitted to practise law.

HELD (ECJ): His claim to be admitted was upheld. The ECJ confirmed that the obligation in **Art.43EC (ex.Art.52)**, ensuring freedom of establishment, was not dependent on the implementation of other measures. The prohibition [in what is now Art.12 EC ex.Art.6] of discrimination on grounds of nationality was also directly effective.

In *Case 71/76, Thieffry v. Conseil de l'ordre des Avocats de Paris* (1978), Thieffry, a Belgian advocate had applied for admission to the French Bar. He held a Belgian law degree, which had been recognised by a French university as equivalent to a French license, and he subsequently obtained the Qualifying Certificate for the Profession of Advocate in France. His application for admission to the Paris Bar was rejected, however, because he lacked a French law degree.

HELD (ECJ): He was entitled to benefit from the right of establishment since he held a diploma (law degree) which was recognised as an equivalent qualification by the competent authority of the country of establishment and since he had also fulfilled the specific conditions regarding professional training in force in that country. However, it was added that it was for the national authorities, taking account of the requirements of Community law, to decide whether the recognition granted by a university authority could, in addition to its academic effect, constitute valid evidence of a professional qualification.

In *Case 107/83, Klopp* was a German lawyer who had qualified as a lawyer both in Germany and France. He wanted to open a practise in Paris whilst continuing with his practise in Nuremberg. The Paris Bar refused his application. The refusal was based on the French rule of not permitting an avocat to practise simultaneously in more than one area of the Court d’Appel.

HELD (ECJ): Klopp’s application was upheld. The French courts were able to overrule the prohibition on multiple chambers whether in France or in France and another country.

Finally, in *Case C-340/89, Vlassopoulou*, a Greek lawyer who qualified and practised in Greece, but whose work was largely in the field of German law and focused in Germany,

was denied access to the German Bar, allegedly for not having the appropriate qualifications.

HELD (ECJ): First, national authorities were required to take into account the knowledge and qualifications already acquired by the lawyer who was already practising in the other Member State. Secondly, following a comparison between those ('foreign') qualifications already obtained and those required by the national rules of the host Member State in which the lawyer wished to practice, a finding of equivalence in the qualifications would oblige the host Member State to recognise them. Finally, a finding of the 'foreign' qualifications not being equivalent would not automatically uphold the decision not to admit the lawyer to the Bar of the host Member State: it would still be necessary to assess whether the knowledge and experience gained by the applicant in the host Member State would more than nullify the perceived lack of qualifications.

Whereas Vlassopoulou highlighted the steps that had to be considered by a host Member State in order to determine the equivalence of qualifications, a new procedure for the 'recognition of higher education diplomas awarded on completion of professional education and training of at least three years duration' was introduced by **Directive 89/48**, the **Mutual Recognition Directive**. Most recently, the '*lawyers Directive*', **98/5**, - a Directive that provides for a considerable relaxation in the requirements to be met for a lawyer to exercise the right of establishment in another Member State – came into force on a date later than intended – 22nd May 2000 (it should have been in March 2000).

Significance of the Mutual Recognition Directive, 89/48

Despite the important contributions of case law to the right of establishment, the principal means of ensuring the right of establishment in the EC has been via Directives. If the right of establishment and the freedom to provide services is to be exercised under the same conditions as are applicable to nationals of the host state, then there must be something akin to harmonisation of rules so as to prevent national rules relating (say) to professional requirements from discriminating against the nationals of other Member States who wish to exercise the freedom in question.

A general programme on harmonizing qualifications leading to the mutual recognition of diplomas, etc., is provided for under **Art.47(1)EC**. It is relatively straightforward to issue such Directives where a professional qualification can be standardised. Thus, it is not of surprising that most progress has been made in the mutual recognition of medical diplomas/qualifications and Directives for many other professions also have been issued. However, they have been repetitive in substance, narrow in scope (applicable to particular professions) and issued piecemeal.

By contrast, it appeared that Directives relating to legal qualifications were much more difficult to issue given the vastly different legal systems within the EC. In an attempt to resolve such an unsatisfactory state of affairs, the piecemeal system of issuing Directives applicable to the individual professions was abandoned in favour of a global scheme under the **Mutual Recognition Directive 89/48** on 'a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years duration.' For lawyers, the significance of this is that **Directive 89/48 applies to the legal profession**.

Under **Directive 89/48**, recognition is to be given to diplomas as defined in **Art.1(a)**. ‘Diplomas’ have three essential elements, viz;

- (i) they are awarded by a competent authority in a Member State;
- (ii) the award follows successful completion of a course lasting at least three years at a university or equivalent institution; plus professional training; and
- (iii) the ‘diploma’ must qualify the holder for the pursuit of a regulated profession in a Member State.

The profession of ‘lawyer’ *is* in the list of regulated professions.

Art.3 of **Directive 89/48** provides the basic rule that if a Member State requires a ‘diploma’ as a condition for exercising a regulated profession, it must accept a ‘diploma’ obtained in another Member State. A lawyer who exercises the right of establishment is entitled to use the professional designation of the Member State in which he practises. Accordingly, a French avocat established and practising law in the U.K. may refer to himself as a solicitor. This contrasts with the situation where a lawyer provides a ‘service’ of a temporary nature in another Member State: then he must retain his professional title as it would appear in his own Member state.

That professional training varies in the Member States is accounted for in Directive 89/48 by permitting the host Member State where the lawyer wishes to practise to impose specified conditions. So, for example, the French and Belgian Bars require the applicant to provide evidence of professional experience not exceeding four years, and to complete an adaptation period not exceeding three years, or take an aptitude test. This is permissible under **Art.4**. In contrast, the Law Society has opted for a test known as the **Qualified Lawyers Transfer Test**. Successful completion of this test will lead to admission to the profession of solicitor.

However, as from the coming into force of **Directive 98/5**, its impact will be to:

“ ... allow a lawyer to become established in a Member State and to practise the host’s [national] law immediately after simply proving that she or he is already registered as a lawyer in another Member State, without the need for either a test or an adaptation period. Moreover, after effectively and regularly pursuing for a period of three years an activity involving the law of the Member State in question, including Community law, a lawyer will be entitled to gain admission to the profession in the host Member State and so acquire the professional title of that Member State.”

Other Directives Relating to the Self Employed.

In essence, the rights of *entry and residence* of the self-employed in host Member States, as provided for in **Directive 73/148**, follows Directive 68/360 on the rules applicable to workers. Similarly, **Directive 75/34** on the rights of self-employed to *remain* in Member States repeats the provisions of Regulation 1251/70 applicable to workers. However, Regulation 1612/68, which applies to workers and their families, has no equivalent that is applicable to the self-employed. Accordingly, **Art.12EC** acquires a particular significance with regard to this area of the law.

Freedom to Supply Services.

The principal Treaty provisions relating to the freedom to supply services are *Arts.49* and *50 EC*. The first paragraph of *Art.49* provides for:

... restrictions on freedom to provide services within the Community shall be progressively abolished ... in respect of nationals of Member States who are established in a State of the Community *other than that* of the person for whom the services are intended.

Art 50 provides that:

Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

Thus, the category of services is a residual category, covering matters that are not governed by provisions relating to the other ‘freedoms’ in the EC Treaty. *Art.50* goes on to provide in *paragraph 2* that: ‘Services’ shall in particular include ... (d) activities of the professions.

Finally, *paragraph 3* of *Art.50* provides that: “Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by the State on its own nationals.”

In *Case 33/74, Van Binsbergen*, the ECJ HELD: *Art.49 para.1* and *Art.50 para.3* to be *directly effective*. Van Binsbergen was a defendant involved in a social security case before the Dutch Appeal Court where he was represented by Kortmann, an unqualified legal adviser. This was not unusual since the rules of procedure of that court permitted representation by such persons. However, in the course of proceedings, Kortmann changed his habitual residence from the Netherlands to Belgium. Continuation of his acting as Van Binsbergen’s adviser was contrary to Dutch legislation that required legal representatives to be habitually resident in the Netherlands. Kortmann challenged this under *Art.49*.

Held: The habitual residence qualification was not incompatible with *Art.49* *where such a requirement can be objectively justified* by the need to ensure respect for professional rules of conduct and professional ethics.

Clearly, then, as *Steiner*³ notes:

a residence requirement could not be imposed if the desired ends could be achieved by less restrictive means. Professional rules which inhibit the free provision of services will only be permissible if they are:

- (a) non-discriminatory,
- (b) objectively justified, and
- (c) not disproportionate.

³*Steiner, J. & Woods, L. Textbook on EC Law*, 7/e. London: Blackstone Press, 2000, p337; and see *Case 33/74, Van Binsbergen*.

[See again, *Case 120/78, Cassis de Dijon*, *Case C-55/94, Gebhard*, and the ‘alignment’ of the ECJ’s approach wrt *Arts.28, 49* and *43*].

Directive 77/249.

This Directive is concerned only with the rights of a lawyer to provide services: it is not applicable to the rights of establishment (see now Directive 98/5). **Directive 77/249** grants lawyers limited rights to provide services in Member States other than their own. In essence, the foreign lawyer is permitted to provide the same services as a local lawyer unless the host Member State reserves certain activities. Thus, in the U.K. foreign lawyers have not been permitted to undertake probate or conveyancing work - activities which have been reserved for U.K. lawyers. Furthermore, a Member State may require lawyers from other Member states to work in conjunction with a lawyer who practises before the judicial authority in question.

Where a Member State imposed additional restrictions when implementing Directive 77/249, the Commission succeeded in an action under *Art.226 [ex.Art.169]* for a declaration that that Member State was in breach of its obligations under Community law: *Case 427/85, Commission v. Germany [Re: Restrictions on the Legal profession]*.

The right of establishment and the freedom to provide services are subject to the same derogations that apply to the free movement of workers, viz on grounds of public policy, public security and public health: *Arts.46* (establishment) and *55* (services).

Freedom to Receive Services.

Whereas *Arts.49* and *50* refer merely to the freedom to *provide* services, the ECJ has extended the freed movement of persons to embrace the converse, i.e., the right of an individual to enter another Member State to *receive* services: *Case 26/83*. This extension of the right has been applied to students in higher education. In essence, the extension gave students the right to receive free vocational training in host States but maintenance grants were not within the scope of the Treaty. See:

Case 293/83, Gravier v. City of Liege;
Case 24/86, Blaizot et al v. University of Liege; and
Case 197/86, Brown v. Secretary of State for Scotland.

(See now *Art.149* ‘post-Amsterdam’ [ex. *Art.126EC*] for the legal basis of the Erasmus-Socrates scheme).

A particularly controversial case, however, is Diane Blood’s case which related to the freedom of a UK national to receive, in Belgium, counselling for, and subsequently, IVF treatment. She could not receive IVF in the UK because of its unlawful basis: it was contrary to the provisions of the ***Human Fertilisation and Embryology Act 1990***. Diane Blood’s husband had died after a very short illness. Before he died, however, Diane Blood had asked for a sample of his sperm to be obtained as she alleged that she and her husband had been trying to start a family and that they had been married under the provisions of a ceremony which had placed great value on procreation. However, the sperm was obtained illegally since the late Mr Blood had not complied with the specific provisions of the ***Human Fertilisation and Embryology Act 1990*** as he had not given his

consent in writing. Nevertheless, the Court of Appeal asked the Human Fertilisation and Embryology Authority to consider granting a licence to Diane Blood to take the sperm to another Member State in order that she might exercise her freedom to receive the counselling and, perhaps, IVF services (in Belgium) notwithstanding the original illegality. The declaration of the illegality would ensure that this case did not constitute a precedent. (The licence was granted, Mrs Blood received the treatment, conceived and subsequently gave birth to a healthy baby boy, Liam. {In Feb 2002 it was announced that Mrs Blood was expecting her second child in July of that year following another course of treatment. Whereas the subsequent birth was widely reported in the press, the significance was, if anything, 'trumped' by Mrs Blood's victory in the High Court in 2003 in getting the birth certificates of her children to record the name of their father as opposed to the cruel provision deemed to be in breach of human rights that insisted on the certificates recording 'father unknown'.}).

(See also *Case C-159/90, SPUC v. Grogan* where abortion was regarded as a service for the purposes of Art.50EC but its free advertising meant that there was no commercial link between the distributor of information and the provider of the services. Consequently, there was no breach of EC law).

References

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