

Handout № 14

Freedom of Establishment

1. General

- Art. 43–48 freedoms granted to self-employed (parallel to workers)
- in addition to individuals, companies may exercise freedoms
- services may be *received*

2. Scope

- Establishment: Art. 43
- Services: Art. 49 and 50(3)
- directly effective since from the end of the transitional period, *Reyners v Belgium* (case 2/74): Art. 47 is complementary, not a necessary precondition (for services: *van Binsbergen* (case 33/74))
- binding for competent authorities and legally recognized professional bodies, *Steinhauser* (case 197/84) and *Walrave* (case 36/74) and since *Angonese* (C-281/98) probably also private parties
- limitation: Art. 46 and 56 → Dir 64/221

3. Definitions

- Services: Art. 50(1) (and 51), NB: economic element (service must be genuine and effective and not marginal and ancillary, *Protection of Unborn Children* (C-159/90)), Art. 49 covers provider and service as such *Alpine Investment* (C-384/93)
- Establishment: participate on a stable and continuous basis in the economic life of the MS, *Gebhard* (C-55/94) (service: temporary or spasmodic basis by a person established in another MS; provisions on establishment, services and workers are mutually exclusive)

4. Beneficiaries

- EC nationals
- companies established according to MS law, Art. 48 (*Überseering* (C-208/00), *Centros* (C-212/97) and *Daily Mail* (case 81/87))

5. fundamental Community rights

- Right to move and to reside: Dir 73/148 (rights of entry/residence), Dir 75/34 (right to remain permanently after having been self-employed); for services the right of residence is of equal duration as the service period
- Right of access (under same conditions as nationals: Art. 43, 49, 50 and 12 may be invoked to challenge discriminatory nationality or residence requirements, *Steinhauser* (s.a.))
- Social and other ancillary rights (no Reg 1612/68!): distinction between establishment and services?

6. Applicability

- Discrimination
 - personal: right to enter and reside (discrimination on the basis of nationality)
 - professional: practice of a particular profession (indirect/disguised discrimination)
- Measures without discriminatory effect → *Dassonville* and *Cassis de Dijon* approach: a rule in breach of Art. 49 must be 'liable to prohibit or otherwise impede' the provision of services but may be justified on the basis of 'imperative reasons relating to the public interest', *Säger* (C-76/90); *Kohll* (C-158/96): Art. 49 precludes application of rules that make the provision of services between MS more difficult than the provision of services purely within one MS

- possibility and conditions to exercise right of establishment must be determined in the light of the activities: if activities are subject to certain conditions those must be complied with in principle if the national measures – hindering or making less attractive the exercise – fulfil the following conditions
 - be applied in a non-discriminatory manner;
 - be justified by imperative requirements in the general interests
 - by suitable for securing the attainment of the objective which they pursue
 - must not go beyond what is necessary in order to obtain it
 - (MS are required to take into account the equivalence of diplomas, compare knowledge and qualification)

7. Rule of reason

- limitation to the freedom: Art. 43(2) and 50(3) →
 - the education and training required for qualification
 - rules of professional conduct

rules justified by the general good (relating to organisation, ethics, qualifications, supervision and liability) binding on any person do not infringe Art. 49 and 50 if they are

- non-discriminatory
- objectively justified
- not disproportionate

legislation can be applied to *temporary* activities only if

- justified by imperative reasons relating to the public interest
- public interest is not already protected by the rules of the State of establishment
- proportionate

8. Harmonisation

- Mutual recognition of qualifications
 - by EC Directive
 - otherwise
 - even if MS nationality but not MS qualification (cross-border element!)
 - criteria
 - * higher education diploma awarded on completion of three years education/training
 - * pursuit of the profession for two years in a MS which does not regulate the activity
 - * evidence of professional experience in case MS requires supervised practice period; MS may require *adaptation period* in case of differences between subject matters
- home country control and supervision (licensed in one MS and services offered in other MS based on the license)

9. Right to *receive* services

- freedom to receive services is corollary of freedom to provide services → right to enter and remain on production of valid identity card
- MS are required to abolish restrictions
- recipients may be tourists, persons receiving medical treatment, persons travelling for purposes of education/training