

# The Law of the EUROPEAN UNION

Teaching Material



THE INTERNAL MARKET:  
FREEDOM TO PROVIDE SERVICES  
FREEDOM OF ESTABLISHMENT

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# **1. FREEDOM OF ESTABLISHMENT**



## **NOTE AND QUESTIONS**

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Based on treaty provisions, the principle of freedom of establishment enables an economic operator (person or company) to carry on an economic activity in a stable and continuous way in one or more Member States without being subject to any discriminatory or restrictive measures which could not be justified by reasons of general interest. When a national regulation is considered not to be in accordance with the principle of freedom of establishment, the Commission may request the national authorities to take the measures necessary to respect this principle and/or commence infringement procedures.

1. Consider while reading the cases what is the scope of the freedom of establishment and what are the specific rights guaranteed for the nationals of Member State. Note the formula of Article 43 “under the conditions laid down for its own nationals” and study the meaning of it through your readings of the different case law.

### **1.1 Relevant Treaty Provisions**

#### **TREATY ESTABLISHING THE EUROPEAN COMMUNITY**

##### ***Right of Establishment***

##### ***Article 43 (ex Article 52)***

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

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 the 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.

**Article 44 (ex Article 54)**

1. In order to attain freedom of establishment as regards a particular activity, the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall act by means of directives.

2. The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

- (a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;
- (b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Community of the various activities concerned;
- (c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;
- (d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;
- (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 33(2);
- (f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;
- (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and other, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the Community;
- (h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

**Article 45 (ex Article 55)**

The provisions of this chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

The Council may, acting by a qualified majority on a proposal from the Commission, rule that the provisions of this chapter shall not apply to certain activities.

**Article 46 (ex Article 56)**

1. The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.
2. The Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the abovementioned provisions.

**Article 47 (ex Article 57)**

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.
2. For the same purpose, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as selfemployed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. In other cases the Council shall act by qualified majority.
3. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

**Article 48 (ex Article 58)**

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

## 1.2 Cases

### 1.2.1 Case 2/74: Reyners

#### Jean Reyners v Belgian State

##### Case 2/74

21 June 1974

Court of Justice

[1974] ECR 631

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 BY JUDGMENT DATED 21 DECEMBER 1973, FILED AT THE REGISTRY ON 9 JANUARY 1974, THE CONSEIL D'ETAT OF BELGIUM RAISED TWO QUESTIONS UNDER ARTICLE 177 OF THE EEC TREATY ON THE INTERPRETATION OF ARTICLES 52 AND 55 OF THE EEC TREATY RELATING TO THE RIGHT OF ESTABLISHMENT IN RELATION TO THE PRACTICE OF THE PROFESSION OF AVOCAT.
  - 2 THESE QUESTIONS HAD BEEN RAISED IN THE CONTEXT OF AN ACTION BROUGHT BY A DUTCH NATIONAL, THE HOLDER OF THE LEGAL DIPLOMA GIVING THE RIGHT TO TAKE UP THE PROFESSION OF AVOCAT IN BELGIUM, WHO HAS BEEN EXCLUDED FROM THAT PROFESSION BY REASON OF HIS NATIONALITY AS A RESULT OF THE ROYAL DECREE OF 24 AUGUST 1972 RELATING TO THE TITLE AND EXERCISE OF THE PROFESSION OF AVOCAT (MONITEUR BELGE 1970, P. 9060).
- ON THE INTERPRETATION OF ARTICLE 52 OF THE EEC TREATY
- 3 THE CONSEIL D'ETAT INQUIRES WHETHER ARTICLE 52 OF THE EEC TREATY IS, SINCE THE END OF THE TRANSITIONAL PERIOD, A 'DIRECTLY APPLICABLE PROVISION' DESPITE THE ABSENCE OF DIRECTIVES AS PRESCRIBED BY ARTICLES 54 (2) AND 57 (1) OF THE TREATY.
  - 4 THE BELGIAN AND IRISH GOVERNMENTS HAVE ARGUED, FOR REASONS LARGELY IN AGREEMENT, THAT ARTICLE 52 DOES NOT HAVE SUCH AN EFFECT.
  - 5 TAKEN IN THE CONTEXT OF THE CHAPTER ON THE RIGHT OF ESTABLISHMENT, TO WHICH REFERENCE IS EXPRESSLY MADE BY THE WORDING 'WITHIN THE FRAMEWORK OF THE PROVISIONS SET OUT BELOW', THIS ARTICLE, IN VIEW OF THE COMPLEXITY OF THE SUBJECT, IS SAID TO CONSTITUTE ONLY THE EXPRESSION OF A SIMPLE PRINCIPLE, THE IMPLEMENTATION OF WHICH IS NECESSARILY SUBJECT TO A SET OF COMPLEMENTARY PROVISIONS, BOTH COMMUNITY AND NATIONAL, PROVIDED FOR BY ARTICLES 54 AND 57.
  - 6 THE FORM CHOSEN BY THE TREATY FOR THESE IMPLEMENTING ACTS - THE ESTABLISHMENT OF A 'GENERAL PROGRAMME', IMPLEMENTED IN TURN BY A SET OF DIRECTIVES - CONFIRMS, IT IS ARGUED, THAT ARTICLE 52 DOES NOT HAVE A DIRECT EFFECT.

- 7 IT IS NOT FOR THE COURTS TO EXERCISE A DISCRETIONARY POWER RESERVED TO THE LEGISLATIVE INSTITUTIONS OF THE COMMUNITY AND THE MEMBER STATES.
- 8 THIS ARGUMENT IS SUPPORTED IN SUBSTANCE BY THE BRITISH AND LUXEMBOURG GOVERNMENTS, AS WELL AS BY THE ORDRE NATIONAL DES AVOCATS DE BELGIQUE, THE INTERVENING PARTY IN THE MAIN ACTION.
- 9 THE PLAINTIFF IN THE MAIN ACTION, FOR HIS PART, STATES THAT ALL THAT IS IN QUESTION IN HIS CASE IS A DISCRIMINATION BASED ON NATIONALITY BY REASON OF THE FACT THAT HE IS SUBJECT TO CONDITIONS OF ADMISSION TO THE PROFESSION OF AVOCAT WHICH ARE NOT APPLICABLE TO BELGIAN NATIONALS.
- 10 IN THIS RESPECT (HE SUBMITS) ARTICLE 52 IS A CLEAR AND COMPLETE PROVISION, CAPABLE OF PRODUCING A DIRECT EFFECT.
- 11 THE GERMAN GOVERNMENT, SUPPORTED IN SUBSTANCE BY THE DUTCH GOVERNMENT AND CITING THE JUDGMENT GIVEN BY THIS COURT ON 16 JUNE 1966 IN CASE 57/65, LUETTICKE (REC. 1966, P. 293), CONSIDERS THAT THE PROVISIONS WHICH IMPOSE ON MEMBER STATES AN OBLIGATION WHICH THEY HAVE TO FULFIL WITHIN A PARTICULAR PERIOD, BECOME DIRECTLY APPLICABLE WHEN, ON THE EXPIRATION OF THIS PERIOD, THE OBLIGATION HAS NOT BEEN FULFILLED.
- 12 AT THE END OF THE TRANSITIONAL PERIOD, THE MEMBER STATES NO LONGER HAVE THE POSSIBILITY OF MAINTAINING RESTRICTIONS ON THE FREEDOM OF ESTABLISHMENT, SINCE ARTICLE 52 HAS, AS FROM THIS PERIOD, THE CHARACTER OF A PROVISION WHICH IS COMPLETE IN ITSELF AND LEGALLY PERFECT.
- 13 IN THESE CIRCUMSTANCES THE 'GENERAL PROGRAMME' AND THE DIRECTIVES PROVIDED FOR BY ARTICLE 54 WERE OF SIGNIFICANCE ONLY DURING THE TRANSITIONAL PERIOD, SINCE THE FREEDOM OF ESTABLISHMENT WAS FULLY ATTAINED AT THE END OF IT.
- 14 THE COMMISSION, IN SPITE OF DOUBTS WHICH IT EXPERIENCES ON THE SUBJECT OF THE DIRECT EFFECT OF THE PROVISION TO BE INTERPRETED - BOTH IN VIEW OF THE REFERENCE BY THE TREATY TO THE 'GENERAL PROGRAMME' AND TO THE IMPLEMENTING DIRECTIVES AND BY REASON OF THE TENOR OF CERTAIN LIBERALIZING DIRECTIVES ALREADY TAKEN, WHICH DO NOT ATTAIN IN EVERY RESPECT PERFECT EQUALITY OF TREATMENT - CONSIDERS, HOWEVER, THAT ARTICLE 52 HAS AT LEAST A PARTIAL DIRECT EFFECT IN SO FAR AS IT SPECIFICALLY PROHIBITS DISCRIMINATION ON GROUNDS OF NATIONALITY.
- 15 ARTICLE 7 OF THE TREATY, WHICH FORMS PART OF THE 'PRINCIPLES' OF THE COMMUNITY, PROVIDES THAT WITHIN THE SCOPE OF APPLICATION OF THE TREATY AND WITHOUT PREJUDICE TO ANY SPECIAL PROVISIONS CONTAINED THEREIN, 'ANY DISCRIMINATION ON GROUNDS OF NATIONALITY SHALL BE PROHIBITED'.
- 16 ARTICLE 52 PROVIDES FOR THE IMPLEMENTATION OF THIS GENERAL PROVISION IN THE SPECIAL SPHERE OF THE RIGHT OF ESTABLISHMENT.
- 17 THE WORDS 'WITHIN THE FRAMEWORK OF THE PROVISIONS SET OUT BELOW' REFER TO THE CHAPTER RELATING TO THE RIGHT OF ESTABLISHMENT TAKEN AS A WHOLE AND REQUIRE, IN CONSEQUENCE, TO BE INTERPRETED IN THIS GENERAL CONTEXT.
- 18 AFTER HAVING STATED THAT 'RESTRICTIONS ON THE FREEDOM OF ESTABLISHMENT OF NATIONALS OF A MEMBER STATE IN THE TERRITORY OF

ANOTHER MEMBER STATE SHALL BE ABOLISHED BY PROGRESSIVE STAGES IN THE COURSE OF THE TRANSITIONAL PERIOD', ARTICLE 52 EXPRESSES THE GUIDING PRINCIPLE IN THE MATTER BY PROVIDING THAT FREEDOM OF ESTABLISHMENT SHALL INCLUDE THE RIGHT TO TAKE UP AND PURSUE ACTIVITIES AS SELF-EMPLOYED PERSONS 'UNDER THE CONDITIONS LAID DOWN FOR ITS OWN NATIONALS BY THE LAW OF THE COUNTRY WHERE SUCH ESTABLISHMENT IS EFFECTED'.

- 19 FOR THE PURPOSE OF ACHIEVING THIS OBJECTIVE BY PROGRESSIVE STAGES DURING THE TRANSITIONAL PERIOD ARTICLE 54 PROVIDES FOR THE DRAWING UP BY THE COUNCIL OF A 'GENERAL PROGRAMME' AND, FOR THE IMPLEMENTATION OF THIS PROGRAMME, DIRECTIVES INTENDED TO ATTAIN FREEDOM OF ESTABLISHMENT IN RESPECT OF THE VARIOUS ACTIVITIES IN QUESTION.
- 20 BESIDES THESE LIBERALIZING MEASURES, ARTICLE 57 PROVIDES FOR DIRECTIVES INTENDED TO ENSURE MUTUAL RECOGNITION OF DIPLOMAS, CERTIFICATES AND OTHER EVIDENCE OF FORMAL QUALIFICATIONS AND IN A GENERAL WAY FOR THE COORDINATION OF LAWS WITH REGARD TO ESTABLISHMENT AND THE PURSUIT OF ACTIVITIES AS SELF-EMPLOYED PERSONS.
- 21 IT APPEARS FROM THE ABOVE THAT IN THE SYSTEM OF THE CHAPTER ON THE RIGHT OF ESTABLISHMENT THE 'GENERAL PROGRAMME' AND THE DIRECTIVES PROVIDED FOR BY THE TREATY ARE INTENDED TO ACCOMPLISH TWO FUNCTIONS, THE FIRST BEING TO ELIMINATE OBSTACLES IN THE WAY OF ATTAINING FREEDOM OF ESTABLISHMENT DURING THE TRANSITIONAL PERIOD, THE SECOND BEING TO INTRODUCE INTO THE LAW OF MEMBER STATES A SET OF PROVISIONS INTENDED TO FACILITATE THE EFFECTIVE EXERCISE OF THIS FREEDOM FOR THE PURPOSE OF ASSISTING ECONOMIC AND SOCIAL INTERPENETRATION WITHIN THE COMMUNITY IN THE SPHERE OF ACTIVITIES AS SELF-EMPLOYED PERSONS.
- 22 THIS SECOND OBJECTIVE IS THE ONE REFERRED TO, FIRST, BY CERTAIN PROVISIONS OF ARTICLE 54 (3), RELATING IN PARTICULAR TO COOPERATION BETWEEN THE COMPETENT AUTHORITIES IN THE MEMBER STATES AND ADJUSTMENT OF ADMINISTRATIVE PROCEDURES AND PRACTICES, AND, SECONDLY, BY THE SET OF PROVISIONS IN ARTICLE 57.
- 23 THE EFFECT OF THE PROVISIONS OF ARTICLE 52 MUST BE DECIDED WITHIN THE FRAMEWORK OF THIS SYSTEM.
- 24 THE RULE ON EQUAL TREATMENT WITH NATIONALS IS ONE OF THE FUNDAMENTAL LEGAL PROVISIONS OF THE COMMUNITY.
- 25 AS A REFERENCE TO A SET OF LEGISLATIVE PROVISIONS EFFECTIVELY APPLIED BY THE COUNTRY OF ESTABLISHMENT TO ITS OWN NATIONALS, THIS RULE IS, BY ITS ESSENCE, CAPABLE OF BEING DIRECTLY INVOKED BY NATIONALS OF ALL THE OTHER MEMBER STATES.
- 26 IN LAYING DOWN THAT FREEDOM OF ESTABLISHMENT SHALL BE ATTAINED AT THE END OF THE TRANSITIONAL PERIOD, ARTICLE 52 THUS IMPOSES AN OBLIGATION TO ATTAIN A PRECISE RESULT, THE FULFILMENT OF WHICH HAD TO BE MADE EASIER BY, BUT NOT MADE DEPENDENT ON, THE IMPLEMENTATION OF A PROGRAMME OF PROGRESSIVE MEASURES.
- 27 THE FACT THAT THIS PROGRESSION HAS NOT BEEN ADHERED TO LEAVES THE OBLIGATION ITSELF INTACT BEYOND THE END OF THE PERIOD PROVIDED FOR ITS FULFILMENT.
- 28 THIS INTERPRETATION IS IN ACCORDANCE WITH ARTICLE 8 (7) OF THE TREATY, ACCORDING TO WHICH THE EXPIRY OF THE TRANSITIONAL PERIOD SHALL

CONSTITUTE THE LATEST DATE BY WHICH ALL THE RULES LAID DOWN MUST ENTER INTO FORCE AND ALL THE MEASURES REQUIRED FOR ESTABLISHING THE COMMON MARKET MUST BE IMPLEMENTED.

- 29 IT IS NOT POSSIBLE TO INVOKE AGAINST SUCH AN EFFECT THE FACT THAT THE COUNCIL HAS FAILED TO ISSUE THE DIRECTIVES PROVIDED FOR BY ARTICLES 54 AND 57 OR THE FACT THAT CERTAIN OF THE DIRECTIVES ACTUALLY ISSUED HAVE NOT FULLY ATTAINED THE OBJECTIVE OF NON-DISCRIMINATION REQUIRED BY ARTICLE 52.
- 30 AFTER THE EXPIRY OF THE TRANSITIONAL PERIOD THE DIRECTIVES PROVIDED FOR BY THE CHAPTER ON THE RIGHT OF ESTABLISHMENT HAVE BECOME SUPERFLUOUS WITH REGARD TO IMPLEMENTING THE RULE ON NATIONALITY, SINCE THIS IS HENCEFORTH SANCTIONED BY THE TREATY ITSELF WITH DIRECT EFFECT.
- 31 THESE DIRECTIVES HAVE HOWEVER NOT LOST ALL INTEREST SINCE THEY PRESERVE AN IMPORTANT SCOPE IN THE FIELD OF MEASURES INTENDED TO MAKE EASIER THE EFFECTIVE EXERCISE OF THE RIGHT OF FREEDOM OF ESTABLISHMENT.
- 32 IT IS RIGHT THEREFORE TO REPLY TO THE QUESTION RAISED THAT, SINCE THE END OF THE TRANSITIONAL PERIOD, ARTICLE 52 OF THE TREATY IS A DIRECTLY APPLICABLE PROVISION DESPITE THE ABSENCE IN A PARTICULAR SPHERE, OF THE DIRECTIVES PRESCRIBED BY ARTICLES 54 (2) AND 57 (1) OF THE TREATY.

ON THE INTERPRETATION OF ARTICLE 55 OF THE EEC TREATY

- 33 THE CONSEIL D'ETAT HAS ALSO REQUESTED A DEFINITION OF WHAT IS MEANT IN THE FIRST PARAGRAPH OF ARTICLE 55 BY 'ACTIVITIES WHICH IN THAT STATE ARE CONNECTED, EVEN OCCASIONALLY, WITH THE EXERCISE OF OFFICIAL AUTHORITY'.
- 34 MORE PRECISELY, THE QUESTION IS WHETHER, WITHIN A PROFESSION SUCH AS THAT OF AVOCAT, ONLY THOSE ACTIVITIES INHERENT IN THIS PROFESSION WHICH ARE CONNECTED WITH THE EXERCISE OF OFFICIAL AUTHORITY ARE EXCEPTED FROM THE APPLICATION OF THE CHAPTER ON THE RIGHT OF ESTABLISHMENT, OR WHETHER THE WHOLE OF THIS PROFESSION IS EXCEPTED BY REASON OF THE FACT THAT IT COMPRISES ACTIVITIES CONNECTED WITH THE EXERCISE OF THIS AUTHORITY.
- 35 THE LUXEMBOURG GOVERNMENT AND THE ORDRE NATIONAL DES AVOCATS DE BELGIQUE CONSIDER THAT THE WHOLE PROFESSION OF AVOCAT IS EXONERATED FROM THE RULES IN THE TREATY ON THE RIGHT OF ESTABLISHMENT BY THE FACT THAT IT IS CONNECTED ORGANICALLY WITH THE FUNCTIONING OF THE PUBLIC SERVICE OF THE ADMINISTRATION OF JUSTICE.
- 36 THIS SITUATION (IT IS ARGUED) RESULTS BOTH FROM THE LEGAL ORGANIZATION OF THE BAR, INVOLVING A SET OF STRICT CONDITIONS FOR ADMISSION AND DISCIPLINE, AND FROM THE FUNCTIONS PERFORMED BY THE AVOCAT IN THE CONTEXT OF JUDICIAL PROCEDURE WHERE HIS PARTICIPATION IS LARGELY OBLIGATORY.
- 37 THESE ACTIVITIES, WHICH MAKE THE ADVOCATE AN INDISPENSABLE AUXILIARY OF THE ADMINISTRATION OF JUSTICE, FORM A COHERENT WHOLE, THE PARTS OF WHICH CANNOT BE SEPARATED.
- 38 THE PLAINTIFF IN THE MAIN ACTION, FOR HIS PART, CONTENDS THAT AT MOST ONLY CERTAIN ACTIVITIES OF THE PROFESSION OF AVOCAT ARE CONNECTED

WITH THE EXERCISE OF OFFICIAL AUTHORITY AND THAT THEY ALONE THEREFORE COME WITHIN THE EXCEPTION CREATED BY ARTICLE 55 TO THE PRINCIPLE OF FREE ESTABLISHMENT.

- 39 THE GERMAN, BELGIAN, BRITISH, IRISH AND DUTCH GOVERNMENTS, AS WELL AS THE COMMISSION, REGARD THE EXCEPTION CONTAINED IN ARTICLE 55 AS LIMITED TO THOSE ACTIVITIES ALONE WITHIN THE VARIOUS PROFESSIONS CONCERNED WHICH ARE ACTUALLY CONNECTED WITH THE EXERCISE OF OFFICIAL AUTHORITY, SUBJECT TO THEIR BEING SEPARABLE FROM THE NORMAL PRACTICE OF THE PROFESSION.
- 40 DIFFERENCES EXIST, HOWEVER, BETWEEN THE GOVERNMENTS REFERRED TO AS REGARDS THE NATURE OF THE ACTIVITIES WHICH ARE THUS EXCEPTED FROM THE PRINCIPLE OF THE FREEDOM OF ESTABLISHMENT, TAKING INTO ACCOUNT THE DIFFERENT ORGANIZATION OF THE PROFESSIONS CORRESPONDING TO THAT OF AVOCAT FROM ONE MEMBER STATE TO ANOTHER.
- 41 THE GERMAN GOVERNMENT IN PARTICULAR CONSIDERS THAT BY REASON OF THE COMPULSORY CONNECTION OF THE RECHTSANWALT WITH CERTAIN JUDICIAL PROCESSES, ESPECIALLY AS REGARDS CRIMINAL OR PUBLIC LAW, THERE ARE SUCH CLOSE CONNEXIONS BETWEEN THE PROFESSION OF RECHTSANWALT AND THE EXERCISE OF JUDICIAL AUTHORITY THAT LARGE SECTORS OF THIS PROFESSION, AT LEAST, SHOULD BE EXCEPTED FROM FREEDOM OF ESTABLISHMENT.
- 42 UNDER THE TERMS OF THE FIRST PARAGRAPH OF ARTICLE 55 THE PROVISIONS OF THE CHAPTER ON THE RIGHT OF ESTABLISHMENT SHALL NOT APPLY 'SO FAR AS ANY GIVEN MEMBER STATE IS CONCERNED, TO ACTIVITIES WHICH IN THAT STATE ARE CONNECTED, EVEN OCCASIONALLY, WITH THE EXERCISE OF OFFICIAL AUTHORITY'.
- 43 HAVING REGARD TO THE FUNDAMENTAL CHARACTER OF FREEDOM OF ESTABLISHMENT AND THE RULE ON EQUAL TREATMENT WITH NATIONALS IN THE SYSTEM OF THE TREATY, THE EXCEPTIONS ALLOWED BY THE FIRST PARAGRAPH OF ARTICLE 55 CANNOT BE GIVEN A SCOPE WHICH WOULD EXCEED THE OBJECTIVE FOR WHICH THIS EXEMPTION CLAUSE WAS INSERTED.
- 44 THE FIRST PARAGRAPH OF ARTICLE 55 MUST ENABLE MEMBER STATES TO EXCLUDE NON-NATIONALS FROM TAKING UP FUNCTIONS INVOLVING THE EXERCISE OF OFFICIAL AUTHORITY WHICH ARE CONNECTED WITH ONE OF THE ACTIVITIES OF SELF-EMPLOYED PERSONS PROVIDED FOR IN ARTICLE 52.
- 45 THIS NEED IS FULLY SATISFIED WHEN THE EXCLUSION OF NATIONALS IS LIMITED TO THOSE ACTIVITIES WHICH, TAKEN ON THEIR OWN, CONSTITUTE A DIRECT AND SPECIFIC CONNEXION WITH THE EXERCISE OF OFFICIAL AUTHORITY.
- 46 AN EXTENSION OF THE EXCEPTION ALLOWED BY ARTICLE 55 TO A WHOLE PROFESSION WOULD BE POSSIBLE ONLY IN CASES WHERE SUCH ACTIVITIES WERE LINKED WITH THAT PROFESSION IN SUCH A WAY THAT FREEDOM OF ESTABLISHMENT WOULD RESULT IN IMPOSING ON THE MEMBER STATE CONCERNED THE OBLIGATION TO ALLOW THE EXERCISE, EVEN OCCASIONALLY, BY NON-NATIONALS OF FUNCTIONS APPERTAINING TO OFFICIAL AUTHORITY.
- 47 THIS EXTENSION IS ON THE OTHER HAND NOT POSSIBLE WHEN, WITHIN THE FRAMEWORK OF AN INDEPENDENT PROFESSION, THE ACTIVITIES CONNECTED WITH THE EXERCISE OF OFFICIAL AUTHORITY ARE SEPARABLE FROM THE PROFESSIONAL ACTIVITY IN QUESTION TAKEN AS A WHOLE.
- 48 IN THE ABSENCE OF ANY DIRECTIVE ISSUED UNDER ARTICLE 57 FOR THE

PURPOSE OF HARMONIZING THE NATIONAL PROVISIONS RELATING, IN PARTICULAR, TO PROFESSIONS SUCH AS THAT OF AVOCAT, THE PRACTICE OF SUCH PROFESSIONS REMAINS GOVERNED BY THE LAW OF THE VARIOUS MEMBER STATES.

- 49 THE POSSIBLE APPLICATION OF THE RESTRICTIONS ON FREEDOM OF ESTABLISHMENT PROVIDED FOR BY THE FIRST PARAGRAPH OF ARTICLE 55 MUST THEREFORE BE CONSIDERED SEPARATELY IN CONNEXION WITH EACH MEMBER STATE HAVING REGARD TO THE NATIONAL PROVISIONS APPLICABLE TO THE ORGANIZATION AND THE PRACTICE OF THIS PROFESSION.
- 50 THIS CONSIDERATION MUST HOWEVER TAKE INTO ACCOUNT THE COMMUNITY CHARACTER OF THE LIMITS IMPOSED BY ARTICLE 55 ON THE EXCEPTIONS PERMITTED TO THE PRINCIPLE OF FREEDOM OF ESTABLISHMENT IN ORDER TO AVOID THE EFFECTIVENESS OF THE TREATY BEING DEFEATED BY UNILATERAL PROVISIONS OF MEMBER STATES.
- 51 PROFESSIONAL ACTIVITIES INVOLVING CONTACTS, EVEN REGULAR AND ORGANIC, WITH THE COURTS, INCLUDING EVEN COMPULSORY COOPERATION IN THEIR FUNCTIONING, DO NOT CONSTITUTE, AS SUCH, CONNEXION WITH THE EXERCISE OF OFFICIAL AUTHORITY.
- 52 THE MOST TYPICAL ACTIVITIES OF THE PROFESSION OF AVOCAT, IN PARTICULAR, SUCH AS CONSULTATION AND LEGAL ASSISTANCE AND ALSO REPRESENTATION AND THE DEFENCE OF PARTIES IN COURT, EVEN WHEN THE INTERVENTION OR ASSISTANCE OF THE AVOCAT IS COMPULSORY OR IS A LEGAL MONOPOLY, CANNOT BE CONSIDERED AS CONNECTED WITH THE EXERCISE OF OFFICIAL AUTHORITY.
- 53 THE EXERCISE OF THESE ACTIVITIES LEAVES THE DISCRETION OF JUDICIAL AUTHORITY AND THE FREE EXERCISE OF JUDICIAL POWER INTACT.
- 54 IT IS THEREFORE RIGHT TO REPLY TO THE QUESTION RAISED THAT THE EXCEPTION TO FREEDOM OF ESTABLISHMENT PROVIDED FOR BY THE FIRST PARAGRAPH OF ARTICLE 55 MUST BE RESTRICTED TO THOSE OF THE ACTIVITIES REFERRED TO IN ARTICLE 52 WHICH IN THEMSELVES INVOLVE A DIRECT AND SPECIFIC CONNEXION WITH THE EXERCISE OF OFFICIAL AUTHORITY.
- 55 IN ANY CASE IT IS NOT POSSIBLE TO GIVE THIS DESCRIPTION, IN THE CONTEXT OF A PROFESSION SUCH AS THAT OF AVOCAT, TO ACTIVITIES SUCH AS CONSULTATION AND LEGAL ASSISTANCE OR THE REPRESENTATION AND DEFENCE OF PARTIES IN COURT, EVEN IF THE PERFORMANCE OF THESE ACTIVITIES IS COMPULSORY OR THERE IS A LEGAL MONOPOLY IN RESPECT OF IT.

[...]

## 1.2.2 Case 107/83 Klopp



### **NOTE AND QUESTIONS**

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Read carefully Klopp in connection to Reyners and see the evolution of the case law of the ECJ. Pay also attention to return to the wording of article 43 of the ECT while reading the case, see if the decision is consistent with its wording.

#### **Ordre des avocats au Barreau de Paris v Onno Klopp**

**Case 107/83**

12 July 1984

Court of Justice

[1984] ECR 2971

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

- 6 IN SUBSTANCE THE QUESTION IS WHETHER IN THE ABSENCE OF A DIRECTIVE ON THE COORDINATION OF NATIONAL PROVISIONS CONCERNING ACCESS TO AND EXERCISE OF THE LEGAL PROFESSION ARTICLE 52 ET SEQ. OF THE TREATY PREVENT THE COMPETENT AUTHORITIES OF A MEMBER STATE FROM DENYING PURSUANT TO THEIR NATIONAL LAW AND THE RULES OF PROFESSIONAL CONDUCT IN FORCE THERE A NATIONAL OF ANOTHER MEMBER STATE THE RIGHT TO ENTER AND TO EXERCISE THE LEGAL PROFESSION SOLELY BECAUSE HE MAINTAINS AT THE SAME TIME PROFESSIONAL CHAMBERS IN ANOTHER MEMBER STATE.
- 7 THE PARIS BAR COUNCIL MAINTAINS FIRST THAT ARTICLE 52 OF THE TREATY HAS ONLY PARTIAL DIRECT EFFECT INASMUCH AS IT EMBODIES THE RULE OF EQUAL TREATMENT BUT DOES NOT NECESSARILY APPLY TO OTHER CASES. ACCORDINGLY IN THE ABSENCE OF DIRECTIVES THE PRACTICAL TERMS OF FREE ESTABLISHMENT DEPEND ON NATIONAL LAW, UNLESS THE LATTER IS DISCRIMINATORY OR CONSTITUTES A PATENTLY UNREASONABLE OBSTACLE OR IS OBJECTIVELY INCOMPATIBLE WITH THE GENERAL INTEREST.
- 8 THE FIRST PARAGRAPH OF ARTICLE 52 OF THE TREATY PROVIDES FOR THE

ABOLITION OF RESTRICTIONS ON THE FREEDOM OF ESTABLISHMENT OF NATIONALS OF A MEMBER STATE IN THE TERRITORY OF ANOTHER MEMBER STATE.

- 9 IN ORDER TO PROMOTE THE PROGRESSIVE ACHIEVEMENT OF THAT OBJECTIVE THE COUNCIL ADOPTED ON 18 DECEMBER 1961 PURSUANT TO ARTICLE 54 OF THE TREATY A GENERAL PROGRAMME FOR THE ABOLITION OF RESTRICTIONS ON FREEDOM OF ESTABLISHMENT (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION, SECOND SERIES VOL IX, P. 7). IN ORDER TO IMPLEMENT THE PROGRAMME ARTICLE 54 (2) OF THE TREATY PROVIDES THAT THE COUNCIL IS TO ISSUE DIRECTIVES TO ACHIEVE FREEDOM OF ESTABLISHMENT IN RESPECT OF THE VARIOUS ACTIVITIES IN QUESTION. FURTHERMORE, ARTICLE 57 OF THE TREATY MAKES THE COUNCIL RESPONSIBLE FOR ISSUING DIRECTIVES PROVIDING FOR THE MUTUAL RECOGNITION OF DIPLOMAS, CERTIFICATES AND OTHER EVIDENCE OF FORMAL QUALIFICATIONS AND FOR THE COORDINATION OF THE PROVISIONS LAID DOWN BY LAW, REGULATION OR ADMINISTRATIVE ACTION IN MEMBER STATES CONCERNING THE TAKING UP AND PURSUIT OF ACTIVITIES AS SELF-EMPLOYED PERSONS. ALTHOUGH THE LEGAL PROFESSION IS ALREADY GOVERNED IN RELATION TO FREEDOM TO PROVIDE SERVICES BY COUNCIL DIRECTIVE 77/249 OF 22 MARCH 1977 FACILITATING THE EFFECTIVE EXERCISE BY LAWYERS OF FREEDOM TO PROVIDE SERVICES (OFFICIAL JOURNAL L 78, P. 17 ), NO DIRECTIVE ON FREEDOM OF ESTABLISHMENT FOR LAWYERS HAS BEEN ADOPTED UNDER ARTICLES 54 AND 57 OF THE TREATY.
- 10 NEVERTHELESS, AS THE COURT HAS ALREADY HELD IN ITS JUDGMENT OF 21 JUNE 1974 (CASE 2/74 REYNERS V BELGIUM (1974) ECR 631), IN LAYING DOWN THAT FREEDOM OF ESTABLISHMENT SHALL BE ATTAINED AT THE END OF THE TRANSITIONAL PERIOD, ARTICLE 52 IMPOSES AN OBLIGATION TO ATTAIN A PRECISE RESULT THE FULFILMENT OF WHICH MUST BE MADE EASIER BY, BUT NOT MADE DEPENDENT ON, THE IMPLEMENTATION OF A PROGRAMME OF PROGRESSIVE MEASURES. CONSEQUENTLY THE FACT THAT THE COUNCIL HAS FAILED TO ISSUE THE DIRECTIVES PROVIDED FOR BY ARTICLES 54 AND 57 CANNOT SERVE TO JUSTIFY FAILURE TO MEET THE OBLIGATION.
- 11 IT IS THEREFORE NECESSARY TO CONSIDER THE SCOPE OF ARTICLE 52 OF THE TREATY AS A DIRECTLY APPLICABLE RULE OF COMMUNITY LAW WITH REGARD TO THE ESTABLISHMENT IN A MEMBER STATE OF A LAWYER ALREADY ESTABLISHED IN ANOTHER MEMBER STATE AND RETAINING HIS ORIGINAL ESTABLISHMENT THERE.
- 12 THE PARIS BAR COUNCIL AND THE FRENCH GOVERNMENT MAINTAIN THAT ARTICLE 52 OF THE TREATY MAKES ACCESS AND EXERCISE OF FREEDOM OF ESTABLISHMENT DEPEND ON THE CONDITIONS LAID DOWN BY THE MEMBER STATE OF ESTABLISHMENT. BOTH ARTICLE 83 OF DECREE NO 72-468 AND ARTICLE 1 OF THE INTERNAL RULES OF THE PARIS BAR (CITED ABOVE) ARE APPLICABLE WITHOUT DISTINCTION TO FRENCH NATIONALS AND THOSE OF OTHER MEMBER STATES. THOSE PROVISIONS PROVIDE THAT AN AVOCAT MAY ESTABLISH CHAMBERS IN ONE PLACE ONLY.
- 13 IN THAT RESPECT THE APPLICANT OBJECTS IN THE FIRST PLACE THAT THE NATIONAL FRENCH LEGISLATION AS APPLIED IS DISCRIMINATORY AND THUS CONTRARY TO ARTICLE 52 OF THE TREATY, FOR WHILST THE PARIS BAR ASSOCIATION HAS ALLOWED OR TOLERATED THE PRACTICE OF CERTAIN OF ITS MEMBERS IN HAVING A SECOND SET OF CHAMBERS IN OTHER COUNTRIES IT WILL NOT PERMIT THE APPLICANT TO ESTABLISH HIMSELF IN PARIS WHILST RETAINING HIS CHAMBERS IN DÜSSELDORF.

- 14 HOWEVER, ACCORDING TO THE DIVISION OF JURISDICTION BETWEEN THE COURT AND THE NATIONAL COURT LAID DOWN IN ARTICLE 177 OF THE EEC TREATY IT IS FOR THE NATIONAL COURT TO DETERMINE WHETHER IN PRACTICE THE RULES IN QUESTION ARE DISCRIMINATORY. THE QUESTION PUT BY THE NATIONAL COURT MUST THEREFORE BE ANSWERED WITHOUT GIVING ANY OPINION ON THE OBJECTION BASED ON A DISCRIMINATORY APPLICATION OF THE NATIONAL LAW IN QUESTION.
- 15 IN THE SECOND PLACE THE APPLICANT, THE UNITED KINGDOM, THE DANISH GOVERNMENT AND THE COMMISSION CONSIDER THAT THE LEGISLATION OF THE MEMBER STATE OF ESTABLISHMENT, ALTHOUGH APPLICABLE TO ACCESS TO THE PROFESSION AND PRACTICE OF LAW IN THAT COUNTRY, MAY NOT PROHIBIT A LAWYER WHO IS A NATIONAL OF ANOTHER MEMBER STATE FROM RETAINING HIS CHAMBERS THERE.
- 16 THE PARIS BAR COUNCIL AND THE FRENCH GOVERNMENT OBJECT IN THAT RESPECT THAT ARTICLE 52 OF THE TREATY REQUIRES THE FULL APPLICATION OF THE LAW OF THE MEMBER STATE OF ESTABLISHMENT. THE RULE THAT AN AVOCAT MAY HAVE HIS CHAMBERS IN ONE PLACE ONLY IS BASED ON THE NEED FOR AVOCATS TO GENUINELY PRACTICE BEFORE A COURT IN ORDER TO ENSURE THEIR AVAILABILITY TO BOTH THE COURT AND THEIR CLIENTS. IT SHOULD BE RESPECTED AS BEING A RULE PERTAINING TO THE ADMINISTRATION OF JUSTICE AND TO PROFESSIONAL ETHICS, OBJECTIVELY NECESSARY AND CONSISTENT WITH THE PUBLIC INTEREST.
- 17 IT SHOULD BE EMPHASIZED THAT UNDER THE SECOND PARAGRAPH OF ARTICLE 52 FREEDOM OF ESTABLISHMENT INCLUDES ACCESS TO AND THE PURSUIT OF THE ACTIVITIES OF SELF-EMPLOYED PERSONS "UNDER THE CONDITIONS LAID DOWN FOR ITS OWN NATIONALS BY THE LAW OF THE COUNTRY WHERE SUCH ESTABLISHMENT IS EFFECTED." IT FOLLOWS FROM THAT PROVISION AND ITS CONTEXT THAT IN THE ABSENCE OF SPECIFIC COMMUNITY RULES IN THE MATTER EACH MEMBER STATE IS FREE TO REGULATE THE EXERCISE OF THE LEGAL PROFESSION IN ITS TERRITORY.
- 18 NEVERTHELESS THAT RULE DOES NOT MEAN THAT THE LEGISLATION OF A MEMBER STATE MAY REQUIRE A LAWYER TO HAVE ONLY ONE ESTABLISHMENT THROUGHOUT THE COMMUNITY TERRITORY. SUCH A RESTRICTIVE INTERPRETATION WOULD MEAN THAT A LAWYER ONCE ESTABLISHED IN A PARTICULAR MEMBER STATE WOULD BE ABLE TO ENJOY THE FREEDOM OF THE TREATY TO ESTABLISH HIMSELF IN ANOTHER MEMBER STATE ONLY AT THE PRICE OF ABANDONING THE ESTABLISHMENT HE ALREADY HAD.
- 19 THAT FREEDOM OF ESTABLISHMENT IS NOT CONFINED TO THE RIGHT TO CREATE A SINGLE ESTABLISHMENT WITHIN THE COMMUNITY IS CONFIRMED BY THE VERY WORDS OF ARTICLE 52 OF THE TREATY, ACCORDING TO WHICH THE PROGRESSIVE ABOLITION OF THE RESTRICTIONS ON FREEDOM OF ESTABLISHMENT APPLIES TO RESTRICTIONS ON THE SETTING UP OF AGENCIES, BRANCHES OR SUBSIDIARIES BY NATIONALS OF ANY MEMBER STATE ESTABLISHED IN THE TERRITORY OF ANOTHER MEMBER STATE. THAT RULE MUST BE REGARDED AS A SPECIFIC STATEMENT OF A GENERAL PRINCIPLE, APPLICABLE EQUALLY TO THE LIBERAL PROFESSIONS, ACCORDING TO WHICH THE RIGHT OF ESTABLISHMENT INCLUDES FREEDOM TO SET UP AND MAINTAIN, SUBJECT TO OBSERVANCE OF THE PROFESSIONAL RULES OF CONDUCT, MORE THAN ONE PLACE OF WORK WITHIN THE COMMUNITY.
- 20 IN VIEW OF THE SPECIAL NATURE OF THE LEGAL PROFESSION, HOWEVER, THE SECOND MEMBER STATE MUST HAVE THE RIGHT, IN THE INTERESTS OF THE DUE

ADMINISTRATION OF JUSTICE, TO REQUIRE THAT LAWYERS ENROLLED AT A BAR IN ITS TERRITORY SHOULD PRACTISE IN SUCH A WAY AS TO MAINTAIN SUFFICIENT CONTACT WITH THEIR CLIENTS AND THE JUDICIAL AUTHORITIES AND ABIDE BY THE RULES OF THE PROFESSION. NEVERTHELESS SUCH REQUIREMENTS MUST NOT PREVENT THE NATIONALS OF OTHER MEMBER STATES FROM EXERCISING PROPERLY THE RIGHT OF ESTABLISHMENT GUARANTEED THEM BY THE TREATY.

- 21 IN THAT RESPECT IT MUST BE POINTED OUT THAT MODERN METHODS OF TRANSPORT AND TELECOMMUNICATIONS FACILITATE PROPER CONTACT WITH CLIENTS AND THE JUDICIAL AUTHORITIES. SIMILARLY, THE EXISTENCE OF A SECOND SET OF CHAMBERS IN ANOTHER MEMBER STATE DOES NOT PREVENT THE APPLICATION OF THE RULES OF ETHICS IN THE HOST MEMBER STATE.
- 22 THE QUESTION MUST THEREFORE BE ANSWERED TO THE EFFECT THAT EVEN IN THE ABSENCE OF ANY DIRECTIVE COORDINATING NATIONAL PROVISIONS GOVERNING ACCESS TO AND THE EXERCISE OF THE LEGAL PROFESSION, ARTICLE 52 ET SEQ. OF THE EEC TREATY PREVENT THE COMPETENT AUTHORITIES OF A MEMBER STATE FROM DENYING, ON THE BASIS OF THE NATIONAL LEGISLATION AND THE RULES OF PROFESSIONAL CONDUCT WHICH ARE IN FORCE IN THAT STATE, TO A NATIONAL OF ANOTHER MEMBER STATE THE RIGHT TO ENTER AND TO EXERCISE THE LEGAL PROFESSION SOLELY ON THE GROUND THAT HE MAINTAINS CHAMBERS SIMULTANEOUSLY IN ANOTHER MEMBER STATE.

[...]

### 1.2.3 Case C-212/97: Centros



## **NOTE AND QUESTIONS**

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Sometimes Member State laws on freedom of establishment vary considerably. Thus it may be possible to establish a company in one Member State which has less strict laws on establishment and provide services in other Member States having stricter laws. Sometimes it may appear that the purpose of establishing in the first Member State was merely to circumvent the laws of the second.

1. In what circumstances will the Court allow the authorities of the second Member State to refuse permission to a company duly established in the first Member State to provide services in the second?

There is a significant amount of case-law under the freedom of establishment relating to the companies, notably the rules relating to the determination of establishment and the impact of national rules, particularly those concerning taxation, on companies established in more than one Member State (for more recent cases see especially: Case C-208/00: Uebeseering, Case C-168/01: Bosal)

#### **Centros Ltd and Erhvervs- og Selskabsstyrelsen**

**Case C-212/97**

9 March 1999

Court of Justice

[1999] ECR I-1459

<http://www.curia.eu.int/en/content/juris/index.htm>

#### **Summary of facts and procedure**

*Centros Ltd, a private limited company registered in May 1992 in England and Wales, has never traded since its formation. Since United Kingdom law imposes no requirement on limited liability companies as to the provision for and the paying-up of a minimum share capital, Centros' share capital has been neither paid up nor made available to the company. It is divided into two shares held by Mr and Mrs Bryde, Danish nationals residing in Denmark. Under Danish law, Centros, as a 'private limited company', is regarded as a foreign limited liability company. During the summer of*

1992, Mrs Bryde requested the Board to register a branch of Centros in Denmark.

*The Board refused that registration on the grounds, inter alia, that Centros, which does not trade in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning, in particular, the paying-up of minimum capital. Centros brought an action before the Østre Landsret against the refusal of the Board to effect that registration.*

## Judgment

[...]

14. By its question, the national court is in substance asking whether it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the State in which that branch is to be set up, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State, more restrictive so far as minimum paid-up share capital is concerned.

[...]

18. That Mrs and Mrs Bryde formed the company Centros in the United Kingdom for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up has not been denied either in the written observations or at the hearing. That does not, however, mean that the formation by that British company of a branch in Denmark is not covered by freedom of establishment for the purposes of Article 52 and 58 of the Treaty. The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty.
19. As to the question whether, as Mr and Mrs Bryde claim, the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which it has its registered office constitutes an obstacle to freedom of establishment, it must be borne in mind that that freedom, conferred by Article 52 of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, under Article 58 of the Treaty companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.
20. The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person (see, to that effect, Segers, paragraph 13, Case 270/83 Commission v France [1986] ECR 273, paragraph 18, Case C-330/91 Commerzbank [1993] ECR I-4017, paragraph 13, and Case C-264/96 ICI [1998] I-4695, paragraph 20).
21. Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58 of the

Treaty.

22. Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.

[...]

24. It is [however] true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law [references omitted].
25. However, although, in such circumstances, the national courts may, case by case, take account — on the basis of objective evidence — of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (Paletta II, paragraph 25).
26. In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.
27. That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.
28. In this connection, the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, on the basis of the powers conferred upon it by Article 54(3)(g) of the EC Treaty, to achieve complete harmonisation.

[...]

30. Accordingly, the refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles 52 and 58 of the Treaty, in so far as it prevents any exercise of the right freely to set up a secondary establishment which Articles 52 and 58 are specifically intended to guarantee.
31. The final question to be considered is whether the national practice in question might not be justified for the reasons put forward by the Danish authorities.

[...]

34. [...] It should be borne in mind that, according to the Court's case-law, 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 [references omitted]

35. Those conditions are not fulfilled in the case in the main proceedings. First, the practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk.

[...]

37. Second, contrary to the arguments of the Danish authorities, it is possible to adopt measures which are less restrictive, or which interfere less with fundamental freedoms, by, for example, making it possible in law for public creditors to obtain the necessary guarantees.
38. Lastly, the fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office does not preclude that first State from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned. In any event, combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State.
39. The answer to the question referred must therefore be that it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

[...]

### 1.2.4 Case C-55/94: Gebhard



## **NOTE AND QUESTIONS**

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The distinction between the freedom to provide services and the freedom of establishment is not a purely theoretical one. Whereas Article 43 (freedom of establishment) accords to non-nationals the conditions of doing business which apply to nationals, Article 49 (freedom to provide services) may in certain cases place a provider of services in a different and even more favourable position than a national established in the host Member State. This distinction depends closely on the factual circumstances and has never been precisely and systematically defined.

In Gebhard, the Court's analysis of the distinction between right of establishment and right to provide services is its most precise and detailed one to date and clearly applies to commercial activities as well as to professional ones.

1. What are the critical elements in drawing the distinction set forth in the Court's decision?
2. Would you agree with the approach Court adopted? What difficulties could it create?

#### **Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano**

##### **Case C-55/94**

30 November 1995

Court of Justice

ECR [1995] I-04165

<http://www.curia.eu.int/en/content/juris/index.htm>

#### **Summary of the facts and procedure:**

*Reinhard Gebhard, a German national, obtained a law degree in Germany. He is authorized to practice as a Rechtsanwalt in Germany and was admitted to the Stuttgart Bar in 1977. Although he does not have chambers of his own in Germany, he works as an "independent collaborator" in a set of chambers there. Since 1978, he has resided in Italy (Milan), where he has worked, initially as*

a collaborator, later as an associate member of a set of chambers of lawyers practicing in association in Milan. On July 30, 1989, Gebhard opened his own chambers in Milan where Italian avvocati and procuratori work in collaboration with him. In September 1991, disciplinary proceedings were initiated against Gebhard on the ground that he had practiced his profession in Italy on a permanent basis whilst using the title avvocato, thereby violating Italian Law No. 31/1982 on the provision of lawyers' services. Article 2 of Law No. 31/82 provides that nationals of Member States authorized to practice as lawyers in the Member State from which they come shall be permitted to pursue lawyers' professional activities on a temporary basis in contentious and non-contentious matters in accordance with the detailed rules laid down in this title. For the purpose of the pursuit of the professional activities referred to in the preceding paragraph, the establishment on the territory of the Republic either of chambers or branch office is not permitted.

On October 14, 1991, Gebhard applied to the Milan Bar Council to be entered on the roll of members of the Bar. His application was based on Council Directive 89/48/EEC of December 21, 1988 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 and of his having completed a ten- year training period in Italy. On December 30, 1992, the Milan Bar Council took a decision, by which they imposed on Gebhard the sanction of suspension from pursuing his professional activity for six months. The Milan Bar Council did not take a formal decision on Gebhard's application to be entered on the roll of the Milan Bar. Gebhard appealed this decision to the Consiglio Nazionale Forense (National Bar Council). His appeal was directed not only against the sanction that was imposed on him but also against the implied rejection of the Milan Bar Council to be entered on the roll. He argued that he was entitled to pursue his professional activity from his own chambers in Milan, referring to Council Directive 77/249/EEC of March 22, 1977 to facilitate the effective exercise by lawyers of freedom to provide services, implemented in Italy by Law No. 31/82, the same law as Gebhard was alleged to have infringed. Directive 77/249/EEC draws a distinction between (a) activities relating to the representation of a client in legal proceedings or before public authorities and (b) all other activities. Article 4(1) of the Directive provides that "[a]ctivities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State with the exception of any conditions requiring residence, or registration with a professional organization, in that State." The National Bar Council stayed the disciplinary proceedings and referred to the Court two questions on the interpretation of Directive 77/249/EEC, namely whether the Italian law which prohibits lawyers established in another Member State who provide services in the territory of the Italian Republic from opening chambers or a principal or branch office in Italy is compatible with the Directive, and as to what criteria have to be applied in assessing whether activities are of a temporary nature.

#### **Judgement:**

[...]

- 20 The situation of a Community national who moves to another Member State of the Community in order there to pursue an economic activity is governed by the chapter of the Treaty on the free movement of workers, or the chapter on the right of establishment or the chapter on services, these being mutually exclusive.
- 21 Since the questions referred are concerned essentially with the concepts of "establishment" and "provision of services", the chapter on workers can be disregarded as having no bearing on those questions.
- 22 The provisions of the chapter on services are subordinate to those of the chapter on the right of establishment in so far, first, as the wording of the first paragraph of Article 59 assumes

that the provider and the recipient of the service concerned are "established" in two different Member States and, second, as the first paragraph of Article 60 specifies that the provisions relating to services apply only if those relating to the right of establishment do not apply. It is therefore necessary to consider the scope of the concept of "establishment".

- 23 The right of establishment, provided for in Articles 52 to 58 of the Treaty, is granted both to legal persons within the meaning of Article 58 and to natural persons who are nationals of a Member State of the Community. Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up.
- 24 It follows that a person may be established, within the meaning of the Treaty, in more than one Member State ° in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries (Article 52) and, as the Court has held, in the case of members of the professions, by establishing a second professional base (see Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971, paragraph 19).
- 25 The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see, to this effect, Case 2/74 *Reyners v Belgium* [1974] ECR 631, paragraph 21).
- 26 In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that he is to pursue his activity there on a temporary basis.
- 27 As the Advocate General has pointed out, the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.
- 28 However, that situation is to be distinguished from that of Mr Gebhard who, as a national of a Member State, pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State. Such a national comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.
- 29 The Milan Bar Council has argued that a person such as Mr Gebhard cannot be regarded for the purposes of the Treaty as being "established" in a Member State ° in his case, Italy ° unless he belongs to the professional body of that State or, at least, pursues his activity in collaboration or in association with persons belonging to that body.
- 30 That argument cannot be accepted.
- 31 The provisions relating to the right of establishment cover the taking-up and pursuit of activities (see, in particular, the judgment in *Reyners*, paragraphs 46 and 47). Membership of a professional body may be a condition of taking up and pursuit of particular activities. It cannot itself be constitutive of establishment.
- 32 It follows that the question whether it is possible for a national of a Member State to exercise his right of establishment and the conditions for exercise of that right must be determined in the light of the activities which he intends to pursue on the territory of the host Member State.

- 33 Under the terms of the second paragraph of Article 52, freedom of establishment is to be exercised under the conditions laid down for its own nationals by the law of the country where establishment is effected.
- 34 In the event that the specific activities in question are not subject to any rules in the host State, so that a national of that Member State does not have to have any specific qualification in order to pursue them, a national of any other Member State is entitled to establish himself on the territory of the first State and pursue those activities there.
- 35 However, the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability (see Case C-71/76 Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris [1977] ECR 765, paragraph 12). Such provisions may stipulate in particular that pursuit of a particular activity is restricted to holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be. They may also lay down the conditions for the use of professional titles, such as *avvocato*.
- 36 Where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 provides that the Council is to issue directives, such as Directive 89/48, for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the coordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.
- 37 It follows, however, from the Court's case-law that 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 (see Case C-19/92 Kraus v Land Baden-Wuerttemberg [1993] ECR I-1663, paragraph 32).
- 38 Likewise, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State (see Case C-340/89 Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg [1991] ECR I-2357, paragraph 15). Consequently, they must take account of the equivalence of diplomas (see the judgment in Thieffry, paragraphs 19 and 27) and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned (see the judgment in Vlassopoulou, paragraph 16).
- 39 Accordingly, it should be stated in reply to the questions from the Consiglio Nazionale Forense that:
- the temporary nature of the provision of services, envisaged in the third paragraph of Article 60 of the EC Treaty, is to be determined in the light of its duration, regularity, periodicity and continuity;
  - the provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question;
  - a national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under

the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services;

- the possibility for a national of a Member State to exercise his right of establishment, and the conditions for his exercise of that right, must be determined in the light of the activities which he intends to pursue on the territory of the host Member State;
- where the taking-up of a specific activity is not subject to any rules in the host State, a national of any other Member State will be entitled to establish himself on the territory of the first State and pursue that activity there. On the other hand, where the taking-up or the 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;
- likewise, Member States must take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned.

[...]

## **2. FREEDOM TO PROVIDE SERVICES**

### **2.1 Relevant Treaty Provisions**

#### **TREATY ESTABLISHING THE EUROPEAN COMMUNITY**

##### **Services**

##### **Article 49 (ex Article 59)**

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited 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.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

##### **Article 50 (ex Article 60)**

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.

'Services' shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

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 that State on its own nationals.

#### **Article 51 (ex Article 61)**

1. Freedom to provide services in the field of transport shall be governed by the provisions of the title relating to transport.

2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

#### **Article 52 (ex Article 63)**

1. In order to achieve the liberalisation of a specific service, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the European Parliament, issue directives acting by a qualified majority.

2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

#### **Article 53 (ex Article 64)**

The Member States declare their readiness to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 52(1), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

#### **Article 54 (ex Article 65)**

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 49.

#### **Article 55 (ex Article 66)**

The provisions of Articles 45 to 48 shall apply to the matters covered by this chapter.

## 2.2 Cases

### 2.2.1 Case 33/74: Van Bisbergen



#### **NOTE AND QUESTIONS**

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1. Compare this case to the previously studied decision of the Court in *Reyners*. While reading this case see the scope of the freedom to provide services as stated in Articles 49 and 50.
2. An issue which was bound to arise was whether Article 49 could have direct effect. The Commission and various legal commentators regarded this as not likely. What did the Court say?

#### **Johannes Henricus Maria van Bisbergen**

##### **Case 33/74**

3 December 1974

Court of Justice

[1974] ECR 1299

<http://www.curia.eu.int/en/content/juris/index.htm>

#### **Summary of the facts and procedure:**

*Kortmann, a Dutch legal representative, was engaged by van Bisebergen to represent him in a Dutch administrative proceeding. The Dutch authorities refused to allow Kortmann to continue to act in the matter after he became a Belgian resident, because Dutch law required legal representatives to reside in the Netherlands. Kortmann appealed this decision.*

#### **Judgement:**

[...]

- 6 The court is requested to interpret articles 59 and 60 in relation to a provision of national law whereby only persons established in the territory of the state concerned are entitled to act as legal representatives before certain courts or tribunals.
- 7 Article 59, the first paragraph of which is the only provision in question in this connexion,

provides that: "within the framework of the provisions set out below, restrictions on freedom to provide services within the community shall be progressively abolished during the transitional period 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".

- 8 Having defined the concept "services" within the meaning of the treaty in its first and second paragraphs, article 60 lays down in the third paragraph that, without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to provide that service, temporarily pursue his activity in the state where the service is provided, under the same conditions as are imposed by that state on its own nationals.
- 9 The question put by the national court therefore seeks to determine whether the requirement that legal representatives be permanently established within the territory of the state where the service is to be provided can be reconciled with the prohibition, under articles 59 and 60, on all restrictions on freedom to provide services within the community.
- 10 The restrictions to be abolished pursuant to articles 59 and 60 include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the state where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service.
- 11 In particular, a requirement that the person providing the service must be habitually resident within the territory of the state where the service is to be provided may, according to the circumstances, have the result of depriving article 59 of all useful effect, in view of the fact that the precise object of that article is to abolish restrictions on freedom to provide services imposed on persons who are not established in the state where the service is to be provided.
- 12 However, taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the treaty where they have as their purpose the application of professional rules justified by the general good - in particular rules relating to organization, qualifications, professional ethics, supervision and liability - which are binding upon any person established in the state in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another member state.
- 13 Likewise, a member state cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.
- 14 In accordance with these principles, the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes within the jurisdiction of certain courts or tribunals cannot be considered incompatible with the provisions of articles 59 and 60, where such requirement is objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics.
- 15 That cannot, however, be the case when the provision of certain services in a member state is not subject to any sort of qualification or professional regulation and when the requirement of habitual residence is fixed by reference to the territory of the state in question.
- 16 In relation to a professional activity the exercise of which is similarly unrestricted within the territory of a particular member state, the requirement of residence within that state constitutes a restriction which is incompatible with articles 59 and 60 of the treaty if the

administration of justice can satisfactorily be ensured by measures which are less restrictive, such as the choosing of an address for service.

- 17 It must therefore be stated in reply to the question put to the court that the first paragraph of article 59 and the third paragraph of article 60 of the EEC treaty must be interpreted as meaning that the national law of a member state cannot, by imposing a requirement as to habitual residence within that state, deny persons established in another member state the right to provide services, where the provision of services is not subject to any special condition under the national law applicable.
- 18 The court is also asked whether the first paragraph of article 59 and the third paragraph of article 60 of the EEC treaty are directly applicable and create individual rights which national courts must protect.
- 19 This question must be resolved with reference to the whole of the chapter relating to services, taking account, moreover, of the provisions relating to the right of establishment to which reference is made in article 66.
- 20 With a view to the progressive abolition during the transitional period of the restrictions referred to in article 59, article 63 has provided for the drawing up of a " general programme " - laid down by Council decision of 18 December 1961 (1962, p. 32) - to be implemented by a series of directives.
- 21 within the scheme of the chapter relating to the provision of services, these directives are intended to accomplish different functions, the first being to abolish, during the transitional period, restrictions on freedom to provide services, the second being to introduce into the law of member states a set of provisions intended to facilitate the effective exercise of this freedom, in particular by the mutual recognition of professional qualifications and the coordination of laws with regard to the pursuit of activities as self-employed persons.
- 22 These directives also have the task of resolving the specific problems resulting from the fact that where the person providing the service is not established, on a habitual basis, in the state where the service is performed he may not be fully subject to the professional rules of conduct in force in that state.
- 23 As regards the phased implementation of the chapter relating to services, article 59, interpreted in the light of the general provisions of article 8 (7) of the treaty, expresses the intention to abolish restrictions on freedom to provide services by the end of the transitional period, the latest date for the entry into force of all the rules laid down by the treaty.
- 24 The provisions of article 59, the application of which was to be prepared by directives issued during the transitional period, therefore became unconditional on the expiry of that period.
- 25 The provisions of that article abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a member state other than that in which the service is to be provided.
- 26 Therefore, as regards at least the specific requirement of nationality or of residence, articles 59 and 60 impose a well-defined obligation, the fulfilment of which by the member states cannot be delayed or jeopardized by the absence of provisions which were to be adopted in pursuance of powers conferred under articles 63 and 66.
- 27 Accordingly, the reply should be that the first paragraph of article 59 and the third paragraph of article 60 have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a member state other than that in which the service is to be provided.

[...]

## 2.2.2 Joined Cases 286/82 and 26/83: Luisi and Carbone



### **NOTE AND QUESTIONS**

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1. Read carefully the ECJ decision and see the new element in this decision and reconsider the first question under Van Biebrgen about the scope of the articles 49 and 50.
2. Do you agree with the teleological analysis of Article 49?
3. Pay attention to the terminology in the case, the difference between “movement of capital” and “current payment”.

#### **Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro**

##### **Joined Cases 286/82 and 26/83**

31 January 1984

Court of Justice

[1984] ECR 377

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

- 8 IT IS APPARENT FROM THE WORDING OF THE QUESTIONS SUBMITTED FOR A PRELIMINARY RULING AND FROM THE STATEMENT OF REASONS CONTAINED IN THE TWO ORDERS FOR REFERENCE THAT THE PROBLEMS OF INTERPRETATION OF COMMUNITY LAW ARISING IN THESE CASES ARE:
  - (A) WHETHER TOURISM AND TRAVEL FOR THE PURPOSES OF BUSINESS, EDUCATION AND MEDICAL TREATMENT FALL WITHIN THE SCOPE OF SERVICES, OR OF INVISIBLE TRANSACTIONS WITHIN THE MEANING OF ARTICLE 106 (3) OF THE TREATY, OR OF BOTH THOSE CATEGORIES AT ONCE;
  - (B) WHETHER THE TRANSFER OF FOREIGN CURRENCY FOR THOSE FOUR PURPOSES MUST BE REGARDED AS A CURRENT PAYMENT OR AS A MOVEMENT OF CAPITAL, IN PARTICULAR WHEN BANK NOTES ARE

TRANSFERRED PHYSICALLY;

(C) WHAT DEGREE OF LIBERALIZATION OF PAYMENTS RELATING TO THOSE FOUR PURPOSES IS PROVIDED FOR IN ARTICLE 106 OF THE TREATY;

(D) WHAT CONTROL MEASURES REGARDING TRANSFERS OF FOREIGN CURRENCY MEMBER STATES ARE ENTITLED TO TAKE IN RELATION TO THE PAYMENTS SO LIBERALIZED.

(A) "SERVICES" AND "INVISIBLE TRANSACTIONS"

9 ACCORDING TO ARTICLE 60 OF THE TREATY, SERVICES ARE DEEMED TO BE "SERVICES" WITHIN THE MEANING OF THE 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. WITHIN THE CONTEXT OF TITLE III OF PART TWO OF THE TREATY ("FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL"), THE FREE MOVEMENT OF PERSONS INCLUDES THE MOVEMENT OF WORKERS WITHIN THE COMMUNITY AND FREEDOM OF ESTABLISHMENT WITHIN THE TERRITORY OF THE MEMBER STATES.

10 BY VIRTUE OF ARTICLE 59 OF THE TREATY, RESTRICTIONS ON FREEDOM TO PROVIDE SUCH SERVICES ARE TO BE ABOLISHED IN RESPECT OF NATIONALS OF MEMBER STATES WHO ARE ESTABLISHED IN A MEMBER STATE OTHER THAN THAT OF THE PERSON FOR WHOM THE SERVICE IS INTENDED. IN ORDER TO ENABLE SERVICES TO BE PROVIDED, THE PERSON PROVIDING THE SERVICE MAY GO TO THE MEMBER STATE WHERE THE PERSON FOR WHOM IT IS PROVIDED IS ESTABLISHED OR ELSE THE LATTER MAY GO TO THE STATE IN WHICH THE PERSON PROVIDING THE SERVICE IS ESTABLISHED. WHILST THE FORMER CASE IS EXPRESSLY MENTIONED IN THE THIRD PARAGRAPH OF ARTICLE 60, WHICH PERMITS THE PERSON PROVIDING THE SERVICE TO PURSUE HIS ACTIVITY TEMPORARILY IN THE MEMBER STATE WHERE THE SERVICE IS PROVIDED, THE LATTER CASE IS THE NECESSARY COROLLARY THEREOF, WHICH FULFILS THE OBJECTIVE OF LIBERALIZING ALL GAINFUL ACTIVITY NOT COVERED BY THE FREE MOVEMENT OF GOODS, PERSONS AND CAPITAL.

11 FOR THE IMPLEMENTATION OF THOSE PROVISIONS, TITLE II OF THE GENERAL PROGRAMME FOR THE ABOLITION OF RESTRICTIONS ON FREEDOM TO PROVIDE SERVICES (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION, SECOND SERIES IX, P. 3), WHICH WAS DRAWN UP BY THE COUNCIL PURSUANT TO ARTICLE 63 OF THE TREATY ON 18 DECEMBER 1961, ENVISAGES INTER ALIA THE REPEAL OF PROVISIONS LAID DOWN BY LAW, REGULATION OR ADMINISTRATIVE ACTION WHICH IN ANY MEMBER STATE GOVERN, FOR ECONOMIC PURPOSES, THE ENTRY, EXIT AND RESIDENCE OF NATIONALS OF MEMBER STATES, WHERE SUCH PROVISIONS ARE NOT JUSTIFIED ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH AND ARE LIABLE TO HINDER THE PROVISION OF SERVICES BY SUCH PERSONS.

12 ACCORDING TO ARTICLE 1 THEREOF, COUNCIL DIRECTIVE 64/221/EEC OF 25 FEBRUARY 1964 ON THE COORDINATION OF SPECIAL MEASURES CONCERNING THE MOVEMENT AND RESIDENCE OF FOREIGN NATIONALS WHICH ARE JUSTIFIED ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1963-1964, P. 117) APPLIES INTER ALIA TO ANY NATIONAL OF A MEMBER STATE WHO TRAVELS TO ANOTHER MEMBER STATE "AS A RECIPIENT OF SERVICES". COUNCIL DIRECTIVE 73/148/EEC OF 21 MAY 1973 ON THE ABOLITION OF RESTRICTIONS ON MOVEMENT AND RESIDENCE WITHIN THE COMMUNITY FOR NATIONALS OF MEMBER STATES WITH REGARD TO

ESTABLISHMENT AND THE PROVISION OF SERVICES (OFFICIAL JOURNAL 1973, L 172, P. 14) GRANTS BOTH THE PROVIDER AND THE RECIPIENT OF A SERVICE A RIGHT OF RESIDENCE CO-TERMINOUS WITH THE PERIOD DURING WHICH THE SERVICE IS PROVIDED.

- 13 BY BASING THE GENERAL PROGRAMME FOR THE ABOLITION OF RESTRICTIONS ON THE FREEDOM TO PROVIDE SERVICES PARTLY ON ARTICLE 106 OF THE TREATY, ITS AUTHORS SHOWED THAT THEY WERE AWARE OF THE EFFECT OF THE LIBERALIZATION OF SERVICES ON THE LIBERALIZATION OF PAYMENTS. IN FACT, THE FIRST PARAGRAPH OF THAT ARTICLE PROVIDES THAT ANY PAYMENTS CONNECTED WITH THE MOVEMENT OF GOODS OR SERVICES ARE TO BE LIBERALIZED TO THE EXTENT TO WHICH THE MOVEMENT OF GOODS AND SERVICES HAS BEEN LIBERALIZED BETWEEN MEMBER STATES.
- 14 AMONG THE RESTRICTIONS ON THE FREEDOM TO PROVIDE SERVICES WHICH MUST BE ABOLISHED, THE GENERAL PROGRAMME MENTIONS, IN SECTION C OF TITLE III, IMPEDIMENTS TO PAYMENTS FOR SERVICES, PARTICULARLY WHERE, ACCORDING TO SECTION D OF TITLE III AND IN CONFORMITY WITH ARTICLE 106 (2), THE PROVISION OF SUCH SERVICES IS LIMITED ONLY BY RESTRICTIONS IN RESPECT OF THE PAYMENTS THEREFOR. BY VIRTUE OF SECTION B OF TITLE V OF THE GENERAL PROGRAMME, THOSE RESTRICTIONS WERE TO BE ABOLISHED BEFORE THE END OF THE FIRST STAGE OF THE TRANSITIONAL PERIOD, SUBJECT TO A PROVISIO PERMITTING LIMITS ON "FOREIGN CURRENCY ALLOWANCES FOR TOURISTS" TO BE RETAINED DURING THAT PERIOD. THOSE PROVISIONS WERE IMPLEMENTED BY COUNCIL DIRECTIVE 63/340/EEC OF 31 MAY 1963 ON THE ABOLITION OF ALL PROHIBITIONS ON OR OBSTACLES TO PAYMENTS FOR SERVICES WHERE THE ONLY RESTRICTIONS ON EXCHANGE OF SERVICES ARE THOSE GOVERNING SUCH PAYMENTS (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1963-1964, P. 31). ARTICLE 3 OF THAT DIRECTIVE ALSO REFERS TO FOREIGN EXCHANGE ALLOWANCES FOR TOURISTS.
- 15 HOWEVER, BOTH THE GENERAL PROGRAMME AND THE AFORESAID DIRECTIVE RESERVE THE RIGHT FOR MEMBER STATES TO VERIFY THE NATURE AND GENUINENESS OF TRANSFERS OF FUNDS AND OF PAYMENTS AND TO TAKE ALL NECESSARY MEASURES IN ORDER TO PREVENT CONTRAVENTION OF THEIR LAWS AND REGULATIONS, "IN PARTICULAR AS REGARDS THE ISSUE OF FOREIGN CURRENCY TO TOURISTS".
- 16 IT FOLLOWS THAT THE FREEDOM TO PROVIDE SERVICES INCLUDES THE FREEDOM, FOR THE RECIPIENTS OF SERVICES, TO GO TO ANOTHER MEMBER STATE IN ORDER TO RECEIVE A SERVICE THERE, WITHOUT BEING OBSTRUCTED BY RESTRICTIONS, EVEN IN RELATION TO PAYMENTS AND THAT TOURISTS, PERSONS RECEIVING MEDICAL TREATMENT AND PERSONS TRAVELLING FOR THE PURPOSE OF EDUCATION OR BUSINESS ARE TO BE REGARDED AS RECIPIENTS OF SERVICES.
- 17 ARTICLE 106 (3) PROVIDES FOR THE PROGRESSIVE ABOLITION OF RESTRICTIONS ON TRANSFERS CONNECTED WITH THE "INVISIBLE TRANSACTIONS" LISTED IN ANNEX III TO THE TREATY. AS THE NATIONAL COURT CORRECTLY STATED, THAT LIST INCLUDES, INTER ALIA, BUSINESS TRAVEL, TOURISM, PRIVATE TRAVEL FOR THE PURPOSE OF EDUCATION AND PRIVATE TRAVEL ON HEALTH GROUNDS.
- 18 HOWEVER, SINCE THAT PARAGRAPH IS MERELY SUBORDINATE TO PARAGRAPHS (1) AND (2) OF ARTICLE 106, AS IS APPARENT FROM THE SECOND SUBPARAGRAPH THEREOF, IT CANNOT BE APPLIED TO THE FOUR TYPES OF TRANSACTION IN QUESTION.

(B) "CURRENT PAYMENTS" AND "MOVEMENTS OF CAPITAL"

- 19 THE NATIONAL COURT HAS POINTED OUT THAT THE PHYSICAL TRANSFER OF BANK NOTES IS INCLUDED IN LIST D IN THE ANNEXES TO THE TWO DIRECTIVES WHICH THE COUNCIL ADOPTED PURSUANT TO ARTICLE 69 OF THE TREATY IN RELATION TO THE MOVEMENT OF CAPITAL (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1959-1962, P. 49, AND 1963-1964, P. 5). LIST D ENUMERATES THE MOVEMENTS OF CAPITAL FOR WHICH THE DIRECTIVES DO NOT REQUIRE THE MEMBER STATES TO ADOPT ANY LIBERALIZING MEASURE. THE QUESTION THEREFORE ARISES WHETHER THE REFERENCE IN THAT LIST TO THE PHYSICAL TRANSFER OF BANK NOTES IMPLIES THAT SUCH A TRANSFER ITSELF CONSTITUTES A MOVEMENT OF CAPITAL.
- 20 THE TREATY DOES NOT SPECIFY WHAT IS TO BE UNDERSTOOD BY THE MOVEMENT OF CAPITAL. HOWEVER, IN THE ANNEXES TO THE TWO ABOVE-MENTIONED DIRECTIVES A LIST IS GIVEN OF THE VARIOUS MOVEMENTS OF CAPITAL, TOGETHER WITH A NOMENCLATURE. ALTHOUGH THE PHYSICAL TRANSFER OF FINANCIAL ASSETS, IN PARTICULAR BANK NOTES, IS INCLUDED IN THAT LIST, THAT DOES NOT MEAN THAT ANY SUCH TRANSFER MUST IN ALL CIRCUMSTANCES BE REGARDED AS A MOVEMENT OF CAPITAL.
- 21 THE GENERAL SCHEME OF THE TREATY SHOWS, AND A COMPARISON BETWEEN ARTICLES 67 AND 106 CONFIRMS, THAT CURRENT PAYMENTS ARE TRANSFERS OF FOREIGN EXCHANGE WHICH CONSTITUTE THE CONSIDERATION WITHIN THE CONTEXT OF AN UNDERLYING TRANSACTION, WHILST MOVEMENTS OF CAPITAL ARE FINANCIAL OPERATIONS ESSENTIALLY CONCERNED WITH THE INVESTMENT OF THE FUNDS IN QUESTION RATHER THAN REMUNERATION FOR A SERVICE. FOR THAT REASON MOVEMENTS OF CAPITAL MAY THEMSELVES GIVE RISE TO CURRENT PAYMENTS, AS IS IMPLIED BY ARTICLES 67 (2) AND 106 (1).
- 22 THE PHYSICAL TRANSFER OF BANK NOTES MAY NOT THEREFORE BE CLASSIFIED AS A MOVEMENT OF CAPITAL WHERE THE TRANSFER IN QUESTION CORRESPONDS TO AN OBLIGATION TO PAY ARISING FROM A TRANSACTION INVOLVING THE MOVEMENT OF GOODS OR SERVICES.
- 23 CONSEQUENTLY, PAYMENTS IN CONNECTION WITH TOURISM OR TRAVEL FOR THE PURPOSES OF BUSINESS, EDUCATION OR MEDICAL TREATMENT CANNOT BE CLASSIFIED AS MOVEMENTS OF CAPITAL, EVEN WHERE THEY ARE EFFECTED BY MEANS OF THE PHYSICAL TRANSFER OF BANK NOTES.

(C) THE EXTENT TO WHICH THE PAYMENTS REFERRED TO IN ARTICLE 106 OF THE TREATY HAVE BEEN LIBERALIZED

- 24 AS REGARDS THE MOVEMENT OF SERVICES, ARTICLE 106 (1) PROVIDES THAT PAYMENTS RELATING THERETO MUST BE LIBERALIZED TO THE EXTENT TO WHICH THE MOVEMENT OF SERVICES ITSELF HAS BEEN LIBERALIZED BETWEEN MEMBER STATES IN ACCORDANCE WITH THE TREATY. BY VIRTUE OF ARTICLE 59 OF THE TREATY, RESTRICTIONS ON THE FREEDOM TO PROVIDE SERVICES WITHIN THE COMMUNITY WERE TO BE ABOLISHED DURING THE TRANSITIONAL PERIOD. AS FROM THE END OF THAT PERIOD, ANY RESTRICTIONS ON PAYMENTS RELATING TO THE PROVISION OF SERVICES MUST THEREFORE BE ABOLISHED.
- 25 CONSEQUENTLY, PAYMENTS RELATING TO TOURISM AND TRAVEL FOR THE PURPOSES OF BUSINESS, EDUCATION OR MEDICAL TREATMENT HAVE BEEN LIBERALIZED SINCE THE END OF THE TRANSITIONAL PERIOD.
- 26 THIS INTERPRETATION FINDS CONFIRMATION IN ARTICLE 54 OF THE ACT OF ACCESSION OF 1979, BY VIRTUE OF WHICH THE HELLENIC REPUBLIC IS

AUTHORIZED TO MAINTAIN RESTRICTIONS ON TRANSFERS RELATING TO TOURISM, BUT ONLY WITHIN CERTAIN LIMITS AND ONLY UNTIL 31 DECEMBER 1985. THAT ARTICLE IMPLIES THAT WITHOUT THAT DEROGATION THE TRANSFERS IN QUESTION WOULD HAVE HAD TO BE LIBERALIZED IMMEDIATELY.

(D) CONTROL MEASURES IN RESPECT OF TRANSFERS OF FOREIGN CURRENCY

- 27 THE LAST ASPECT OF THE PROBLEM RAISED IN THESE CASES CONCERNS THE QUESTION WHETHER, AND IF SO TO WHAT EXTENT, MEMBER STATES HAVE RETAINED THE POWER TO SUBJECT LIBERALIZED TRANSFERS AND PAYMENTS TO CONTROL MEASURES APPLICABLE TO THE TRANSFER OF FOREIGN CURRENCY.
- 28 IN THAT RESPECT, IT SHOULD BE NOTED IN THE FIRST PLACE THAT THE LIBERALIZATION OF PAYMENTS PROVIDED FOR IN ARTICLE 106 COMPELS MEMBER STATES TO AUTHORIZE THE PAYMENTS REFERRED TO IN THAT PROVISION IN THE CURRENCY OF THE MEMBER STATE IN WHICH THE CREDITOR OR BENEFICIARY RESIDES. PAYMENTS MADE IN THE CURRENCY OF A THIRD COUNTRY ARE NOT THEREFORE COVERED BY THAT PROVISION.
- 29 IT SHOULD ALSO BE NOTED THAT ARTICLE 2 OF DIRECTIVE 63/340, CITED ABOVE, STATES THAT THE LIBERALIZATION MEASURES PROVIDED FOR IN THE DIRECTIVE DO NOT LIMIT THE RIGHT OF MEMBER STATES TO "VERIFY THE NATURE AND GENUINENESS OF PAYMENTS". THIS PROVISIO APPEARS TO BE INSPIRED BY THE FACT THAT, AT THAT TIME, PAYMENTS RELATING TO THE MOVEMENTS OF GOODS AND SERVICES AND MOVEMENTS OF CAPITAL WERE NOT YET FULLY LIBERALIZED.
- 30 HOWEVER, EVEN THOUGH THE TRANSITIONAL PERIOD HAS ENDED THAT LIBERALIZATION HAS NOT YET BEEN FULLY ACCOMPLISHED. THE COUNCIL DIRECTIVES PROVIDED FOR IN ARTICLE 69 OF THE TREATY WITH A VIEW TO ATTAINING THE FREE MOVEMENT OF CAPITAL HAVE NOT YET IN FACT ABOLISHED ALL THE RESTRICTIONS IN THAT AREA, WHILST ARTICLE 67, WHICH PROVIDES FOR THAT FREEDOM, MUST, AS THE COURT HELD IN ITS JUDGMENT OF 11 NOVEMBER 1981 (CASE 203/80 CASATI (1981) ECR 2595), BE INTERPRETED AS MEANING THAT EVEN AFTER THE EXPIRY OF THE TRANSITIONAL PERIOD RESTRICTIONS ON THE EXPORT OF FOREIGN CURRENCY MAY NOT BE REGARDED AS HAVING BEEN ABOLISHED, IRRESPECTIVE OF THE TERMS OF THE DIRECTIVES ADOPTED PURSUANT TO ARTICLE 69.
- 31 IN THOSE CIRCUMSTANCES, MEMBER STATES HAVE RETAINED THE POWER TO IMPOSE CONTROLS ON TRANSFERS OF FOREIGN CURRENCY IN ORDER TO VERIFY THAT TRANSFERS DO NOT IN FACT CONSTITUTE MOVEMENTS OF CAPITAL, WHICH HAVE NOT BEEN LIBERALIZED. THAT POWER IS PARTICULARLY IMPORTANT SINCE IT IS BOUND UP WITH THE RESPONSIBILITY WHICH MEMBER STATES HAVE IN RELATION TO MONETARY MATTERS UNDER ARTICLES 104 AND 107 OF THE TREATY, A RESPONSIBILITY WHICH IMPLIES THAT APPROPRIATE MEASURES MAY BE ADOPTED IN ORDER TO PREVENT THE FLIGHT OF CAPITAL OR OTHER SPECULATION OF THAT KIND AGAINST THEIR CURRENCIES.
- 32 ARTICLES 108 AND 109 OF THE TREATY PROVIDE FOR THE MEASURES TO BE TAKEN AND THE PROCEDURES TO BE FOLLOWED WHERE A MEMBER STATE IS IN DIFFICULTIES OR IS SERIOUSLY THREATENED WITH DIFFICULTIES AS REGARDS ITS BALANCE OF PAYMENTS. HOWEVER, THOSE PROVISIONS, WHICH ARE TO REMAIN OPERATIVE EVEN AFTER THE FREE MOVEMENT OF CAPITAL HAS BEEN FULLY ACHIEVED RELATE ONLY TO PERIODS OF CRISIS.
- 33 IN THE ABSENCE OF ANY CRISIS AND UNTIL THE FREE MOVEMENT OF CAPITAL HAS BEEN FULLY ACHIEVED, IT MUST THEREFORE BE ACKNOWLEDGED THAT MEMBER STATES ARE EMPOWERED TO VERIFY THAT TRANSFERS OF FOREIGN

CURRENCY PURPORTEDLY INTENDED FOR LIBERALIZED PAYMENTS ARE NOT DIVERTED FROM THAT PURPOSE AND USED FOR UNAUTHORIZED MOVEMENTS OF CAPITAL. IN THAT CONNECTION, MEMBER STATES ARE ENTITLED TO VERIFY THE NATURE AND GENUINENESS OF THE TRANSACTIONS OR TRANSFERS IN QUESTION.

- 34 CONTROLS INTRODUCED FOR THAT PURPOSE MUST, HOWEVER, BE KEPT WITHIN THE LIMITS IMPOSED BY COMMUNITY LAW, IN PARTICULAR THOSE DERIVING FROM THE FREEDOM TO PROVIDE SERVICES AND TO MAKE PAYMENTS RELATING THERETO. CONSEQUENTLY, THEY MAY NOT HAVE THE EFFECT OF LIMITING PAYMENTS AND TRANSFERS IN CONNECTION WITH THE PROVISION OF SERVICES TO A SPECIFIC AMOUNT FOR EACH TRANSACTION OR FOR A GIVEN PERIOD, SINCE IN THAT CASE THEY WOULD INTERFERE WITH THE FREEDOMS RECOGNIZED BY THE TREATY. FOR THE SAME REASON, SUCH CONTROLS MAY NOT BE APPLIED IN SUCH A MANNER AS TO RENDER THOSE FREEDOMS ILLUSORY OR TO SUBJECT THE EXERCISE THEREOF TO THE DISCRETION OF THE ADMINISTRATIVE AUTHORITIES.
- 35 THESE FINDINGS DO NOT PRECLUDE A MEMBER STATE FROM FIXING FLAT-RATE LIMITS BELOW WHICH NO VERIFICATION IS CARRIED OUT AND FROM REQUIRING PROOF, IN THE CASE OF EXPENDITURE EXCEEDING THOSE LIMITS, THAT THE AMOUNTS TRANSFERRED HAVE ACTUALLY BEEN USED IN CONNECTION WITH THE PROVISION OF SERVICES, PROVIDED HOWEVER THAT THE FLAT-RATE LIMITS SO DETERMINED ARE NOT SUCH AS TO AFFECT THE NORMAL PATTERN OF THE PROVISION OF SERVICES.
- 36 IT IS FOR THE NATIONAL COURT TO DETERMINE IN EACH INDIVIDUAL CASE WHETHER THE CONTROLS ON TRANSFERS OF FOREIGN CURRENCY WHICH ARE AT ISSUE IN PROCEEDINGS BEFORE IT ARE IN CONFORMITY WITH THE LIMITS THUS DEFINED.
- 37 ON THE BASIS OF ALL THE FOREGOING CONSIDERATIONS, IT MAY BE STATED IN REPLY TO THE QUESTIONS SUBMITTED FOR A PRELIMINARY RULING THAT ARTICLE 106 OF THE TREATY MUST BE INTERPRETED AS MEANING THAT:

TRANSFERS IN CONNECTION WITH TOURISM OR TRAVEL FOR THE PURPOSES OF BUSINESS, EDUCATION OR MEDICAL TREATMENT CONSTITUTE PAYMENTS AND NOT MOVEMENTS OF CAPITAL, EVEN WHERE THEY ARE AFFECTED BY MEANS OF THE PHYSICAL TRANSFER OF BANK NOTES;

ANY RESTRICTIONS ON SUCH PAYMENTS ARE ABOLISHED AS FROM THE END OF THE TRANSITIONAL PERIOD;

MEMBER STATES RETAIN THE POWER TO VERIFY THAT TRANSFERS OF FOREIGN CURRENCY PURPORTEDLY INTENDED FOR LIBERALIZED PAYMENTS ARE NOT IN REALITY USED FOR UNAUTHORIZED MOVEMENTS OF CAPITAL;

CONTROLS INTRODUCED FOR THAT PURPOSE MAY NOT HAVE THE EFFECT OF LIMITING PAYMENTS AND TRANSFERS IN CONNECTION WITH THE PROVISION OF SERVICES TO A SPECIFIC AMOUNT FOR EACH TRANSACTION OR FOR A GIVEN PERIOD, OR OF RENDERING ILLUSORY THE FREEDOMS RECOGNIZED BY THE TREATY OR OF SUBJECTING THE EXERCISE THEREOF TO THE DISCRETION OF THE ADMINISTRATIVE AUTHORITIES;

SUCH CONTROLS MAY INVOLVE THE FIXING OF FLAT-RATE LIMITS BELOW WHICH NO VERIFICATION IS CARRIED OUT, WHEREAS IN THE CASE OF EXPENDITURE EXCEEDING THOSE LIMITS PROOF IS REQUIRED THAT THE AMOUNTS TRANSFERRED HAVE ACTUALLY BEEN USED IN CONNECTION WITH THE

PROVISION OF SERVICES, PROVIDED HOWEVER THAT THE FLAT-RATE LIMITS SO DETERMINED ARE NOT SUCH AS TO AFFECT THE NORMAL PATTERN OF THE PROVISION OF SERVICES.

[...]

### 2.2.3 Case C-384/93: Alpine Investments



#### **NOTE AND QUESTIONS**

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1. Compare this case to the previous two cases. Is there any difference in the decision of the ECJ?
2. Compare this case to the Keck decision from Unit IX and see if this is the same equivalent decision for freedom to provide services.

#### **2.2.3.1 Judgement of the Court of Justice**

##### **Alpine Investments v Minister van Financien**

**Case C- 384/93**

10 May 1995

Court of Justice

[1995] ECR I-1141

<http://www.curia.eu.int/en/content/juris/index.htm>

##### **Summary of the facts and procedure:**

*Alpine Investments offers services in the market of commodities futures contracts. The company is established in the Netherlands, and receives orders from clients in the Netherlands; but also in Belgium, France and the UK. At the time of the events, financial services were governed by the Dutch Law on Securities Transactions. Article 6(1) of that law prohibited a person from acting as an intermediary in securities transactions without a license; Article 8 empowered the Minister of Finance to grant narrow exemptions from that prohibition, provided that the exemption could be restricted with a view to preventing undesirable developments in securities trading. Alpine Investments was granted such an exception, permitting it to place orders with a specified broker,*

*Merrill Lynch. The exemption required Alpine Investments to comply with future rules issued by the Finance Ministry regarding client contact.*

*Subsequently, the Finance Ministry imposed a general prohibition on financial intermediaries who offered investments in off-market commodities futures by "cold calling" potential clients, which means calling potential customers and offering them services without the customers' prior consent to receiving telephone solicitation. The prohibition was adopted following complaints from investors who had made unfortunate investments, and since some of those complaints came from investors established in other Member States, the prohibition was extended to offers of services made to other Member States from the Netherlands with a view to preserve the reputation of the Netherlands financial sector also outside the Netherlands.*

*Alpine Investments was unsuccessful with an administrative complaint against the Ministry's prohibition and appealed to the Administrative Court. Alpine claimed that the prohibition against cold calling was incompatible with Article 49 TEC in so far as it concerned potential clients established in Member States other than the Netherlands.*

#### **Judgement:**

[...]

13 Alpine investments pleaded in particular that the prohibition of cold calling was incompatible with Article 59 of the Treaty in so far as it concerned potential clients established in Member States other than the Netherlands. The administrative Court referred several questions on the interpretation of that provision to the Court of justice:

'(1) must Article 59 of the EEC Treaty be interpreted as meaning that it also covers services which the provider offers by telephone from the Member State of his establishment to (potential) clients established in another Member State and therefore also provides from that Member State?

(2) does Article 59 also apply to the provisions and/or restrictions which in the Member State of establishment of the provider of services govern the lawful exercise of the occupation or business concerned but do not apply \* in any event not in the same way and to the same extent \* to the exercise of that occupation or business in the Member State of establishment of (potential) recipients of the service in question and for that reason may constitute for the provider of services when offering his services to (potential) clients established in another Member State hindrances that do not apply to providers of similar services established in that other Member State?

if the answer to the second question is yes:

(3)(a) can the concern to protect consumers and safeguard the reputation of the Netherlands securities trading sector which underlies a provision aimed at combating undesirable developments in the securities trading sector be regarded as imperative reasons of public interest justifying a hindrance such as that referred to in question (2)? (b) is a proviso in an exemption banning cold calling to be regarded as objectively necessary to protect the aforementioned concern and as proportionate to the objective pursued?

14 It should be noted as a preliminary point that, were it applicable to transactions on commodities futures markets, council directive 93/22/eec of 10 may 1993 on investment services in the securities field (OJ 1993 I 141, p. 27) post-dates the events which gave rise to the main proceedings. Furthermore, council directive 85/577/eec of 20 December 1985 concerning the protection of consumers in respect of contracts negotiated away

from business premises (OJ 1985 I 372, p. 31) applies neither to contracts concluded by telephone nor to contracts for securities (Article3(2)(e)).

15 The questions referred to the Court must therefore be examined solely in the light of the Treaty provisions on the freedom to provide services. It is common ground that, since they were provided for remuneration, the services provided by alpine investments are services covered by Article60 of the EEC Treaty.

16 The national Court's first and second questions essentially ask whether the prohibition of cold calling falls within the scope of Article59 of the Treaty. If so, its third question asks whether that prohibition may none the less be justified.

#### The first question

17 There are two aspects to the national Court's first question.

18 First, it asks whether the fact that the services in question are just offers without, as yet, an identifiable recipient of the service precludes application of Article59 of the Treaty.

19 The freedom to provide services would become illusory if national rules were at liberty to restrict offers of services. The prior existence of an identifiable recipient cannot therefore be a condition for application of the provisions on the freedom to provide services.

20 The second aspect of the question is whether Article59 covers services which the provider offers by telephone to persons established in another Member State and which he provides without moving from the Member State in which he is established.

21 In this case, the offers of services are made by a provider established in one Member State to a potential recipient established in another Member State. It follows from the express terms of Article59 that there is therefore a provision of services within the meaning of that provision.

22 The answer to the first question is therefore that, on a proper construction, Article59 of the EEC Treaty covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established.

#### The second question

23 The national Court's second question asks whether rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services within the meaning of Article59 of the Treaty.

24 The preliminary observation should be made that the prohibition at issue applies to the offer of cross-border services.

25 In order to reply to the national Court's question, three points must be examined in turn.

26 First, it must be determined whether the prohibition against telephoning potential clients in another Member State without their prior consent can constitute a restriction on freedom to provide services. The national Court draws the Court's attention to the fact that providers established in the Member States where the potential recipients reside are not necessarily subject to the same prohibition or in any event not on the same terms.

27 A prohibition such as that at issue in the main proceedings does not constitute a restriction on freedom to provide services within the meaning of Article59 solely by virtue of the fact that other Member States apply less strict rules to providers of similar services established in their territory (see the judgment in case C-379/92 Peralta [1994] ECR I-3453, paragraph 48).

28 However, such a prohibition deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can

therefore constitute a restriction on the freedom to provide cross-border services.

- 29 Secondly, it must be considered whether that conclusion may be affected by the fact that the prohibition at issue is imposed by the Member State in which the provider is established and not by the Member State in which the potential recipient is established.
- 30 The first paragraph of Article 59 of the Treaty prohibits restrictions on freedom to provide services within the Community in general. Consequently, that provision covers not only restrictions laid down by the state of destination but also those laid down by the state of origin. As the Court has frequently held, the right freely to provide services may be relied on by an undertaking as against the state in which it is established if the services are provided for persons established in another Member State (see case C-18/93 *Corsica ferries Italy v Corpo dei piloti del porto di Genova* [1994] ECR I-1783, paragraph 30; *Peralta*, cited above, paragraph 40, and case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 14).
- 31 It follows that the prohibition of cold calling does not fall outside the scope of Article 59 of the Treaty simply because it is imposed by the state in which the provider of services is established.
- 32 Finally, certain arguments adduced by the Netherlands government and the United Kingdom must be considered.
- 33 They submit that the prohibition at issue falls outside the scope of Article 59 of the Treaty because it is a generally applicable measure, it is not discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States. Since it affects only the way in which the services are offered, it is analogous to the non-discriminatory measures governing selling arrangements which, according to the decision in joined cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16, do not fall within the scope of Article 30 of the Treaty.
- 34 Those arguments cannot be accepted.
- 35 Although a prohibition such as the one at issue in the main proceedings is general and non-discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States, it can none the less, as has been held above (see paragraph 28), constitute a restriction on the freedom to provide cross-border services.
- 36 Such a prohibition is not analogous to the legislation concerning selling arrangements held in *Keck and Mithouard* to fall outside the scope of Article 30 of the Treaty.
- 37 According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.
- 38 A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that state or move there in order to receive services but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.
- 39 The answer to the second question is therefore that rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to

potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

The third question

- 40 The national Court's third question asks whether imperative reasons of public interest justify the prohibition of cold calling and whether that prohibition must be considered to be objectively necessary and proportionate to the objective pursued.
- 41 The Netherlands government argues that the prohibition of cold calling in off-market commodities futures trading seeks both to safeguard the reputation of the Netherlands financial markets and to protect the investing public.
- 42 Financial markets play an important role in the financing of economic operators and, given the speculative nature and the complexity of commodities futures contracts, the smooth operation of financial markets is largely contingent on the confidence they inspire in investors. That confidence depends in particular on the existence of professional regulations serving to ensure the competence and trustworthiness of the financial intermediaries on whom investors are particularly reliant.
- 43 Although the protection of consumers in the other Member States is not, as such, a matter for the Netherlands authorities, the nature and extent of that protection does none the less have a direct effect on the good reputation of Netherlands financial services.
- 44 Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.
- 45 As for the proportionality of the restriction at issue, it is settled case-law that requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective (see case C-288/89 *Collectieve Antennevoorziening gouda and others v Commissariat voor de media* [1991] ECR I-4007, paragraph 15).
- 46 As the Netherlands government has justifiably submitted, in the case of cold calling the individual, generally caught unawares, is in a position neither to ascertain the risks inherent in the type of transactions offered to him nor to compare the quality and price of the caller's services with competitors' offers. Since the commodities futures market is highly speculative and barely comprehensible for non-expert investors, it was necessary to protect them from the most aggressive selling techniques.
- 47 Alpine investments argues however that the Netherlands government's prohibition of cold calling is not necessary because the Member State of the provider of services should rely on the controls imposed by the Member State of the recipient.
- 48 That argument must be rejected. The Member State from which the telephone call is made is best placed to regulate cold calling. Even if the receiving state wishes to prohibit cold calling or to make it subject to certain conditions, it is not in a position to prevent or control telephone calls from another Member State without the cooperation of the competent authorities of that state.
- 49 Consequently, the prohibition of cold calling by the Member State from which the telephone call is made, with a view to protecting investor confidence in the financial markets of that state, cannot be considered to be inappropriate to achieve the objective of securing the integrity of those markets.
- 50 Alpine investments also argues that a general prohibition of telephone canvassing of potential clients is not necessary for the achievement of the objectives pursued by the Netherlands authorities. Requiring broking firms to tape-record unsolicited telephone calls made by them would suffice to protect consumers effectively. Such rules have moreover

been adopted in the United Kingdom by the securities and futures authority.

- 51 That point of view cannot be accepted. As the advocate general correctly states in point 88 of his opinion, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law.
- 52 Alpine investments argues finally that, since it is of a general nature, the prohibition of cold calling does not take into account the conduct of individual undertakings and accordingly imposes an unnecessary burden on undertakings which have never been the subject of complaints by consumers.
- 53 That argument must also be rejected. Limiting the prohibition of cold calling to certain undertakings because of their past conduct might not be sufficient to achieve the objective of restoring and maintaining investor confidence in the national securities markets in general.
- 54 In any event, the rules at issue are limited in scope. First, they prohibit only the contacting of potential clients by telephone or in person without their prior agreement in writing, while other techniques for making contact are still permitted. Next, the measure affects relations with potential clients but not with existing clients who may still give their written agreement to further calls. Finally, the prohibition of unsolicited telephone calls is limited to the sector in which abuses have been found, namely the commodities futures market.
- 55 In the light of the above, the prohibition of cold calling does not appear disproportionate to the objective which it pursues.
- 56 The answer to the third question is therefore that Article 59 does not preclude national rules which, in order to protect investor confidence in national financial markets, prohibit the practice of making unsolicited telephone calls to potential clients resident in other Member States to offer them services linked to investment in commodities futures.

[...]

## 2.2.3.2 Opinion of AG Jacobs

### Alpine Investments v Minister van Financien

Case C- 384/93

26 January 1995

AG Jacobs

[1995] ECR I-1141

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

59. The government of the United Kingdom and the government of the Netherlands also rely on the judgment in Keck on the scope of Article 30 of the Treaty and submit that a similar view should be taken of the scope of Article 59 in the present case. In Keck the Court held that rules of the importing state restricting or prohibiting certain selling arrangements do not fall within the scope of Article 30 provided that they apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. It is argued that, similarly, Article 59 does not apply to non-discriminatory measures which affect the manner in which services are provided, such as the prohibition of cold calling in the present case.
60. While I accept that, in general, similar principles should apply to the interpretation of Articles 30 and 59, I do not find the reliance on Keck of assistance in the present case. In the first place, there are difficulties in determining the effect of the Keck judgment even in relation to Article 30. Moreover, even if one were to accept that some analogy with Keck might be appropriate here, there is a significant difference between Keck and the present case. In Keck, the Court was concerned with rules of the importing state relating to selling arrangements for the sale of goods in the territory of that state. In the present case, the exporting state requires compliance with its own rules of marketing not only for the provision of services in its territory but also in the territory of other Member States.
61. There is a further reason why the principle laid down by the Court in Keck should not be applied in the present case. If it were accepted that that principle applies both to rules concerning selling arrangements imposed by the Member State of exportation and to those imposed by the Member State of importation, then it would follow that both sets of rules would fall outside the scope of application of Article 59, provided that they were non-discriminatory. A person exporting services would then need to comply with both sets of rules even if they were not objectively justified. That would render the freedom to provide services nugatory. Moreover those sets of rules might even impose contradictory requirements.
62. I conclude therefore that the contested prohibition of cold calling is a restriction on the freedom to provide services within the meaning of Article 59.

[...]

## 2.2.4 Case C-3/95: Bröde

### Reiseburo Bröde v Gerd Sandker

#### Case C-3/95

12 December 1996

Court of Justice

ECR [1996] I-06511

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

2 [Two] questions were raised in judicial debt-collection proceedings brought on behalf of Reiseburo Broede against Mr Sandker. The dispute concerns the judicial recovery of debts by debt-collecting undertakings wishing to undertake the recovery in Germany of debts owed to other persons.

3 Under Paragraph 828 of the Zivilprozessordnung (Code of Civil Procedure) of 30 January 1877, in the version of 12 September 1950 (BGBl. I, p. 455, hereinafter 'the ZPO'), jurisdiction to grant orders for the enforcement of debts is vested in the Amtsgericht (Local Court).

4 Paragraph 78 of the ZPO provides that representation by a lawyer is compulsory only before a Landgericht or any higher court. It follows that representation by a lawyer is not, in principle, compulsory before an Amtsgericht.

5 Paragraph 79 of the ZPO provides in that regard:

'In all cases where representation by a lawyer is not compulsory, the parties may conduct the proceedings themselves or through the intermediary of any person having capacity to conduct legal proceedings, acting as agent.'

6 However, Article 1(1) of the Rechtsberatungsgesetz (Law on Legal Advice) of 17 December 1935 (RGBl. I, p. 1478, hereinafter 'the RBerG') provides:

'Only persons who have been given the corresponding authorization by the competent authority may, in the course of business - whether as their principal activity or as an ancillary activity, and whether for remuneration or without charge - engage in the conduct of legal matters on behalf of others, including the provision of legal advice and the collection of debts owed to others or debts assigned for the purposes of collection. Each authorization shall be granted for one field of activity:

...

(5) to debt-collecting undertakings, for the extra-judicial recovery of debts (debt-collection agencies),

...

It may be exercised only under the occupational designation corresponding to the authorization.'

- 7 Reisebuero Broede, the creditor in the main proceedings, is a travel agency established in Cologne, Germany. On 29 December 1992 it obtained from the Amtsgericht Hagen an enforceable decision against Mr Sandker, who resides in Dortmund, also in Germany.
- 8 On 8 May 1994 Reisebuero Broede gave INC Consulting SARL ('INC') authority inter alia to take all recovery measures necessary in order to secure full settlement of the debt. INC is a company registered with the Tribunal de Commerce (Commercial Court), Senlis, France, under No B 391 100 021 (93B185) and is engaged in the provision of debt-collection and corporate consultancy services.
- 9 On 19 May 1994 INC in turn conferred a power of attorney on its managing director, Ms Ramthun, who resides in Overath, Germany, authorizing her to enforce the decision of the Amtsgericht Hagen on behalf of Reisebuero Broede and to take all related legal measures.
- 10 Accordingly, Ms Ramthun applied to the Amtsgericht Dortmund on 6 June 1994 for the issue of an attachment order against Mr Sandker.
- 11 By order of 23 August 1994, the Amtsgericht Dortmund dismissed that application on the ground that Ms Ramthun lacked the requisite capacity to act, since, under German law, debt-collection undertakings are prohibited from representing their creditor clients in legal proceedings. According to that court, the prohibition in question also applies to foreign debt-collection undertakings, notwithstanding Articles 59 and 60 of the EC Treaty, on which Reisebuero Broede relied. Ms Ramthun lodged an appeal against that decision by document dated 31 August 1994.
- 12 The Landgericht Dortmund considered that the dispute raised questions as to the interpretation of Community law; it therefore decided to stay proceedings and to refer the following questions to the Court:
- '(1) Does Article 59 of the EEC Treaty preclude a national rule which prohibits an undertaking established in another Member State from securing judicial recovery of debts of others on the ground that this activity is reserved under the national rule for persons to whom a special official licence has been issued for that purpose?
- (2) If the answer is in the affirmative: is this also the case where national law alone is to be applied in the recovery proceedings on the ground that the parties to the enforcement proceedings are resident within the State and the enforceable decision was also obtained within the State?'
- 13 Without raising any formal objection of inadmissibility, the German Government and the Commission express doubts as to the existence of a genuine Community element in the main proceedings. They question whether Ms Ramthun, a German national resident in Germany, is not in fact representing Reisebuero Broede, a travel agency established in Germany, as one of her own clients and not as a client of INC.
- 14 It has consistently been held that the provisions of the Treaty on freedom to provide services cannot apply to activities all of whose relevant elements are confined within a single Member State. Whether that is so in a particular case depends on findings of fact which are for the national court to make (Case C-23/93 TV10 v Commissariaat voor de Media [1994] ECR I-4795, paragraph 14).
- 15 In the present case, it is apparent from the order for reference and the information provided at the hearing that Reisebuero Broede gave a power of attorney to INC, which has its seat in France, and which itself gave its managing director, Ms Ramthun, power to act on behalf of the creditor company.
- 16 In those circumstances, the information before the Court leaves no room for doubt as to the cross-border nature of the case in the main proceedings.
- 17 By its first question, the national court seeks in essence to know whether Article 59 of the

Treaty precludes a national rule which prohibits an undertaking established in another Member State from securing judicial recovery of debts owed to others.

- 18 As a preliminary point, the German Government and the Commission question whether the issues raised by the reference do not in fact concern freedom of establishment rather than freedom to provide services. If it proved to be the case that INC was able, as a result of Ms Ramthun's residence in Germany, to establish a permanent presence in that country or that its activities were wholly or mainly concentrated on German territory, the provisions on freedom of establishment would apply.
- 19 It should be recalled that the provisions of the chapter on services are subordinate to those of the chapter on freedom of establishment (Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, paragraph 22).
- 20 The concept of establishment within the meaning of Articles 52 to 58 of the Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (judgment in Gebhard, cited above, paragraph 25).
- 21 By contrast, the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that the provider of services is to pursue his activity in another Member State on a temporary basis, although the fact that the provision of services is temporary does not mean that the provider of services may not equip himself with some form of infrastructure, such as an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of performing the services in question (judgment in Gebhard, paragraphs 26 and 27).
- 22 It is for the national court to determine, having regard to the duration, regularity, periodicity and continuity of INC's activities, whether the activity which it pursues in Germany is of a temporary nature for the purposes of the Treaty.
- 23 In this respect, it should be noted that Ms Ramthun stated, in response to written questions put by the Court, that INC undertook debt-collection work in Germany on behalf of Reisebuero Broede on six occasions between February and May 1994. At the hearing, Ms Ramthun further confirmed that INC had undertaken debt-collection work in France and in Germany for French clients and a number of foreign clients.
- 24 In those circumstances, it must be assumed, for the purposes of answering the questions referred, that the situation with which the main proceedings are concerned falls within Article 59 of the Treaty.
- 25 It has consistently been held that Article 59 requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-272/94 Guiot [1996] ECR I-1905).
- 26 In the present case, it is apparent from the documents before the Court and the observations made at the hearing by the German Government that in Germany an undertaking may carry out judicial debt-collection work for others only through the intermediary of a lawyer. The administrative authorization provided for by Article 1(1) of the RBerG, to which the national court refers, applies only to the extra-judicial recovery of debts and is therefore not relevant to the determination of the present case.
- 27 In prohibiting debt-collection undertakings from carrying out judicial debt-collection work themselves, without the involvement of a lawyer, Article 1(1) of the RBerG constitutes a

restriction on freedom to provide services within the meaning of Article 59 of the Treaty, albeit it applies without distinction to national providers of services and to those of other Member States, since it makes it impossible to provide those services in Germany, even where the activities of the provider of the services in that State are of a purely occasional nature.

- 28 Consequently, in accordance with settled case-law, if it is to fall outside the prohibition laid down by Article 59, the restriction imposed by the RBerG must fulfil four conditions: it must be applied in a non-discriminatory manner; it must be justified by imperative requirements in the general interest; it must be suitable for securing the attainment of the objective which it pursues; and it must not go beyond what is necessary in order to attain it (see Gebhard, paragraph 37). The Court has also stated in that connection that freedom to provide services may be restricted only by rules which are justified by overriding reasons in the general interest, in so far as that interest is not safeguarded by the rules to which the provider of the service is subject in the Member State where he is established (see, to that effect, Case C-180/89 Commission v Italy [1991] ECR I-709, paragraph 17, Case C-198/89 Commission v Greece [1991] ECR I-727, paragraph 18, and Case C-43/93 Vander Elst v Office des Migrations Internationales [1994] ECR I-3803, paragraph 16).
- 29 It is necessary, therefore, to consider whether those four conditions are fulfilled in circumstances such as those of the main proceedings.
- 30 As regards the first condition, it follows from what has already been said that the rule prohibiting a debt-collection agency from itself undertaking, in the course of business, the judicial recovery of debts, without representation by a lawyer, is not discriminatory and applies without distinction to national providers of services and to those of other Member States.
- 31 As to the second condition, the German Government maintains, without being contradicted in that regard, that Article 1(1) of the RBerG is intended, first, to protect the recipients of the services in question against the harm which they could suffer as a result of legal advice given to them by persons who did not possess the necessary professional or personal qualifications and, second, to safeguard the proper administration of justice (Case C-76/90 Saeger v Dennemeyer [1991] ECR I-4221, paragraph 16, and Case 33/74 Van Binsbergen v Bedrijfsvereniging Metaalnijverheid [1974] ECR 1299).
- 32 As regards the third and fourth conditions, however, the Commission and Reisebuero Broede maintain that the rule prohibiting a debt-collection agency from itself undertaking the judicial recovery of debts goes beyond what is necessary in order to attain the objectives pursued by the RBerG.
- 33 In that regard, Reisebuero Broede submits, in particular, that those objectives could equally well be attained by less restrictive measures. The German authorities could accept a certificate of integrity or solvency issued by the competent authorities of the Member State where the provider of the services is established, or could require it to elect domicile in the host Member State for the purposes of receiving official legal correspondence there.
- 34 The Commission maintains that the restrictions in issue are not concerned with the protection either of creditors or of officials responsible for the administration of justice, since, under Paragraph 79 of the ZPO, creditors can apply to an Amtsgericht for an attachment order either personally or through the intermediary of non-professional advisers instructed by them, and such applications are not subject to the requirement that they be represented by a lawyer.
- 35 It should be noted, first, that the main proceedings concern the representation of litigants by third parties who are legal persons acting in the course of business. The German Government has explained that, in allowing creditors engaged in legal proceedings to act in person or through the intermediary of another person, Paragraph 79 of the ZPO seeks to

limit the costs of proceedings before courts lower than a Landgericht. The possibility of acting through an intermediary is afforded only to natural persons. Such persons may, where appropriate, obtain, within the premises of the courts themselves, the advice of persons experienced in such matters. The position is different in the case of litigation services provided on a professional basis. That activity is reserved, according to the relevant provisions of the RBerG, to lawyers who are answerable personally to the courts.

- 36 Consequently, the fact, pointed out by the Commission, that a creditor or a non-professional adviser acting on his behalf can lodge an application for an attachment order does not preclude legislative provisions such as those at issue in the main proceedings from being regarded as justified in the general interest on the ground that they protect creditors or safeguard the sound administration of justice in relation to the provision of litigation services on a professional basis.
- 37 Second, it has consistently been held that, in the absence of specific Community rules in the matter, each Member State is free to regulate the exercise of the legal profession in its territory (Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971, paragraph 17).
- 38 As the Court has repeatedly observed, the application of professional rules to lawyers, in particular those relating to organization, qualifications, professional ethics, supervision and liability, ensures that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see to that effect, the judgments in Case 292/86 *Gullung v Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne* [1988] ECR 111 and *Van Binsbergen*, cited above).
- 39 According to the German Government, the rule that only lawyers may, in a professional capacity, represent individuals in legal proceedings, in a field involving complex legal issues and governed by numerous specific rules, ensures the protection of those to whom the services are provided and the sound administration of justice against the risks arising from incompetence or inexperience on the part of debt-collection agencies in that field.
- 40 Those guarantees, it submits, are all the more necessary in circumstances such as those of the main proceedings, where the object of the proceedings is the execution of an enforceable decision against an individual by means of an attachment order, and, consequently, the procedural rules ensuring the protection of individuals must be complied with.
- 41 As Community law presently stands, it is for the Member States to assess whether it is necessary to place restrictions on the professional recovery of debts by way of judicial proceedings. Although, in some Member States, that activity is not reserved to lawyers, the Federal Republic of Germany is entitled to consider that the objectives pursued by the RBerG cannot be attained, as regards that activity, by less restrictive means.
- 42 Whilst it is true that debt-collection agencies are not subject to legal regulation in France, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law (Case C-348/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paragraph 51).
- 43 The answer to the national court's first question must therefore be that Article 59 of the Treaty does not preclude a national rule which prohibits an undertaking established in another Member State from securing judicial recovery of debts owed to others on the ground that the exercise of that activity in a professional capacity is reserved to the legal profession.
- 44 In view of the answer given to the first question, there is no need to give a ruling on the second question.

[...]

## 2.2.5 Case C-415/93: Bosman

**Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others**

**Case C-415/93**

15 December 1995

Court of Justice

[1995] ECR I-4921

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of the facts and procedure:**

*Organized football in the European Union is played by clubs joined together in national associations. Each national association, including Belgium's ASBL Union Royale Belge des Societes de Football Association ("URBSFA"), belongs to the Federation Internationale de Football Association ("FIFA"), which organizes football internationally from its headquarters in Switzerland. FIFA is further divided into confederations for each continent, such as the Union of European Football Associations ("UEFA"), which is comprised of European national associations, including those from Member States. Football matches are played within national associations by clubs belonging to that association or an affiliate. Every professional player must be registered with his national association in order to play for a club. The URBSFA rules define a transfer as the transaction by which a player affiliated with an association obtains a change of club affiliation. Under those rules, clubs are required to offer professional players new contracts at least sixty-five days before the end of their current contract, failing which the player is designated an amateur and thereby falls under a different set of transfer rules. If the player rejects his club's offer, he is put on a list of players available during the month of May for "compulsory transfers" without the consent of his affiliate club and subject to payment of a compensation fee to that club for training and development costs. These transfer fees are calculated by multiplying the player's gross annual income by a factor depending on his age.*

*If a compulsory transfer does not take place before June 1, the "free transfer" period begins, during which transfers require agreement between both clubs on the amount of a freely negotiable transfer fee. A club's failure to pay an agreed upon transfer fee may result in sanctions imposed by the national association. In the event that a player's affiliate club does not conclude a free transfer agreement, the club must offer him a new contract for one season on the same terms offered before his original contract expired. If the player refuses this offer, his affiliate club will either suspend him or reclassify him as an amateur. Once suspended, a player's only options are to reach an agreement with his affiliate club or wait two years, after which he may obtain a transfer as an amateur without his club's consent. Before an international transfer takes place, the UEFA and FIFA regulations require that a player's former national association issue a transfer certificate acknowledging settlement of all financial commitments, including those related to transfer fees. Those regulations also stipulate that business relationships between the clubs are not to influence a player's ability to play for his new club. Under the most recent regulations, any dispute as to the*

amount of a transfer fee is submitted to UEFA or FIFA for calculation according to a function of the player's income, age, and, in some cases, achievement.

Beginning in the 1960's, football associations, including UEFA, introduced rules limiting the number of players of foreign nationality any club could field in a match. These foreign player rules use the term "nationality" to refer to whether a player is qualified to play for a country's national team, as opposed to a literal reference to a player's country of origin. In 1978, the Commission issued a press release describing a gentleman's agreement between UEFA and the Commission. UEFA agreed to amend its rules to allow clubs to field not more than three players who are nationals of other Member States, plus two players counted as assimilated based on how long they have played in the host Member State.

Belgian national Jean-Marc Bosman contracted with RC Liege as a professional football player for an average monthly salary of approximately 120,000 Belgian francs ("BFR"). On April 21, 1991, with Bosman's contract drawing to a close, RC Liege offered him a one-year contract at BFR30,000, the league minimum. Bosman refused the offer and was placed on the compulsory transfer list, with a transfer fee set at BFR11,743,000. Because he did not secure a contract by the end of the compulsory transfer period, Bosman contacted US Dunkerque, a French second division team and signed a contract with them for BFR100,000 a month plus a BFR900,000 signing bonus. In accordance with the procedure for free transfers, US Dunkerque and RC Liege concluded a separate contract for Bosman's temporary one season transfer for a compensation fee of BFR1,200,000 plus an irrevocable option in favor of US Dunkerque on a full transfer for BFR4,800,000. Both contracts were conditioned on receipt of the transfer certificate by the French national association before August 2, 1990. Due to doubts about US Dunkerque's solvency, RC Liege never requested issuance of a transfer certificate from URBSFA and the contracts never took effect. In addition, RC Liege suspended Bosman, thereby preventing him from playing for the entire season. Bosman sued RC Liege for lost wages. The Court d'Appel Liege stayed the proceedings and referred two questions to the ECJ regarding the compatibility of the transfer rules and the rules on foreign players with EC Treaty Articles 48, 85, and 86.

#### **Judgement:**

[...]

68 By its first question, the national Court seeks in substance to ascertain whether Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former a transfer, training or development fee.

Application of Article 48 to rules laid down by sporting associations

69 It is first necessary to consider certain arguments which have been put forward on the question of the application of Article 48 to rules laid down by sporting associations.

70 URBSFA argued that only the major European clubs may be regarded as undertakings, whereas clubs such as RC Liege carry on an economic activity only to a negligible extent. Furthermore, the question submitted by the national Court on the transfer rules does not concern the employment relationships between players and clubs but the business relationships between clubs and the consequences of freedom to affiliate to a sporting federation. Article 48 of the Treaty is accordingly not applicable to a case such as that in issue in the main proceedings.

- 71 UEFA argued, *inter alia*, that the Community authorities have always respected the autonomy of sport, that it is extremely difficult to distinguish between the economic and the sporting aspects of football and that a decision of the Court concerning the situation of professional players might call in question the organization of football as a whole. For that reason, even if Article 48 of the Treaty were to apply to professional players, a degree of flexibility would be essential because of the particular nature of the sport.
- 72 The German government stressed, first, that in most cases a sport such as football is not an economic activity. It further submitted that sport in general has points of similarity with culture and pointed out that, under Article 128(1) of the EC Treaty, the Community must respect the national and regional diversity of the cultures of the Member States. Finally, referring to the freedom of association and autonomy enjoyed by sporting federations under national law, it concluded that, by virtue of the principle of subsidiarity, taken as a general principle, intervention by public, and particularly Community, authorities in this area must be confined to what is strictly necessary.
- 73 In response to those arguments, it is to be remembered that, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty (see case 36/74 *Walrave v Union cycliste internationale* [1974] ECR 1405, paragraph 4). This applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service (see case 13/76 *Donà v Mantero* [1976] ECR 1333, paragraph 12).
- 74 It is not necessary, for the purposes of the application of the Community provisions on freedom of movement for workers, for the employer to be an undertaking; all that is required is the existence of, or the intention to create, an employment relationship.
- 75 Application of Article 48 of the Treaty is not precluded by the fact that the transfer rules govern the business relationships between clubs rather than the employment relationships between clubs and players. The fact that the employing clubs must pay fees on recruiting a player from another club affects the players' opportunities for finding employment and the terms under which such employment is offered.
- 76 As regards the difficulty of severing the economic aspects from the sporting aspects of football, the Court has held (in *Donà*, cited above, paragraphs 14 and 15) that the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.
- 77 With regard to the possible consequences of this judgment on the organization of football as a whole, it has consistently been held that, although the practical consequences of any judicial decision must be weighed carefully, this cannot go so far as to diminish the objective character of the law and compromise its application on the ground of the possible repercussions of a judicial decision. At the very most, such repercussions might be taken into consideration when determining whether exceptionally to limit the temporal effect of a judgment (see, *inter alia*, case C-163/90 *Administration des douanes v Legros and others* [1992] ECR I-4625, paragraph 30).
- 78 The argument based on points of alleged similarity between sport and culture cannot be accepted, since the question submitted by the national Court does not relate to the conditions under which Community powers of limited extent, such as those based on Article 128(1), may be exercised but on the scope of the freedom of movement of workers guaranteed by Article 48, which is a fundamental freedom in the Community system

(see, *inter alia*, case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 16).

- 79 As regards the arguments based on the principle of freedom of association, it must be recognized that this principle, enshrined in Article 11 of the European convention for the protection of human rights and fundamental freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the single European act and in Article f(2) of the Treaty on European Union, are protected in the Community legal order.
- 80 However, the rules laid down by sporting associations to which the national Court refers cannot be seen as necessary to ensure enjoyment of that freedom by those associations, by the clubs or by their players, nor can they be seen as an inevitable result thereof.
- 81 Finally, the principle of subsidiarity, as interpreted by the German government to the effect that intervention by public authorities, and particularly Community authorities, in the area in question must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty.
- 82 Once the objections concerning the application of Article 48 of the Treaty to sporting activities such as those of professional footballers are out of the way, it is to be remembered that, as the Court held in paragraph 17 of its judgment in Walrave, cited above, Article 48 not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.
- 83 The Court has held that the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of state barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law (see Walrave, cited above, paragraph 18).
- 84 It has further observed that working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Accordingly, if the scope of Article 48 of the Treaty were confined to acts of a public authority there would be a risk of creating inequality in its application (see Walrave, cited above, paragraph 19). That risk is all the more obvious in a case such as that in the main proceedings in this case in that, as has been stressed in paragraph 24 above, the transfer rules have been laid down by different bodies or in different ways in each Member State.
- 85 UEFA objects that such an interpretation makes Article 48 of the Treaty more restrictive in relation to individuals than in relation to member states, which are alone in being able to rely on limitations justified on grounds of public policy, public security or public health.
- 86 That argument is based on a false premiss. There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.
- 87 Article 48 of the Treaty therefore applies to rules laid down by sporting associations such as URBSFA, FIFA or UEFA, which determine the terms on which professional sportsmen can engage in gainful employment. Whether the situation envisaged by the national Court is of a purely internal nature
- 88 UEFA considers that the disputes pending before the national Court concern a purely internal Belgian situation which falls outside the ambit of Article 48 of the Treaty. They concern a Belgian player whose transfer fell through because of the conduct of a Belgian

club and a Belgian association.

- 89 It is true that, according to consistent case-law (see, inter alia, case 175/78 Regina v Saunders [1979] ECR 1129, paragraph 11; case 180/83 Moser v Land Baden-Württemberg [1984] ECR 2539, paragraph 15; case C-332/90 Steen v Deutsche Bundespost [1992] ECR I-341, paragraph 9; and case C-19/92 Kraus, cited above, paragraph 15), the provisions of the Treaty concerning the free movement of workers, and particularly Article 48, cannot be applied to situations which are wholly internal to a member state, in other words where there is no factor connecting them to any of the situations envisaged by Community law.
- 90 However, it is clear from the findings of fact made by the national Court that Mr Bosman had entered into a contract of employment with a club in another Member State with a view to exercising gainful employment in that state. By so doing, as he has rightly pointed out, he accepted an offer of employment actually made, within the meaning of Article 48(3)(a).
- 91 Since the situation in issue in the main proceedings cannot be classified as purely internal, the argument put forward by UEFA must be dismissed.

#### Existence of an obstacle to freedom of movement for workers

- 92 It is thus necessary to consider whether the transfer rules form an obstacle to freedom of movement for workers prohibited by Article 48 of the Treaty.
- 93 As the Court has repeatedly held, freedom of movement for workers is one of the fundamental principles of the Community and the Treaty provisions guaranteeing that freedom have had direct effect since the end of the transitional period.
- 94 The Court has also held that the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see case 143/87 Stanton v Inasti [1988] ECR 3877, paragraph 13, and case C-370/90 the Queen v Immigration appeal tribunal and Surinder Singh [1992] ECR I-4265, paragraph 16).
- 95 In that context, nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity (see, inter alia, case C-363/89 Roux v Belgium [1991] ECR I-273, paragraph 9, and Singh, cited above, paragraph 17).
- 96 Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (see also case C-10/90 Masgio v Bundesknappschaft [1991] ECR I-1119, paragraphs 18 and 19).
- 97 The Court has also stated, in case 81/87 the Queen v h.M. Treasury and commissioners of inland revenue ex parte daily mail and general trust PLC [1988] ECR 5483, paragraph 16, that even though the Treaty provisions relating to freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that state, they also prohibit the member state of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58. The rights guaranteed by Article 52 et seq. of the Treaty would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State. The same considerations apply, in relation to Article 48 of the Treaty, with regard to rules which impede the freedom of

movement of nationals of one member state wishing to engage in gainful employment in another Member State.

- 98 It is true that the transfer rules in issue in the main proceedings apply also to transfers of players between clubs belonging to different national associations within the same Member State and that similar rules govern transfers between clubs belonging to the same national association.
- 99 However, as has been pointed out by Mr Bosman, by the Danish government and by the advocate general in points 209 and 210 of his opinion, those rules are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.
- 100 Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.
- 101 As the national Court has rightly pointed out, that finding is not affected by the fact that the transfer rules adopted by UEFA in 1990 stipulate that the business relationship between the two clubs is to exert no influence on the activity of the player, who is to be free to play for his new club. The new club must still pay the fee in issue, under pain of penalties which may include its being struck off for debt, which prevents it just as effectively from signing up a player from a club in another Member State without paying that fee.
- 102 Nor is that conclusion negated by the case-law of the Court cited by URBSFA and UEFA, to the effect that Article 30 of the Treaty does not apply to measures which restrict or prohibit certain selling arrangements so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (see joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16).
- 103 It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in *Keck and Mithouard* were held to fall outside the ambit of Article 30 of the Treaty (see also, with regard to freedom to provide services, case C-384/93 *Alpine investments v Minister van financiën* [1995] ECR I-1141, paragraphs 36 to 38).
- 104 Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, *inter alia*, the judgment in *Kraus*, cited above, paragraph 32, and case C-55/94 *Gebhard* [1995] ECR I-0000, paragraph 37).

#### Existence of justifications

- 105 First, URBSFA, UEFA and the French and Italian governments have submitted that the transfer rules are justified by the need to maintain a financial and competitive balance between clubs and to support the search for talent and the training of young players.
- 106 In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain

degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.

- 107 As regards the first of those aims, Mr Bosman has rightly pointed out that the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.
- 108 As regards the second aim, it must be accepted that the prospect of receiving transfer, development or training fees is indeed likely to encourage football clubs to seek new talent and train young players.
- 109 However, because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally. The prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.
- 110 Furthermore, as the advocate general has pointed out in point 226 et seq. of his opinion, the same aims can be achieved at least as efficiently by other means which do not impede freedom of movement for workers.
- 111 It has also been argued that the transfer rules are necessary to safeguard the worldwide organization of football.
- 112 However, the present proceedings concern application of those rules within the Community and not the relations between the national associations of the Member States and those of non-member countries. In any event, application of different rules to transfers between clubs belonging to national associations within the Community and to transfers between such clubs and those affiliated to the national associations of non-member countries is unlikely to pose any particular difficulties. As is clear from paragraphs 22 and 23 above, the rules which have so far governed transfers within the national associations of certain member states are different from those which apply at the international level.
- 113 Finally, the argument that the rules in question are necessary to compensate clubs for the expenses which they have had to incur in paying fees on recruiting their players cannot be accepted, since it seeks to justify the maintenance of obstacles to freedom of movement for workers simply on the ground that such obstacles were able to exist in the past.
- 114 The answer to the first question must therefore be that Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.

#### Interpretation of Article 48 of the Treaty with regard to the nationality clauses

- 115 By its second question, the national Court seeks in substance to ascertain whether Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States.

#### Existence of an obstacle to freedom of movement for workers

- 116 As the Court has held in paragraph 87 above, Article 48 of the Treaty applies to rules laid down by sporting associations which determine the conditions under which professional sports players may engage in gainful employment. It must therefore be considered whether

the nationality clauses constitute an obstacle to freedom of movement for workers, prohibited by Article 48.

- 117 Article 48(2) expressly provides that freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and conditions of work and employment.
- 118 That provision has been implemented, in particular, by Article 4 of regulation (EEC) no 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English special edition, 1968(ii), p. 475), under which provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, are not to apply to nationals of the other Member States.
- 119 The same principle applies to clauses contained in the regulations of sporting associations which restrict the right of nationals of other Member States to take part, as professional players, in football matches (see the judgment in *Donà*, cited above, paragraph 19).
- 120 The fact that those clauses concern not the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. In so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned.

#### Existence of justifications

- 121 The existence of an obstacle having thus been established, it must be considered whether that obstacle may be justified in the light of Article 48 of the Treaty.

[...]

- 127 It must be recalled that in paragraphs 14 and 15 of its judgment in *Donà*, cited above, the Court held that the Treaty provisions concerning freedom of movement for persons do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. It stressed, however, that that restriction on the scope of the provisions in question must remain limited to its proper objective.
- 128 Here, the nationality clauses do not concern specific matches between teams representing their countries but apply to all official matches between clubs and thus to the essence of the activity of professional players.
- 129 In those circumstances, the nationality clauses cannot be deemed to be in accordance with Article 48 of the Treaty, otherwise that Article would be deprived of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the Community rendered nugatory (on this last point, see case 222/86 *Unectef v Heylens and others* [1987] ECR 4097, paragraph 14).
- 130 None of the arguments put forward by the sporting associations and by the governments which have submitted observations detracts from that conclusion.
- 131 First, a football club's links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than its links with its locality, town, region or, in the case of the United Kingdom, the territory covered by each of the four associations. Even though national championships are played between clubs from different regions, towns or localities, there is no rule restricting the right of clubs to field players from other regions, towns or localities in such matches.

- 132 In international competitions, moreover, participation is limited to clubs which have achieved certain results in competition in their respective countries, without any particular significance being attached to the nationalities of their players.
- 133 Secondly, whilst national teams must be made up of players having the nationality of the relevant country, those players need not necessarily be registered to play for clubs in that country. Indeed, under the rules of the sporting associations, foreign players must be allowed by their clubs to play for their country's national team in certain matches.
- 134 Furthermore, although freedom of movement for workers, by opening up the employment market in one Member State to nationals of the other member states, has the effect of reducing workers' chances of finding employment within the Member State of which they are nationals, it also, by the same token, offers them new prospects of employment in other Member States. Such considerations obviously apply also to professional footballers.
- 135 Thirdly, although it has been argued that the nationality clauses prevent the richest clubs from engaging the best foreign players, those clauses are not sufficient to achieve the aim of maintaining a competitive balance, since there are no rules limiting the possibility for such clubs to recruit the best national players, thus undermining that balance to just the same extent.
- 136 Finally, as regards the argument based on the Commission's participation in the drafting of the '3 + 2' rule, it must be pointed out that, except where such powers are expressly conferred upon it, the commission may not give guarantees concerning the compatibility of specific practices with the Treaty (see also joined cases 142/80 and 143/80 Amministrazione delle finanze dello Stato v Essevi and Salengo [1981] ECR 1413, paragraph 16). In no circumstances does it have the power to authorize practices which are contrary to the Treaty.
- 137 It follows from the foregoing that Article 48 of the Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States.

[...]

## 2.2.6 Case C-118/96: Safir

### Jessica Safir v Skattemyndigheten i Dalarnas Län

Case C-118/96

28 April 1998

Court of Justice

[1998] ECR 1897

<http://www.curia.eu.int/en/content/juris/index.htm>

#### Summary of the facts and procedure:

*Jessica Safir purchased a life insurance policy from a company outside Sweden and challenged Sweden's tax on the premium paid to the foreign corporation by a Swedish national. Sweden placed the burden of filing forms containing information on the location and identity of the foreign insurance company on the Swedish taxpayer.*

#### Judgement:

[...]

The Swedish legislation

3. In Sweden, taxation of savings in the form of capital life assurance (K-assurance) taken out with companies established in that country affects both companies and policyholders.
4. Insurance companies established in Sweden must pay tax under Law 1990: 661 on Yield Tax on Pension Funds. That tax takes the form of a tax on the yield from capital insurance levied on the insurer. This is calculated according to a standard method which is based on the capital of the company as it stood at the end of the year preceding the assessment to tax, less the company's financial liabilities existing at that time, then multiplied by the average government bond yield in the year before the tax year. The yield thus obtained is taxed at 27%.
5. Persons who have taken out life assurance policies with companies established in Sweden may not deduct premiums from their taxable income. On the other hand, proceeds from policies are not subject to tax.
6. The same applies in relation to persons taking out insurance with companies established abroad.
7. Savings in the form of capital life assurance taken out with companies established abroad are taxed pursuant to the Premium Tax Law (1990: 662) (hereinafter 'the Premium Tax Law'), which entered into force on 1 January 1991.
8. According to the judgment making the reference, the purpose of the Premium Tax Law is to

ensure competitive neutrality between savings in the form of capital life assurance taken out with insurance companies established in Sweden and savings in the form of like policies taken out with companies established abroad.

9. Article 1 of the Premium Tax Law provides that natural or legal persons domiciled or permanently resident in Sweden who have taken out life assurance with companies not established in Sweden must pay to the State a tax on the premiums paid. Under Paragraph 3 of the Premium Tax Law, the tax is to be 15% of the amount of the premium.
10. Furthermore, these taxpayers must register themselves and declare the payment of premiums to a central body, Skattemyndigheten.
11. Finally, Paragraph 5 of the Premium Tax Law provides that this body may, at the request of the policyholder, grant an exemption from payment of tax or reduce the tax by half if the company with which the insurance was taken out is subject, in the State in which it is established, to revenue tax comparable to that payable by insurance companies established in Sweden. The tax on premiums may be reduced by half if the foreign tax is at least one quarter of the tax applicable in Sweden and not be payable at all if the foreign tax is at least one half of the tax applicable in Sweden.
12. According to Länsrätten i Dalarnas Län, that possibility of granting exemption from tax or reducing the tax payable is intended to prevent the saver who takes out capital life assurance with a company established abroad from being subject to taxation higher than that applicable to a person taking out such insurance with a company established in Sweden.

#### The facts

13. Having taken out capital life assurance with Skandia Life at the beginning of 1995, Jessica Safir applied to the tax authority for exemption from payment of tax on the insurance premiums, pursuant to Paragraph 5 of the Premium Tax Law.
14. By decision of 12 April 1995, the tax authority reduced the amount of the tax by one half, setting it at 7.5% of the amount paid by way of premiums to Skandia Life in 1995, the resulting sum being SKR 75.
15. Jessica Safir then appealed against that decision to the body empowered to grant exemptions, Riksskatteverket, which, on 3 July 1995, rejected her appeal by final decision.
16. On 4 January 1996, she accordingly declared to Skattemyndigheten the premium payments made but she still maintained that she was not obliged to pay tax on the premiums on the ground that the tax was incompatible with Community law.
17. After re-examining her case, Skattemyndigheten, by decisions of 17 January and 25 January 1996, maintained its tax assessment.
18. By applications of 22 January and 13 February 1996, Jessica Safir then brought proceedings in Länsrätten i Kopparbergs Län for annulment of Skattemyndigheten's tax assessment.
19. That court, in its judgment referring a question to the Court of Justice, stated that, despite the Swedish legislature's declared aim to maintain competitive neutrality between savers holding Swedish insurance policies and savers holding foreign insurance policies, the taxation arrangements are technically quite different, depending on whether the insurance company is established in Sweden or abroad and that this difference might be incompatible with the Treaty. It therefore submitted the following question to the Court for a preliminary ruling:

'Where in a Member State, the taxation of savings policies issued by domestic life assurance companies and foreign life assurance companies conducting insurance business in the Member State through an establishment takes the form of a tax on yield from insurance capital calculated in a standard way and levied on the insurer, is it contrary to Articles 6, 59,

60 or 73b and 73d of the Treaty of Rome for tax to be charged — with the aim of maintaining competitive neutrality between domestic and foreign savings policies — on insurance premiums paid by policyholders resident in the Member State under life assurance policies contracted with insurers who are established in another Member State and who are operating in the firstmentioned Member State in accordance with the rules on cross-border insurance activities, if the tax on the aforementioned insurance premiums can, upon application to the tax administration, be reduced to zero or by 50% in the event that the insurance company established abroad is subject to revenue tax in the State in which it is domiciled that is comparable to the tax charged on domestic savings policies in the other Member State?’

20. By its question, the national court is essentially asking whether Articles 6, 59, 60 or 73b and 73d of the Treaty preclude the application of national legislation on taxation of capital life assurance such as the legislation in question in the main proceedings.
21. It must be observed first of all that, although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law (see, in particular, Case C-279/93 Schumacker [1995] ECR I-225, paragraph 21).
22. Since the provision of insurance constitutes a service within the meaning of Article 60 of the Treaty, it must next be borne in mind that, according to the case-law of the Court, Article 59 of the Treaty precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them (see, in particular, Case C-381/93 Commission v France [1994] ECR I-5145, paragraph 16).
23. In the perspective of a single market and in order to enable its objectives to be attained, Article 59 of the Treaty likewise precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services exclusively within one Member State (Case C-381/93 Commission v France, cited above, paragraph 17).
24. The legislation in question in the main proceedings establishes different tax regimes for capital life assurance policies, depending on whether they are taken out with companies established in Sweden or with companies established elsewhere. According to the Swedish Government, the reason for such different treatment is that it is impossible to apply the same regime in both cases and that it is necessary to fill the fiscal vacuum which arises from non-taxation of savings in the form of capital life assurance taken out with companies not established in Sweden.
25. It must therefore be determined whether such legislation creates obstacles to the freedom to provide services and whether, should this be the case, such obstacles are justified on the grounds relied on by the Swedish Government.
26. First, unlike persons who have taken out capital life assurance with companies established in Sweden, persons so insured with companies not established in Sweden must register themselves and declare premium payments to a central body, Skattemyndigheten, which also has power to grant a tax exemption or a tax reduction. Policyholders must also pay the tax themselves and for this purpose find the necessary funds, which, as Jessica Safir points out, has negative consequences for them in terms of liquidity. It is true that such obligations cannot in themselves be regarded as being contrary to Community law. However, those obligations, combined with the need to follow a centralised procedure, may dissuade interested persons from taking out capital life assurance with companies not established in Sweden, since no particular action on their part would be called for if they took out such assurance with companies established in Sweden, the tax being levied in this case on the company.

27. Second, it is clear from the explanations provided at the hearing by the Swedish Government that, although the surrender, after a long period, of a capital life assurance policy taken out with a company not established in Sweden is no more costly for the policyholder than the surrender of an insurance policy taken out with a company established in that State, the situation may be different where a policy is surrendered after a short period. The fact that the surrender after a short period of a life assurance policy taken out with a company not established in Sweden is more costly is another factor liable to dissuade a person from taking out such a policy in so far as he would not know, on taking it out, whether and, if so, when, he would surrender it.
28. Third, when a person holding a policy issued by a company not established in Sweden applies for an exemption from or reduction of tax on the premiums, Skattemyndigheten requires precise information concerning the income tax to which the company is subject, unless the authority already has such information. As Jessica Safir points out, such a requirement is particularly burdensome for the policyholder. It may also dissuade insurance companies which still do not operate on the Swedish market from offering their services there, since it means that those companies must provide their potential customers with precise information relating to the tax system applicable to those companies in another Member State.
29. Fourth, the legislation challenged in the main proceedings provides that the determination of the tax applicable to insurance premiums is to depend on the assessment by the administration of the tax regime applicable to the insurer not established in Sweden. However, as is clear from the file, Skattemyndigheten and Riksskatteverket adopted in 1995 different decisions regarding applications for exemption made by certain British life assurance companies although the British tax regime had not been altered. It therefore appears that such differences of assessment of the tax regime applicable to insurers not established in Sweden are liable to create uncertainty which may dissuade individuals from taking out long-term contracts, such as capital life assurance contracts, with insurers not established in Sweden.
30. In those circumstances, legislation such as that in question in the main proceedings contains a number of elements liable to dissuade individuals from taking out capital life assurance with companies not established in Sweden and liable to dissuade insurance companies from offering their services on the Swedish market.
31. It must be added that, although the legislation in issue in the main proceedings allows account to be taken of the tax applicable in another Member State in order, according to the Swedish Government, to satisfy the principle of equal treatment laid down by Community law, there is nevertheless, as Jessica Safir points out, a threshold effect since payment of such tax is not taken into consideration where it does not amount to at least one quarter of the tax applicable in Sweden. The tax applicable in another Member State must amount to at least one quarter of the Swedish tax on insurance premiums in order to be capable of being reduced by half, and to at least a half of that tax in order to be reduced to zero. As a result of that threshold effect, the taxation of savings in the form of capital life assurance taken out with companies not established in Sweden is in most cases liable to be higher than the taxation of like savings with companies established in that State.
32. Moreover, legislation such as the Swedish legislation makes it difficult, if not impossible, for the national court called upon to determine whether the tax regime is discriminatory to compare, on the one hand, the yield tax on insurance policies taken out with companies established in Sweden and, on the other hand, the tax on insurance premiums paid to companies not established in Sweden.
33. Other systems which are more transparent and are also capable of filling the fiscal vacuum referred to by the Swedish Government, whilst being less restrictive of the freedom to provide services, are conceivable, in particular a system for charging tax on the yield on life

assurance capital, calculated according to a standard method and applicable in the same way to all insurance policies, whether taken out with companies established in the Member State concerned or with companies established in another Member State.

34. In those circumstances, the reasons cited by the Swedish Government, namely the impossibility of applying to capital life assurance policies taken out with companies not established in Sweden the same tax regime as that applied to such insurance policies taken out with companies which are established in Sweden and the need to fill the fiscal vacuum arising from the non-taxation of savings in the form of capital life assurance policies taken out with companies not established in Sweden are not such as to justify the inclusion in national legislation on the taxation of capital life assurance of elements as restrictive of the freedom to provide services as those contained in the legislation in question in the main proceedings.
35. In view of the foregoing considerations, it is not necessary to determine whether such legislation is also incompatible with Articles 6, 73b and 73d of the Treaty.
36. The reply to be given to the national court must therefore be that Article 59 of the Treaty precludes the application of national legislation relating to the taxation of capital life assurance such as the legislation in question in the main proceedings.

[...]

## 2.2.7 Case C-243/01: Gambelli



### **NOTE AND QUESTIONS**

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Just a month before ruling in Gambelli the court issued its judgement in Case C-6/01: ANOMAR and Others v Portugal. In this case ANOMAR, an association of Portuguese gambling machines operators, and eight Portuguese companies which pursue the same activities brought an action before the Portuguese courts against the Portuguese state. Portuguese law reserves the exploitation and operation of games of chance or gambling to the State and authorises such exploitation only in areas provided for by law, that is to say in casinos which hold a public licence. The national court made a reference to the ECJ as to the compatibility of Portuguese provisions with EC law.

The Court replied by saying that “national legislation such as the Portuguese legislation which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it”. It then continued by saying that “in the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.”

1. The two cases are at first sight similar, but the conclusions the Court reached were different. Why?

#### **Piergiorgio Gambelli and Others**

**Case C-243/01**

6 November 2003

Court of Justice

[2003] ECR I-0000

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of the facts and procedure:**

*Piergiorgio Gambelli and 137 other persons manage data transmission centres in Italy which collect sporting bets in Italy on behalf of an English bookmaker to which they are linked by the internet. The bookmaker, Stanley International Betting Ltd, carries on business as a bookmaker under a licence granted pursuant to English law by the City of Liverpool.*

*In Italy this activity is reserved to the State or its licensees. Breach of the rule can result in criminal penalties of up to one year's imprisonment. Accordingly criminal proceedings were brought against Mr Gambelli and others for unlawfully taking bets and the data transmission centres were placed under sequestration.*

*Mr Gambelli claims that the Italian provisions are contrary to the Community principles of freedom of establishment and freedom to provide services. The Tribunale Ascoli Piceno, before which the case was brought, asked the Court of Justice of the European Communities how to interpret the relevant provisions of the EC Treaty.*

### **Judgement:**

[...]

17. The defendants in the main proceedings brought an action for review before the Tribunale di Ascoli Piceno against the orders for sequestration relating to the data transmission centres of which they are the proprietors.
18. The Tribunale di Ascoli Piceno makes reference to the case-law of the Court, in particular its judgment in Case C-67/98 Zenatti [1999] ECR I-7289. However, it considers that the questions raised in the case before it do not quite correspond to the facts already considered by the Court in Zenatti. Recent amendments to Law No 401/89 demand re-examination of the issue by the Court of Justice.
19. The Tribunale di Ascoli Piceno refers in this context to the parliamentary working papers relating to Law No 388/00 which show that the restrictions inserted by that law into Law No 401/89 were dictated chiefly by the need to protect sports Totoricevitori, a category of private sector undertakings. The court states that it cannot find in those restrictions any public policy concern able to justify a limitation of the rights guaranteed by Community or constitutional rules.
20. The court emphasises that the apparent legality of collecting and forwarding bets on foreign sporting events, on the initial wording of Article 4 of Law No 401/89, had led to the creation and development of a network of operators who have invested capital and created infrastructures in the gaming and betting sector. Those operators suddenly find the legitimacy of their position called in question following amendments to the rules in Law No 388/00 prohibiting on pain of criminal penalties the carrying on of activities by any person anywhere involving the collection, acceptance, registration and transmission of offers to bet, in particular on sporting events, without a licence or permit from the State.
21. The national court questions whether the principle of proportionality is being observed, having regard first to the severity of the prohibition, breach of which attracts criminal penalties which may make it impossible in practice for lawfully constituted undertakings or Community operators to carry on economic activities in the betting and gaming sector in Italy, and secondly to the importance of the national public interest protected and for which the Community freedoms are sacrificed.

22. The Tribunale di Ascoli Piceno also considers that it cannot ignore the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the Italian State is pursuing at national level for the purpose of collecting taxation revenues, on the other.
23. The court observes that the proceedings before it raise, first, questions of national law relating to the compatibility of the statutory amendments to Article 4 of Law No 401/89 with the Italian constitution, which protects private economic initiative for activities which are not subject to taxes levied by the State, and secondly questions relating to the incompatibility of the rule laid down in that article with the freedom of establishment and the freedom to provide cross-border services. The questions of national law raised have been referred by the Tribunale di Ascoli Piceno to the Corte costituzionale (the Italian Constitutional Court).
24. In those circumstances, the Tribunale di Ascoli Piceno has decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Is there incompatibility (with the repercussions that that has in Italian law) between Articles 43 et seq. and Article 49 et seq. of the EC Treaty regarding freedom of establishment and freedom to provide cross-border services, on the one hand, and on the other domestic legislation such as the provisions contained in Article 4(1) et seq., Article 4a and Article 4b of Italian Law No 401/89 (as most recently amended by Article 37(5) of Law No 388/00 of 23 December 2000) which prohibits on pain of criminal penalties the pursuit by any person anywhere of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, unless the requirements concerning concessions and authorisations prescribed by domestic law have been complied with?

The question

Observations submitted to the Court

25. Gambelli and others consider that by prohibiting Italian citizens from linking up with foreign companies in order to place bets and thus to receive the services offered by those companies by internet, by prohibiting Italian intermediaries from offering the bets managed by Stanley, by preventing Stanley from establishing itself in Italy with the assistance of those intermediaries and thus offering its services in Italy from another Member State and, in sum, by creating and maintaining a monopoly in the betting and gaming sector, the legislation at issue in the main proceedings amounts to a restriction on both freedom of establishment and freedom to provide services. No justification for the restriction is to be found in the case-law of the Court of Justice stemming from Case C-275/92 Schindler [1994] ECR I-1039, Case C-124/97 Läärä and Others [1999] ECR I-6067 and Zenatti, cited above, because the Court has not had occasion to consider the amendments made to that legislation by Law No 388/00 and it has not examined the issue from the point of view of freedom of establishment.
26. The defendants in the main proceedings emphasise in that regard that the Italian State is not pursuing a consistent policy whose aim is to restrict, or indeed abolish, gaming activities within the meaning of the judgments in Läärä, paragraph 37, and Zenatti, paragraph 36. The concerns cited by the national authorities relating to the protection of bettors against the risk of fraud, the preservation of public order and reducing both opportunities for gaming in order to avoid the damaging consequences of betting at both individual and social level and the incitement to spend inherent therein are groundless because Italy is increasing the range of betting and gaming available, and even inciting people to engage in such activities by facilitating collection in order to increase tax revenue. The fact that the organising of bets is regulated by financial laws shows that the true motivation of the national authorities is economic.
27. The purpose of the Italian legislation is also to protect licensees under the national monopoly by making that monopoly impenetrable for operators from other Member States, since the

invitations to tender contain criteria relating to ownership structures which cannot be met by a capital company quoted on the stock exchange but only by natural persons, and since they require applicants to own premises and to have been a licence holder over a substantial period.

28. The defendants in the main proceedings argue that it is difficult to accept that a company like Stanley, which operates entirely legally and is duly regulated in the United Kingdom, should be treated by the Italian legislation in the same way as an operator who organises clandestine gaming, when all the public-interest concerns are protected by the United Kingdom legislation and the Italian intermediaries in a contractual relationship with Stanley as secondary or subsidiary establishments are registered as official suppliers of services and with the Ministry of Post and Telecommunications with which they operate, and which subjects them to regular checks and inspections.
29. That situation, which falls within the scope of freedom of establishment, contravenes the principle of mutual recognition in sectors which have not yet been harmonised. It is also contrary to the principle of proportionality, a fortiori because criminal penalties ought to constitute a last resort for a Member State in cases where other measures and instruments are not able to provide adequate protection of the interests concerned. Under the Italian legislation, bettors in Italy are not only deprived of the possibility of using bookmakers established in another Member State, even through the intermediary of operators established in Italy, but are also subject to criminal penalties.
30. The Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish and Swedish Governments, as well as the Commission, cite the case-law of the Court of Justice, in particular the judgments in Schindler, Läärä and Zenatti.
31. The Italian Government relies on the judgment in Zenatti to show that Law No 401/89 is compatible with the Community legislation in the sphere of freedom to provide services, and even in that of freedom of establishment. Both the matter considered by the Court in that case, namely administrative authorisation to pursue the activity of collecting and managing bets in Italy, and the question raised in the main proceedings, namely the existence of a criminal penalty prohibiting that activity where it is carried on by operators who are not part of the State monopoly on betting, pursue the same aim, which is to prohibit such activities and to reduce gaming opportunities in practice, other than in situations which are expressly provided for by law.
32. The Belgian Government observes that a single market for gaming will only incite consumers to squander more and will have significant damaging effects for society. The level of protection introduced by Law No 401/89 and the restrictive authorisation scheme serve to ensure the attainment of objectives which are in the general interest, namely limiting and strictly controlling the supply of gaming and betting, is proportionate to those objectives and involves no discrimination on grounds of nationality.
33. The Greek Government considers that the organisation of games of chance and bets on sporting events must remain within the control of the State and be operated by means of a monopoly. If it is engaged in by private entities, that will have direct consequences such as disturbance of the social order and incitement to commit offences, as well as exploitation of bettors and consumers in general.
34. The Spanish Government submits that both the grant of special or exclusive rights under a strict authorisation or licensing regime and the prohibition on opening foreign branches to process bets in other Member States are compatible with the policy of limiting supply, provided that those measures are adopted with a view to reducing opportunities for gaming and stimulation of supply.
35. The French Government maintains that the fact that in the main proceedings the collection of bets is effected at a distance by electronic means and the sporting events to which the bets

relate take place exclusively in Italy - which was not the case in Zenatti - does not affect the Court's case-law under which national laws which limit the pursuit of activities relating to gaming or lotteries and cash machines are compatible with the principle of the freedom to provide services where they pursue an objective that is in the general interest, such as the prevention of fraud or the protection of bettors against themselves. Member States are therefore justified in regulating the activities of operators in the area of betting in non-discriminatory ways, since the degree and scope of the restrictions are within the discretion enjoyed by the national authorities. It is thus for the courts of the Member States to determine whether the national authorities have acted proportionately in their choice of means, having regard to the principle of freedom to provide services.

36. As regards freedom of establishment, the French Government considers that the restrictions on the activities of the independent Italian companies in a contractual relationship with Stanley do not undermine Stanley's right to establish itself freely in Italy.
37. The Luxembourg Government considers that the Italian legislation constitutes an obstacle to the pursuit of the activity of organising bets in Italy because it prohibits Stanley from carrying on its activities in Italy either directly, under the freedom to provide cross-border services, or indirectly through the intermediary of Italian agencies linked by internet. It also constitutes a restriction on the freedom of establishment. However, those obstacles are justified in so far as they pursue objectives which are in the general interest, such as the need to channel and control the desire to engage in gaming, and are appropriate and proportionate for the attainment of those objectives inasmuch as they do not discriminate on grounds of nationality, because both Italian entities and those established abroad have to obtain the same permit from the Minister for Finance to be allowed to engage in the organisation, taking and collecting of bets in Italy.
38. The Portuguese Government notes that the main proceedings have serious implications as regards the maintenance not only in Italy but in all the Member States of a system for running lotteries by public monopoly and as regards the need to preserve a significant source of revenue for the States, which replaces the compulsory levying of taxes and serves to finance social, cultural and sporting policies. In the activity of gaming, the market economy and free competition operate a redistribution of sums levied in the context of that activity which is contrary to the social order, because they are likely to move from countries where overall involvement is low to countries where it is higher and the amount of winnings more attractive. Bettors in the small Member States would therefore be financing the social, cultural and sporting budgets of the large Member States and the reduction in revenue from gaming would force governments in the smaller Member States to finance public initiatives of a social nature and other State social, sporting and cultural activities by other means, which would mean an increase in taxes in those Member States and a reduction in taxes in the big States. Furthermore, dividing up the State betting, gaming and lotteries market between three or four large operators in the European Union would produce structural changes in distribution networks for gaming lawfully carried on by those States, destroying an enormous number of jobs and distorting unemployment levels in the various Member States.
39. The Finnish Government cites in particular the judgment in *Läärä*, in which the Court acknowledged that the need for and proportionality of provisions adopted by a Member State are to be assessed solely in the light of the objectives pursued by the national authorities in that State and the level of protection they seek to provide, so that it is for the national court to determine whether, in the light of the specific detailed rules for its application, national legislation enables the aims relied on to justify it to be attained and whether the restrictions are proportionate to those aims, having regard to the fact that the legislation must be applied to all operators alike, whether they are from Italy or another Member State.
40. The Swedish Government observes that the fact that restrictions on the free movement of services are introduced for tax purposes is not sufficient to support the conclusion that those

restrictions are contrary to Community law, provided that they are proportionate and do not involve discrimination as between operators, a matter for the national court to determine. The amendments to the Italian legislation made by Law No 388/00 enable an entity which has been refused authorisation to collect bets in Italy to circumvent the legislation by carrying on its activity from another Member State and prohibit foreign entities which organise bets in their own country from pursuing their activities in Italy. As the Court held at paragraph 36 of the judgment in *Läärä* and at paragraph 34 of the judgment in *Zenatti*, the mere fact that a Member State has opted for a protection scheme which is not the same as that adopted in another Member State cannot influence the assessment of the need for and proportionality of the provisions adopted in that area.

41. The Commission of the European Communities takes the view that the legislative amendments effected by Law No 388/00 merely make explicit what was already contained in Law No 401/89 and do not introduce a genuinely new category of offences. The public-order grounds for limiting the damaging effects of betting activities relating to football matches which are relied on to justify the fact that the national legislation reserves the right to collect those bets to certain organisations are the same regardless of the Member State in which those activities take place. The fact that the sporting events to which the bets related in the case of *Zenatti* took place abroad whereas in the main proceedings here the football matches take place in Italy is irrelevant. The Commission adds that Directive No 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ 2000 L 178, p. 1) does not apply to bets, so that the outcome should be no different to that in *Zenatti*.
42. The Commission considers that the issue is not to be examined from the point of view of freedom of establishment because the agencies run by the defendants in the main proceedings are independent and act as collection centres for bets and as intermediaries in relations between their Italian customers and Stanley, and are not in any way subordinate to the latter. However, even if the right of establishment were to apply, the restrictions in the Italian legislation are justified on the same grounds of social policy as those accepted by the Court in *Schindler*, *Läärä* and *Zenatti* with regard to the restriction on the freedom to provide services.
43. At the hearing the Commission informed the Court that it had initiated the procedure against the Italian Republic for failure to fulfil obligations in regard to the liberalisation of the horse-race betting sector managed by the UNIRE. As regards the lottery sector, which is liberalised, the Commission referred to the judgment in Case C-272/91 *Commission v Italy* [1994] ECR I-1409, in which the Court held that by restricting participation in an invitation to tender for the concession of a lottery computerisation system to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, was held by the public sector, the Italian Republic had failed to fulfil its obligations *inter alia* under the EC Treaty.

#### The Court's reply

44. The first point to consider is whether legislation such as that at issue in the main proceedings (Law No 401/89) constitutes a restriction on the freedom of establishment.
45. It must be remembered that restrictions on freedom of establishment for nationals of a Member State in the territory of another Member State, including restrictions on the setting-up of agencies, branches or subsidiaries, are prohibited by Article 43 EC.
46. Where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment.

47. Furthermore, in reply to the questions put to it by the Court at the hearing, the Italian Government acknowledged that the Italian legislation on invitations to tender for betting activities in Italy contains restrictions. According to that Government, the fact that no entity has been licensed for such activities apart from the monopoly-holder is explained by the fact that the way in which the Italian legislation is conceived means that the licence can only be awarded to certain persons.
48. In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State.
49. It is therefore possible that the conditions imposed by the legislation for submitting invitations to tender for the award of these licences also constitute an obstacle to the freedom of establishment.
50. The second point to consider is whether the Italian legislation in that respect constitutes a restriction on the freedom to provide services.
51. Article 49 EC prohibits restrictions on freedom to provide services within the Community for nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. Article 50 EC defines services as services which are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.
52. The Court has already held that the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a service (Schindler, paragraph 37). By analogy, the activity of enabling nationals of one Member State to engage in betting activities organised in another Member State, even if they concern sporting events taking place in the first Member State, relates to a service within the meaning of Article 50 EC.
53. The Court has also held that, on a proper construction, Article 49 EC covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established (Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 22).
54. Transposing that interpretation to the issue in the main proceedings, it follows that Article 49 EC relates to the services which a provider such as Stanley established in a Member State, in this case the United Kingdom, offers via the internet - and so without moving - to recipients in another Member State, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.
55. In addition, the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions (see, to that effect, Joined Cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377, paragraph 16, and Case C-294/97 Eurowings Luftverkehr [1999] ECR I-7447, paragraphs 33 and 34).
56. In reply to the questions put by the Court at the hearing, the Italian Government confirmed that an individual in Italy who from his home connects by internet to a bookmaker established in another Member State using his credit card to pay is committing an offence under Article 4 of Law No 401/89.

57. Such a prohibition, enforced by criminal penalties, on participating in betting games organised in Member States other than in the country where the bettor is established constitutes a restriction on the freedom to provide services.
58. The same applies to a prohibition, also enforced by criminal penalties, for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, since the prohibition constitutes a restriction on the right of the bookmaker freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.
59. It must therefore be held that national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services.
60. In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.
61. With regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services (see, to that effect, Case C-264/96 ICI [1998] ECR I-4695, paragraph 28, and Case C-136/00 Danner [2002] ECR I-8147, paragraph 56).
62. As stated in paragraph 36 of the judgment in Zenatti, the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.
63. On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in Schindler, Läärä and Zenatti that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.
64. In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37).
65. According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.
66. It is for the national court to decide whether in the main proceedings the restriction on the freedom of establishment and on the freedom to provide services instituted by Law No 401/89 satisfy those conditions. To that end, it will be for that court to take account of the issues set out in the following paragraphs.
67. First of all, whilst in Schindler, Läärä and Zenatti the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming,

restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

68. In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.
69. In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.
70. Next, the restrictions imposed by the Italian rules in the field of invitations to tender must be applicable without distinction: they must apply in the same way and under the same conditions to operators established in Italy and to those from other Member States alike.
71. It is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination.
72. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate in the light of the Court's case-law (see Case C-193/94 Skanavi and Chryssanthakopoulos [1996] ECR I-929, paragraphs 34 to 39, and Case C-459/99 MRAX [2002] ECR I-6591, paragraphs 89 to 91), especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.
73. The national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year's imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State other than that in which those services are offered by making an internet connection to that bookmaker available to bettors at their premises is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events.
74. As to the proportionality of the Italian legislation in regard to the freedom of establishment, even if the objective of the authorities of a Member State is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.
75. It is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.
76. In the light of all those considerations the reply to the question referred must be that national legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events,

without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

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