PÁZMÁNY | JÁK

Petra Lea LÁNCOS

THE LAW OF THE INTERNAL MARKET – CASE BY CASE

Egyetemi jegyzet

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A PÁZMÁNY PÉTER KATOLIKUS EGYETEM
JOG- ÉS ÁLLAMTUDOMÁNYI KARÁNAK
JEGYZETEI

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CONTENT

Acknowledgments 7

Teaching Goals and Professional Competencies Conveyed
With the Help of This Case Booklet 9

Abbreviations 11

I. Stages of economic integration 13

II. The free movement of goods – Summary 14
A. Free movement of goods – Pecuniary measures 18
B. Free movement of goods – Non-pecuniary measures 20
C. Free movement of goods cases 23

III. Free movement of persons 35
A. Free movement of workers 38
B. Free movement of workers cases 42
C. Freedom of establishment 48
D. Freedom of establishment cases 52
E. Freedom to provide and receive services 55
F. Freedom to provide and receive services cases 58

IV. The free movement of capital 60
A. Free movement of capital 63
B. Free movement of capital cases 65

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TEACHING GOALS AND PROFESSIONAL COMPETENCIES CONVEYED WITH THE HELP OF THIS CASE BOOKLET

I have been teaching internal market law over the last decade based on Alina Kaczorowska-Ireland's textbook *European Union Law* (Routledge). This comprehensive textbook, available at an affordable price, presents, among other things, the internal market law of the European Union. The chapters on market freedoms are based on the case-law of the Court of Justice of the European Union (CJEU), and take stock of the main concepts of internal market law and the development of secondary legislation. While it presents the market freedoms in a detailed, but well structured in comprehensible manner, by its very nature, it does not allow students to work independently. Hence the need for a case booklet emerged, that fits well with the structure of the abovementioned work by Kaczorowska-Ireland.

My aim was to produce a case booklet, which may be integrated into the teaching of the compulsory English-language course *EU law 2*, supporting the main lecture and providing material for the exercises, helping students to acquire the skills necessary for working with internal market law-related cases.

Based on the main lectures in *EU law 2*, accompanied by the use of this case booklet,

a) Students will learn about the basic Treaty structure underlying market freedoms; the most important secondary sources of European law regulating the internal market; the principles governing the delimitation of market freedoms; the structure and steps involved in solving internal market cases, and the specificities of the proportionality test under EU law. Students will learn to identify the relevant elements of the facts of the case under scrutiny, associating them with the concepts of internal market law.

b) At the same time, students will improve their English language skills, familiarizing themselves with the terminology of EU law, including internal market law, and use English legal language with confidence, both in class and in written tasks (mock tests, case studies).

c) The case-based approach of the course enables students to work both individually and in groups, developing collaborative and autonomous problem-solving skills. These linguistic, legal and social skills will be useful not only in their work involving European law, but also in their other professional activities in the legal field.

The knowledge thus acquired contributes to the improvement of legal professional competencies by developing general legal skills, helping students in taking a structured approach to case solving and making conceptual distinctions, while also strengthening their legal reasoning skills. Approaching EU internal market law from a practical, case-based angle can also provide a solid foundation for students' participation in national and international moot court competitions. In particular, it can support students by providing them with a strong linguistic basis for the oral and written processing of cases, and the presentation of relevant legal arguments.

This case booklet only covers real, internal market law-related cases that have come before the CJEU. Relying only on real-life cases, students can familiarize themselves with the basics of case solving, while at the same time learn about the landmark cases of internal market law – from the driver's seat. At the same time, most of the cases presented here have been simplified for educational purposes. Students are encouraged to read the original judgments rendered in these cases to deepen their knowledge about the structure of CJEU judgments, the development of legal reasoning and the contexts within which questions on internal market law emerge.

ABBREVIATIONS

CEE	Charge having equivalent effect to customs
EMU	Economic and Monetary Union
EEC Treaty	Treaty establishing the European Economic Community
FMG	Free movement of goods
FMW	Free movement of workers
FoE	Freedom of establishment
MEQR	Measure having equivalent effect to quantitative restrictions
QR	Quantitative restriction
SEA	Single European Act
TEC	Treaty establishing the European Community
TFEU	Treaty on the functioning of the European Union

I.
STAGES OF ECONOMIC INTEGRATION

customs union   single market   internal market   EMU

1958   1970   1986   1992   2002

TEEC   SEA   TEC (Maastricht amendment)

Treaty basis of the internal market:

THE INTERNAL MARKET

Article 26 TFEU

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

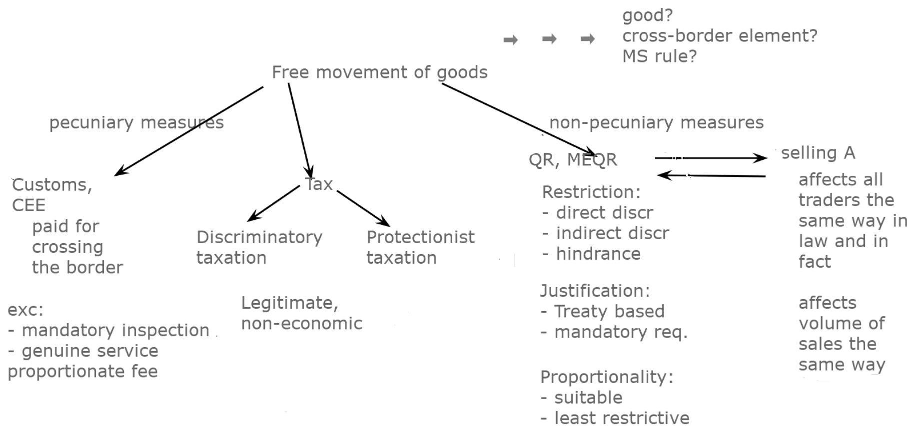
2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

II.
THE FREE MOVEMENT OF GOODS – SUMMARY

(FMG, Articles 28-37, 110 TFEU)

Instruments:
- External:
  - Customs Union
  - Common Commercial Policy
- Internal:
  - prohibition of customs duties & charges having equivalent effect (CEE)
  - prohibition of discriminatory/protectionist taxes
  - prohibition of quantitative restrictions & measures having equivalent effect (MEQR)
  - obligation to adjust state monopolies of commercial character
  - elimination of the restrictions on the payments



1. Should FMG rules be applied?

a) *Is there a good involved?*

Material scope of FMG measures:

- *Goods* = products which can be valued in money, and which are capable of forming the subject of commercial transactions

- *Goods in free circulation* = products originating in a Member State, or products coming from a third country in case all import formalities have been complied with and customs duties or equivalent charges payable have been levied in a Member State with no total or partial drawback of these charges

(*Products excluded from FMG* = agricultural products
arms, ammuntion and war material
nuclear products)

a) *Is there a cross-border element?*

aa) Actual movement of goods between the Member States
ab) Potential effect of Member State measure on trade between the Member States

b) *Is there a Member State measure?*

ba) General norm (law, decree), state practice
bb) Omission of the state to enforce internal market rules (e.g. deter private persons from hindering free movement of goods)

2. Is it a pecuniary or a non-pecuniary prohibited measure?

Prohibited measures of the Member States:

1. Quantitative restrictions on imports/exports
2. MEQRs on imports/exports
   - directly discriminatory
   - indirectly discriminatory
   - hindrances
3. Customs duties on imports/exports in the trade between Member States
4. CEE on imports/exports in the trade between Member States
5. Discriminatory or protectionist taxes
6. Discriminatory state monopolies of commercial character distorting competition[1]

a) *Pecuniary measures*

= Measures that require direct payment, rendering trading directly costlier by reason of imposing a charge, levy, tax, etc.

- Customs duties on imports/exports in the trade between Member States
- CEE on imports/exports in the trade between Member States
- Discriminatory or protectionist taxes

→ cannot be justified

b) *Non-pecuniary measures*

= Measures that normatively restrict trading between the Member State

- Quantitative restrictions on imports/exports
- MEQRs on imports/exports (Dassonville)

[1] We will not be working with cases pertaining to this category of prohibited measures.

i) What is the nature of the prohibited measure?

a) directly discriminative measures = discriminates between goods based on their origin

b) indirectly discriminative measures = do not seem discriminatory on a first glance, however, the rule typically disadvantages goods or traders of foreign origin

c) hindrances = non-discriminatory rules that disadvantage both domestic and foreign traders and products

ii) Can the prohibited measure be justified?

Justifications:
1. Treaty justifications (Art. 36 TFEU)
- public morality
- public policy
- public security
- protection of the health and life of humans, animals or plants
- protection of national treasures possessing artistic, historic or archaeological value
- protection of industrial and commercial property

→ direct discrimination
→ indirect discrimination
→ hindrance

2. Mandatory requirements = any non-economic, legitimate justification accepted by the CJEU that are not measures of arbitrary discrimination or disguised restriction

→ indirect discrimination
→ hindrance

Proportionality test:
- necessary and appropriate to achieve the aim (cf. justification)
- does not go beyond what is necessary to achieve the aim

A. Free movement of goods – Pecuniary measures

Article 28 TFEU

1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

(…)

Article 30 TFEU

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

1. Customs and charges having equivalent effect to customs duties

a) *Customs duties* = Actual customs duties reintroduced unilaterally by the Member States between each other (→ no justifications!)

b) *Charges having equivalent effect to customs duties* (CEE) = Any pecuniary charge, however small, whatever its designation and mode of application, imposed on goods by reason of the fact that they cross a frontier and is not a customs duty in the strict sense constitutes a charge having an equivalent effect to a customs duty (Sociaal Fonds voor de Diamantarbeiders v S.A.) (→ no justifications!)

Exemption:

1. the charge constitutes a consideration for a genuine service rendered to the trader and the charge is proportionate

   or

2. the charge is a consideration for an inspection prescribed under EU law, and
   - it does not exceed the actual cost of the inspection
   - the inspections are mandatory and uniform for all products concerned
   - the inspections promote FMG by neutralizing obstacles

2. Discriminatory and protectionist taxes

> Article 110 TFEU
>
> No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
>
> Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Tax = General system of internal dues applied systematically to categories of products based on objective criteria and regardless of origin

a) Discriminatory taxes = different taxation of 'similar products'
- characteristics of the product (raw material, production mode, smell, taste)
- meets the same needs of the consumer

  (→ no justifications!)

b) Protectionist taxes = different taxation of 'products in competition'
- products that are substitutable for consumer (test: cross-elasticity of demand)

  (→ no justifications!)

No infringement where different taxation is based on objective criteria (unrelated to origin of the product), e.g. alcohol content, environmental protection considerations etc.

B. *Free movement of goods – Non-pecuniary measures*

> Article 35 TFEU
>
> Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.
>
> Article 36 TFEU
>
> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

a) *Bans, quotas* = complete or partial restriction of import or export of certain products
(← justification available)

b) *Measures having equivalent effect to quantitative restrictions* = rules, norms, practices that make trading in the product(s) impossible, difficult or indirectly costlier by imposing certain non-pecuniary conditions

- All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions

- Typically rules governing content, packaging, size, colour, etc. of products
(← justification available)

→ Exemption: Selling arrangements = rules related to sale of goods

i) opening hours
ii) sale at loss bans
iii) rules on where certain goods may be sold
iv) certain advertising rules

→ such rules are not prohibited in case:

i) they affect all traders and goods legally
and
ii) factually the same way

→ if exemption conditions not fulfilled, rules is a MEQR and must be justified!

1. Check nature of restriction!

- direct discrimination (→ Treaty justifications)
- indirect discrimination (→ Treaty justifications or mandatory requirements)
- hindrance (→ Treaty justifications or mandatory requirements)

2. Justifications available

i) Treaty justifications
   - public morality
   - public policy
   - public security
   - protection of health and life of humans, animals, plants
   - protection of national artistic, historic or archaeological treasures
   - protection of industrial and commercial property

ii) Mandatory requirements = non-economic, legitimate justifications

3. Proportionality test

- is the measure appropriate and necessary to achieve the aim?
- does it go beyond what is necessary to achieve the aim?

C. *Free movement of goods cases*

3/69	Sociaal Fonds voor de Diamantarbeiders v Chougal Diamand Co

Belgium imposed an insignificant tax on rough diamonds and transferred the tax collected to the social fund of workers employed in the diamond polishing industry. Belgium does not produce rough diamonds.

C-170/88	Ford Espaňa SA v Spain

Spanish authorities imposed a progressive tax on exported goods calculated on the basis of the value of the inspected goods.

7/68	Commission v Italy

Italy imposed a progressive tax on the export of objects of artistic, historic, archaeological or ethnographic value, calculated on the basis of the value of the artwork.

According to Italy, such objects cannot be deemed ordinary ‘consumer goods’, and therefore the rules on the free movement of goods does not extend to these. Furthermore, the aim of the tax is to protect artistic treasures in Italy. Finally, the contribution of this tax to the national budget is insignificant.

340/87	Commission v Italy

Community law (Council Reg 83/643/EC) prescribed certain inspections to be carried out at national customs borders: national customs officials were to ensure customs controls for 10 hours daily. Italian law foresaw a fee to be imposed on traders inspected beyond the 6 hours official working time of Italian customs officials.

Italy argued that the fee constitutes a consideration for a specific service actually and individually rendered to the trader, the amount of which is proportionate to the service rendered.

18/87 Commission v Germany

Certain Bundesländer of the Federal Republic of Germany (Bremen, Hessen, Niedersachsen, Nordrhein-Westfalen and Rheinland-Pfalz) levied a fee on the import and transit of livestock in order to cover the costs of veterinary inspections prescribed by Council Reg 81/389/EC. Such inspections are only carried out once in the territory of Germany.

77/72 Carmine Capolongo v Azienda Agricola Maya

Italy imposed a tax on both domestically produced and imported egg boxes. Italy used the taxes thus collected to support the domestic manufacturing of paper.
Italy maintains that the tax is non-discriminatory: it must be paid on both domestic and foreign products and the amount of the tax is also equal.

C-163/90 Administration des douanes et droits indirects v Léopold Legros

Two motor vehicles from Germany were bought through a France-based agent by Réunion residents (respondents). The vehicles were introduced into the French customs territory with no customs payment obligation owing to the customs union of which Germany and France both form a part. When the vehicles reached Réunion, the customs clearance formalities were carried out and the Réunion customs and tax administration demanded the payment of dock dues from the respondents. These dock dues were based on a 1947 Law, according to which dock dues are levied on almost all products entering French overseas territories to finance local budgets. The respondents appealed the decision of the customs and tax authority before the Réunion court of appeal pleading that the dock due was a charge of equivalent effect as customs duties .

The Réunion court of appeal referred the following questions for a preliminary ruling:

° *Are the articles on the customs union to be interpreted as meaning that a charge may be defined as a charge having an effect equivalent to a customs duty when it is levied on the value of foreign or national goods on the occasion of their release for consumption, without direct or indirect reference to the crossing of a State frontier, or do they, on the contrary, mean that the crossing of a State*

frontier must be, de facto or de jure, one of the operative events giving rise to the levying of the charge?

° *Can the regional origin of a product or class of products constitute a lawful criterion for different fiscal treatment established by a Member State, in so far as it necessarily excludes foreign producers from more favourable provisions, or must such different treatment be based also, or only, on the nature of the product concerned?*

° *May the fiscal advantages enjoyed by products from the French overseas departments, particularly Réunion, as a result of their exemption from dock dues (octroi de mer) be regarded as pursuing aims of economic policy which are compatible with the requirements of the Treaty and of the secondary legislation?*

France argues, that the dock dues are not charges having equivalent effect, since they constitute an internal operation and are not imposed on the grounds of crossing the state frontier. Indeed, dock dues are payable irrespective of where the products introduced into Réunion originate from, and as such, are imposed also on products manufactured in France.

78/76 Steinike und Weinling v Federal Republic of Germany

By order dated 10 June 1976, received at the Court Registry on 2 August 1976, the Verwaltungsgericht Frankfurt am Main raised various questions of interpretation of the EEC Treaty. These questions have arisen in an action between a German undertaking, the plaintiff in the main action, and the Federal Republic of Germany, represented by the Bundesamt für Ernährung und Forstwirtschaft; they relate to the compatibility with Community law of a charge German marks (DEM) 20 000 levied on the plaintiff on the processing of citrus concentrates imported from Italy and various third countries. This charge is levied on undertakings in the agricultural and forestry sector, however, the levy depends on type of undertaking: agricultural and forestry undertakings' levies are fixed to land tax or head of cattle, while processing undertakings pay based on the end product's value. The levy is intended, along with other funds of a different kind, to finance the Absatzförderungsfonds der deutschen Land-, Forst- und Ernährungswirtschaft (hereinafter called 'the Fund') set up by a Federal Law of 26 June 1969. Under Paragraph 2 of this law the purpose of the Fund is, with the help of a body financed and controlled by it and functioning under the name 'Centrale Marketing-Gesellschaft der deutschen Agrarwirtschaft', to 'promote centrally by the use of modern means and methods the sale and use of

products of the German agricultural and food industry and of German forestry by opening up and fostering markets at home and abroad'. The aid is given to the German food industry independently of whether its products are made from domestic raw material or from semi-finished products of domestic origin or from other Member States.

243/84 Johnnie Walker v Ministeriet for Skatter og Afgifter

A Danish law of 1971 classified fruit spirits of an alcoholic strength not exceeding 20% under a special (moderate) tax calculated per litre of the product. Meanwhile, other fruit wines and liquors were taxed on the bases of a law adopted in 1980. According to a circular issued by the Directorate General for Customs, fruit wine is a product obtained by the fermentation of fruit juice or honey (with an alcohol volume of approximately 6-8%).

The Plaintiff John Walker & Sons Ltd produces scotch whisky of 40 % alcoholic strength which it markets also in Denmark. In 1982 it instituted proceedings against the Danish Ministry for Fiscal Affairs in Denmark on the basis that it applies discriminatory taxation between scotch whisky and fruit liquor which are similar or in competition. According to the Plaintiff, scotch whisky and fruit liquor are similar products as they meet the same needs of the consumer.

The Respondent argues that the two products are dissimilar both regarding the raw material they are made of, their mode of production and their taste, indeed, these products are classified under different customs tariffs under Community law. Denmark primarily produces liquors of high alcoholic strength.

55/79 Commission v Ireland

Based on Irish law, domestic producers of spirits, beers and wine receive a 4-6 week deferment of payment of excise duties, while importers of similar goods of foreign origin must pay excise duties at the time of import or delivery from the customs warehouse. All affected products are taxed at the same rate, irrespective of origin. Ireland grants deferment of payment also to importers, but only in case they pay an additional duty or furnish a security.

Ireland contends that the EEC Treaty merely prohibits taxation in excess of the tax imposed on domestic products.

C-290/05 and C-333/05 joined cases Nádasdi and Németh Ilona kontra Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága

According to Law No. CX of 2003 all passenger cars placed in circulation in Hungary are subject to registration tax. The tax is calculated on the basis of the cars' environmental classification, engine type and engine capacity, i.e. new and used cars are taxed under the same conditions.

Németh Ilona contends that the registration tax is in fact a charge having equivalent effect to a customs duty, while Nádasdi Ákos is of the view that it is a protectionist tax.

C-132/88 Commission v Greece

In Greece, passenger cars are subject to tax at the time of their placing in circulation based on their engine capacity. Registration tax ascends steeply at 1200 cc engine capacity as well as at 1800 cc. The majority of cars manufactured in Greece have an engine capacity of 1300 cc, the country does not produce cars with an engine capacity of 1800 cc, and foreign cars of all engine capacities are available for purchase in the country.

According to Greece, the outstanding taxation of 1800 cc cars is based on the fact these are luxury cars available only to the wealthiest. At the same time, public roads are overcrowded and environmental pollution is a big problem, therefore Greece would like to encourage buyers to purchase cars of a smaller engine capacity.

216/81 COGIS v Amministrazione delle Finanze dello Stato

A trader importing whisky from the UK to Italy demanded a partial refund of the tax levied by the Italian tax authority, claiming that spirits distilled from wine or grape marc were taxed at a lower rate.

252/86 Gabriel Bergandi v Directeur général des impôts

Gabriel Bergandi, an operator of automatic games machines challenged the decision of the Director-General of Taxes, La Manche, regarding collection of the annual tax on automatic machines. Automatic games machines installed in public places were subject in France to a tax calculated according to the category of the machine. Depending on machine category, the tax payable was FF 500 or FF 1 500, the latter reduced to FF 1 000 for machines first brought into service more than three years earlier.

According to France, the different taxation of the machine categories is meant to encourage the use, by certain people and in certain places, of particular categories of machines and to discourage the use of other categories. The taxation follows social objectives, to deter the operation of socially less desirable machines.

142/77 Larsen and Kjerulff v Statens Kontrol med ædle Metaller

Denmark does not produce precious metals, but it imposes a tax on undertakings manufacturing products from gold, silver or platinum, based on their consumption of precious metals. This tax is to finance the body entrusted with overseeing the activities of such manufacturers. The consumption of the manufacturer includes both metals in products bearing the manufacturers mark, and metals in unmarked, exported products (which shall receive another undertaking's mark). Goldsmiths Larsen and Kjerulff challenged the tax imposed on their consumption of metals in products they exported, claiming that it is a charge having equivalent effect to customs duties.

8/74 Procureur du Roi v. Benoit & Gustave Dassonville (Dassonville)

Criminal proceedings were instituted in Belgium against Benoit and Gustave Dassonville, traders who acquired scotch whisky in free circulation in France and imported it into Belgium. The Dassonville brothers infringed Belgian rules, because they did not possess a certification of origin for the whisky from the British customs authorities. France does not require such certification from importers. Traders wishing to import scotch whisky which is already in free

circulation in France can obtain such a certificate only with great difficulty, unlike importers who import directly from the British producer.

According to the Belgian prosecutor, a rule incriminating imports of whisky in lack of an official document certifying the origin of the product is justified by the need to prevent unfair trade practices towards consumers.

C-267 & 268/91 Criminal proceedings against Bernard Keck & Daniel Mithouard (Keck)

In France, criminal proceedings were brought against Bernard Keck and Daniel Mithouard, owners of a supermarket on the border of France and Germany, for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at loss') contrary to Article 1 of French Law No. 63-628.

In their defence Keck and Mithouard argued that such a general prohibition on resale at loss breaches Article 30 of the EEC Treaty and is also incompatible with the principles of the free movement of persons, services, capital and the free competition within the European Community. Resale at loss can increase the turnover of a business unit by attracting customers, thereby enhancing the free movement of persons and goods between the Member States. Because some Member States do not prohibit resale at loss, French traders are put at a disadvantage, which distorts competition within the European Community.

C-145/88 Torfaen Borough Council v. B & Q plc (Sunday Trading)

Proceedings were brought against B & Q for violating the rules on Sunday trading in the United Kingdom. According to Sections 47 and 59 of the United Kingdom Shops Act certain products may not be sold in shops on Sundays (eg.: liquors, tobacco, newspapers, etc.).

According to B & Q such a prohibition is in fact a measure having equivalent effect to quantitative restrictions on imports, for compliance with the latter leads to a 10% loss in turnover from other Member States' products for traders.

C-405/98 Konsumentenombudsmann v. Gourmet International Products AB

According to the Swedish Law of 1978 on the Marketing of Alcoholic Beverages, "in view of the health risks involved in alcohol consumption" advertising may not be used to market alcoholic beverages on radio, television or periodicals. This prohibition, however, does not apply to specialist publications aimed essentially at manufacturers, traders and restauranteurs, and distributed solely at the point of sale of such beverages. GIP publishes a magazine called Gourmet. In its 4th issue, the edition intended for all subscribers contained 3 pages of advertisements for alcoholic beverages; these pages did not appear in the edition sold in shops. 90% of the magazine's subscribers were traders, manufacturers or restauranteurs, only the remaining 10% were private individuals.

The Swedish Consumer Ombudsman sought the imposition of a fine on GIP for failure to comply with the prohibition on advertising alcohol to consumers.

According to GIP, the Swedish rule is contrary to Community law, by reason of hindering the free movement of goods.

120/78 Rewe-Zentral-AG v. Bundesmonopol-verwaltung für Branntwein (Cassis de Dijon)

Rewe-Zentral-AG applied to the Federal Monopoly Administration for Spirits for authorization to import the liquor Cassis de Dijon from France to Germany. The Federal Monopoly Administration for Spirits informed Rewe that because of its insufficient alcoholic strength the said product cannot be marketed in Germany. This is based on Article 100 of the Act on Spirits which fixes the minimum alcohol content of specified categories of liquors. In the case of fruit liquors such as Cassis de Dijon, the minimum alcohol content is fixed at 25%. The alcohol content of Cassis de Dijon, which is freely marketed in France, is between 15% and 20%.

Rewe takes the view that the fixing of minimum alcohol content leads to the result that sprits are excluded from the German market, and therefore the rule constitutes a measure that has an effect equivalent to a quantitative restriction on imports.

The German government put forward several arguments to justify the measure fixing the alcohol content of liquors. According to the German government the measure is justified by considerations of public health, as products of lower

alcohol content may more easily induce a tolerance towards alcohol than more highly alcoholic beverages. At the same time, the measure is justified by reasons of protecting against unfair trade practices, because lowering the alcohol content secures a competitive advantage, since alcohol is the most expensive constituent by reason of the high rate of tax to which it is subject.

249/81 Commission v Ireland (Buy Irish)

The Irish government launched the „Buy Irish” campaign to promote the sale of Irish products within Ireland, including measures such as the encouragement of the use of the 'Guaranteed Irish' symbol for Irish products, and a publicity campaign by the Irish Goods Council in favour of domestic products. The Management Committee members of the Irish Goods Council are appointed by the Ministry for Industry.

Ireland maintains that this is just an advertising campaign and the use of the „Guaranteed Irish” symbol is meant to raise awareness for Irish products and the problem of unemployment in Ireland. Moreover, the Irish Goods Council is not a public authority, just an arrangement of Irish industries cooperating for the common good, which is merely financed, but not run by the government. Finally, Ireland contends that the campaign was unsuccessful and could not increase the consumption of Irish goods by the 3% target.

C-12/00 Commission v Spain

According to Spanish law, 'cocoa' and 'chocolate' products may only contain cocoa butter, all other products containing other vegetable fats, including those lawfully manufactured in other Member States can only be marketed as 'chocolate substitutes'. Directive 2000/36 states, in the fifth to seventh recitals in its preamble: The addition to chocolate products of vegetable fats other than cocoa butter, up to a maximum of 5%, is permitted in certain Member States.
According to Spain, the rule on the use of vegetable fats and the different designations for the different types of chocolates are selling arrangements, applying to Spanish and foreign products alike. It reflects the objective reality that the two types of chocolate products are not the same, and these rules do not increase marketing costs for these products in Spain. The rules are necessary to protect consumers, since Spanish consumers understand that the traditional

designation ‘chocolate’ indicates that the product is produced with cocoa butter with the corresponding quality, taste, consistency.

C-315/92 Clinique

According to the German law on foodstuffs and consumer items it is prohibited to market cosmetic products with misleading names and to attribute to such products properties they do not possess. Estée Lauder brought an action before the Berlin Landgericht to stop the use of the name ‘Clinique’ for certain cosmetic products on the ground that they could mislead consumers into believing the products had medicinal properties.

Clinique argued that the prohibition of the name amounted to a measure having equivalent effect to a quantitative restriction, restricting the importation and marketing of a cosmetic product lawfully manufactured or marketed in another Member State.

178/84 Commission v Federal Republic of Germany (Reinheitsgebot für Bier)

The German Biersteuergesetz (Law on beer duty) governing the manufacture of beer, provides that beers may be manufactured only from malted barley, hops, yeast and water. According to the ‘implementing measures’ to the Biersteuergesetz, rice, maize and sorghum are not treated as cereals for the purposes of manufacturing beer. Further, according to the Biersteuergesetz, the commercial utilization of the designation ‘Bier’ is only open to beverages manufactured in compliance with the above rules. Other beverages may not be marketed in Germany under the name ‘Bier’; those contravening the above rules may be fined.

According to the Commission, the above rules constitute measures having equivalent effect as quantitative restrictions. By contrast, the German government takes the view that the rules of the Biersteuergesetz protect the expectations of consumers that associate ‘Bier’ with beverages brewed only from certain cereals.

C-265/95 Commission v French Republic

The Commission brought an action against France on the basis that it did not take all necessary and proportionate measures to prevent private individuals from obstructing the free movement of fruit and vegetables for over a decade. French authorities remained passive to violent acts of private individuals and farmers' groups (Coordination Rurale), who, among others, intercepted lorries transporting such goods, destructed their loads, were violent against lorry drivers or threatened French supermarkets selling products originating in other Member States or even damaged such goods displayed in supermarkets, shops.
The Commission gave formal notice to the French government to submit its observations on this issue, upon which France contended that it condemns such acts, it conducted investigations against certain individuals, however, it is difficult to monitor partisan-like groups. Yet, after further incidents took place, the Commission delivered a reasoned opinion stating that France failed to take all necessary and proportionate measures to prevent the obstruction of the free movement of fruit and vegetables. Finally, when the French agricultural minister stated in 1995 that it shall take no action against such obstruction and further incidents took place, the Commission brought an action against France for infringement of the TEC.

C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich

On 15 May 1998 the Transitforum Austria Tirol, an environmental association for the protection of the Alpine region notified the Innsbruck government that it shall organize a demonstration on the Brenner motorway between 12 June 1998 and 13 June 1998 closing the Europabrücke and Schönberg toll station to traffic. Information regarding the closing of the motorway was disseminated in both Germany and Austria. Schmidberger, a German based international transport undertaking in the business of transporting timber from Germany and Italy and back, generally uses the Brenner motorway for its transport activities.

Schmidberger sought damages from Austria in the amount of 140 000 ATS on the basis that five of its lorries could not use the Brenner motorway for 4 days. Due to the fact that 11 June was a bank holiday, the 13 and 14 June was a weekend, and on those days, lorries are not allowed on the motorway, Austria should have banned the demonstration, for it restricted the free movement of

goods on the remaining day on the sole transit route between Germany and Italy. According to Schmidberger, freedom of assembly does not justify restricting free movement of goods under Community law.

III.
FREE MOVEMENT OF PERSONS

← Covers three modalities in which persons may be economically active within the internal market. Common factors:

- cross-border element
- economic activity
- receiving remuneration for work/services

1. Right holders:

Worker = natural person, who integrates into the socio-economic framework of the host Member State and works under the direction of others

and Employer, Recruitment agency

→ different from

- natural person service provider: worker's long term integration in host Member State
- self-employed person: worker works under the direction of their superior

Service provider = offers services temporarily in host Member State

and Recipient of service: purchases service in another Member State

→ different from self-employed person/ company: service provider only temporarily offers services in the host Member State (if at all)

Self-employed person = natural person, who integrates into the socio-economic framework of the host Member State and works at his own risk

Company/ firm = EU resident legal persons offering services or goods on the market

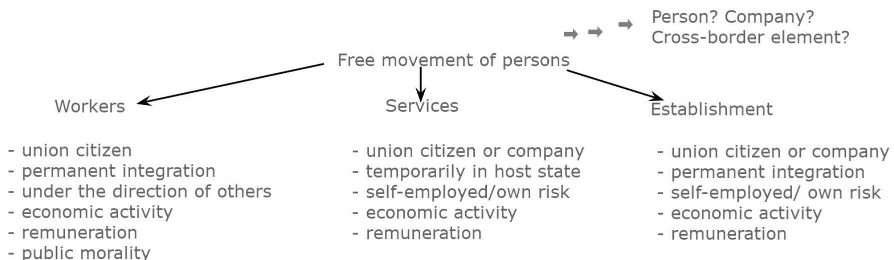
→ different from service-provider: long term integration into host Member State
- infrastructure
- periodicity

→ Free movement of persons exemption: public service = activities connected with the exercise of official authority

2. Cross-border element

1) Difference between the
   a) nationality of the worker, service provider/recipient, self-employed person/ origin of company and
   b) the place of work, business, offering/purchase of service

2) Same nationality as Member State where work is carried out, service is offered, but worker/ self-employed person/ service provider had previously made use of his free movement rights (in a way relevant to the case)



3. Check nature of restriction!

- direct discrimination (→ Treaty justifications)
- indirect discrimination (→ Treaty justifications or mandatory requirements)
- hindrance (→ Treaty justifications or mandatory requirements)

4. Justifications available

i) Treaty justifications
   - public policy
   - public security
   - public health

ii) Overriding reasons relating to the public interest = non-economic, legitimate justifications

4. Proportionality test

- is the measure appropriate and necessary to achieve the aim?
- does it go beyond what is necessary to achieve the aim?

A. Free movement of workers
(FMW, Arts 45-49 TFEU)

WORKERS

Article 45 TFEU

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
   (a) to accept offers of employment actually made;
   (b) to move freely within the territory of Member States for this purpose;
   (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
   (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

5. The provisions of this Article shall not apply to employment in the public service.

1. Check for worker!

Workers (autonomous term of Union law)

- union citizens /family members
- pursuing an economic activity which is not marginal or ancillary
- working under the direction of their superior
- receiving remuneration for their work
- (their activities are not inconsistent with public morality)

+ Employers, Recruitment agencies

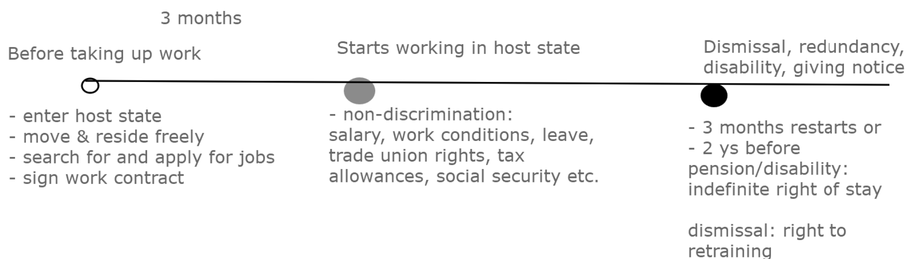
→ Public service exemption!

- only allows restriction on access to such position
- must be interpreted narrowly – case by case!
  - position involves protection of interests or institutions of the state
  - use of legitimate force or exercise of state privileges

2. Check for rights restricted!

Temporal scope of the rights of workers

1) enter & move freely within host Member State – 6 months
2) reside during employment & residence permit
3) right to be retrained in case worker is dismissed
4) residence rights for those reaching pensionable age or disablement (after 2 years of work in the host Member State)



Supplementary rights of workers:

- non-discrimination
- recognition of rights acquired under social systems of other Member State(s)
- equal treatment as regards labour rights, social protection and tax allowances

3. Check nature of prohibited restriction!

- direct discrimination
- indirect discrimination ↔ 'genuine linguistic requirements'
- hindrances

4. Available justifications

a) Treaty justifications:

- public policy
- public security
- public health
  - → direct discrimination
  - → indirect discrimination
  - → hindrance

b) Overriding reasons in the public interest

→ indirect discrimination
→ hindrance

5. Proportionality test

- necessary and appropriate to achieve the aim (cf. justification)
- does not go beyond what is necessary to achieve the aim

Family members = union citizen worker's family members of Member State or third country citizenship

Scope:

i) spouse or civil/ registered partner
ii) children (natural and adopted) until the age of 21 or when they finish their studies
iii) dependent parents, grandparents

Rights:

- same rights as union citizen worker!
- rights 'parasitic' on rights of the worker
  - ← independent right of children once they enter the school system in the host Member States
  - ← primary caretaker parent's right may become parasitic on right of the child
  - ← independent right if divorce, annulment or termination in case the marriage/partnership lasted at least 3 years, 1 year in the host Member State

B. *Free movement of workers cases*

66/85 Deborah Lawrie-Blum v Land Baden-Württemberg.

Deborah Lawrie-Blum, a British national, who, after passing the necessary examination at the University of Freiburg was – on grounds of her nationality – refused by the Land Baden-Württemberg (LBW) admission to a preparatory course which qualifies successful candidates for appointment as teachers. In Germany, the training of teachers is a matter for the Länder. According to the decree of LBW, persons admitted to the preparatory course are afforded the status of 'temporary civil servant' with all the benefits accruing therefrom. According to the LBW law on civil service, only German nationals may acquire the status of civil servant.

Lawrie-Blum contends that the law in question is contrary to Community law, for reasons of discriminating on grounds of nationality as regards access to employment. According to the administrative courts of Freiburg and LBW, the rules concerning the free movement of workers do not apply, it being a case of employment in public service, and further, this area does not form part of economic life.

C-109/04 Karl Robert Kranemann v Land Nordrhein-Westfalen

In the course of his mandatory legal traineeship in law, Karl Robert Kranemann underwent training in a firm of lawyers in London where he received a salary. In response to his request for reimbursement of travel expenses for the return trip from his home in Aachen (Germany) to the place of his traineeship, instead of his actual costs of 539 DEM, he received only 83,25 DEM. This was justified on the basis that the applicable German decree limited reimbursements of travel expenses for legal trainees to the amount necessary for a return journey to, and from the German border.

Kranemann challenged the decision on travel expenses, stating that it constitutes a restriction of the movement of persons. According to Land Nordrhein-Westfallen, trainees do not fall under the scope of 'workers' and such a limitation is justified based on budgetary considerations.

C-350/96 Clean Car Autoservice GmbH v Landeshauptmann von Wien

The Clean Car Autoservice GmbH, an Austrian company established in Vienna applied to the Vienna City Council that it wished to appoint Rudolf Henssen, a German national resident in Berlin, as manager. It stated that Henssen was actively seeking accommodation in Vienna and that „the declaration relating to his residence there would be submitted in due course”. In its decision, the Magistrat of Vienna prohibited the taking up of trade, with reference to the Austrian Trade Law, which requires the manager to be resident in Austria and to be in the position to act effectively as manager of the firm.

Clean Car challenged the decision stating that it breached Community law by restricting the free movement of workers.

53/81 D.M. Levin v Staatssecretaris van Justitie

Mrs. Levin, a British national, took up an activity as an employed person in the Netherlands, from which she drew less income than sufficient to support herself and her husband. She applied for a residence permit in the Netherlands, which was refused based on Dutch legislation, according to which Mrs. Levin was not engaged in gainful occupation and may therefore not receive the said permit. In her appeal, Mrs. Levin claimed that she and her husband had sufficient other income and property to support themselves, even without having to work, and that the decision of the Dutch authorities denying her the residence permit infringed her rights related to the free movement of workers.

However, according to the Dutch government, the free movement of workers may only be relied upon by persons who receive a wage at least commensurate with the means of subsistence considered necessary by the legislation of the Member State in which they work, or at least work full time.

C-138-02 Brian Francis Collins v Secretary of State for Work and Pensions

Brian Francis Collins is a dual Irish-American national. In the course of his studies he spent one semester in the UK in 1978, and then returned for a 10 months stay in 1981. During this time, he did part-time and casual work in pubs, bares and in sales. 17 years later he returned to find work in the social services sector, and claimed a *jobseeker's allowance* which was he was refused on the

grounds that he was 1) not habitually resident in the UK, 2) he was not a worker in the meaning of Community law, and 3) he did not have a right to reside in the UK.

According to Mr. Collins, he is a 'worker' under Community law, seeking employment. In line with the case-law of the ECJ, "migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship" (Ninni-Orasche, C-413/01). According to Reg 1612/68 those Union citizens who move in search for work benefit from the principle of equal treatment only as regards *access to employment,* while those who have already entered the employment market may claim the same social and tax advantages in the host Member State as national workers. The UK however contends, that Collins is not a 'former' migrant worker, for there is no relationship between his work he did in 1981 and the employment he is seeking in 1988.

C-379/87 Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee (Groener)

Anita Groener is a Dutch national who was engaged on a temporary basis as a part-time art teacher in the College of Marketing and Design in Dublin where she lectured in English. Indeed, in public vocational education schools in Ireland, subjects are taught essentially or exclusively in English. She applied for a permanent, full-time post as a lecturer. According to Irish law a person may not be appointed to a permanent, full-time post as a teacher, unless they hold the certificate of proficiency in the Irish language or an equivalent qualification recognized by the Minister. Those not holding the certificate in question may be required to undergo a special examination in Irish. Exemption from the linguistic qualification requirement may be granted by the Minister in case where there is no fully qualified candidate. Ms. Groener failed the Irish language examination and was therefore refused employment as a permanent, full-time lecturer.

C-94/07 Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften

Doctoral students may receive a grant or a work contract from the MPG to support their research activities. Grant recipients are not obliged to work for the MPG and are not liable to pay taxes, they are also outside the social security system. Those receiving the part-time work contract are employed by, and must work for the MPG, must pay taxes and have social security insurance.

Raccanelli brought an action before the Arbeitsgericht Bonn stating that although he had been given a grant, in fact, there was an employment relationship between him and the MPG: he was treated the same was as German doctoral students who were employed under part-time work contracts and who were beneficiaries of social security affiliation. Raccanelli contended that he must be considered a 'worker', since he has been upon to provide similar work-related services as doctoral students employed under a work contract.

C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman (Bosman)

Association football is practised as an organized sport in clubs which belong to national associations of the Member States. URBSFA is the Belgian national association. The national associations are members of the Fédération Internationale de Football Association ("FIFA") which organizes football at world level. FIFA is divided into confederations for each continent. The confederation for Europe is UEFA to which European national association belong.

A transfer takes place when a player of an association changes his club affiliation. All professional players' contracts run to 30 June. Before the expiry of the contract, the club must offer the player a new contract. The player is free to accept or refuse the offer made to him. If he refuses, he is placed on a list of players available for 'compulsory' transfer, subject to payment to the original club by the new club of a compensation fee for training. International transfers may only take place if the national association issues a transfer certificate certifying that the transfer fee has been paid.

Jean – Marc Bosman a player of the football team R. C. Liege (Belgian club) between 1988 and 1990 (for 120 000 Belgian Francs BFR) received a new contract in 1990 that would have reduced his salary by 75% (30 000 BFR). He declined the offer and was put on the transfer list. No club showed any interest in Bosman,

so he arranged a contract with l'Union Sportive de Litoral de Dunkerque (a French club) for a salary of 100 000 BFR + 900 000 BFR signing-on bonus. The Belgian and the French clubs agreed on a one-year temporary contract for 1,200,000 BFR and an option to buy Bosman after the first year for 4,800,000 BFR in exchange for a transfer certificate issued by the Liege to Dunkerque. Liege doubted Dunkerque's solvency, and declined to request that the Union Royal Belge des Sociétés de Football Association (URBSFA) send the transfer certificate to Dunkerque. This led to the termination of the contract between Bosman and Dunkerque. Liege then suspended Bosman and prevented him from playing the entire season. Mr. Bosman brought a lawsuit against Liege and later the URBSFA and the UEFA.

267/83 Aissatou Diatta v Land Berlin

A Senegalese woman married to a French national living and working in Germany separated from her husband and moved to a separate accommodation with the intention of divorcing. The German authorities refused to renew her residence permit based on the ground that she was no longer to be considered a family member of a 'worker'.

37/75 Anita Cristini v Société nationale des chemins de fer français

An Italian mother resident in France, a widow of an Italian worker who worked in France had a right to lawfully remain in the host state of France. She was refused a fare reduction available for large families on French railways on grounds of her nationality, stating that the work contract which would have enabled her to receive the same benefits as French nationals, has ceased to exist.

261/83 Carmela Castelli v Office National des Pensions pour Travailleurs Salariés

Castelli, an Italian national is entitled to a survivor's pension in Italy. In 1957 she moved to Belgium as a dependent of her son who worked in Belgium and later received a Belgian early retirement pension. In 1978 the Belgian National Office denied her the income guaranteed to old people under national law on

the ground that she is not a Belgian national or a national of a country with which Belgium had concluded a reciprocal agreement and she is not entitled to a retirement pension or survivor's pension in Belgium. Although she had never worked in Belgium, she satisfied the minimum residence requirement set by Belgian legislation for the provision of the benefit.

C. *Freedom of establishment*
(FoE, Articles 49-55 TFEU)

RIGHT OF ESTABLISHMENT

Article 49 TFEU

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 54, 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.

1. Check for self-employed person/ company!

Self-employed person

- union citizens /family members
- pursuing an economic activity
- working at their own risk
- for remuneration
- typically activities under Article 50 TFEU
  - industrial;
  - commercial character;
  - crafts;
  - professions.

Companies/ firms = 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, with a registered office, central administration or principal place of business within the Union, offering products and services

→ Public service exemption!
- use of legitimate force or exercise of state privileges

2. Cross-border element

- different nationality of self-employed person/ host Member State
- different origin of company/ firm than host Member State

3. Check for rights restricted!

- Right to non-discrimination
  - pursuing activities
  - taxation
  - qualifications etc.

- Primary establishment:
  - right to move to the host Member State and take up and pursue activities as a self-employed person
  - right to move seat of company/ firm to another Member State
    - rules of host and Member State of origin apply as to whether the company can remain subject to the law of the Member State of origin!

- Secondary establishment:
  - right to set up agencies, branches or subsidiaries in another Member State
  - right to manage undertakings

- Right to leave the Member State of origin and pursue activities/ move seat of company elsewhere

4. Check nature of prohibited restriction!

- direct discrimination
- indirect discrimination ↔ ‘genuine linguistic requirements’
- hindrances

5. Available justifications

a) Treaty justifications:
- public policy
- public security
- public health
  - → direct discrimination
  - → indirect discrimination
  - → hindrance

b) Overriding reasons in the public interest
- → indirect discrimination
- → hindrance

6. Proportionality test

- necessary and appropriate to achieve the aim (cf. justification)
- does not go beyond what is necessary to achieve the aim

FoE and practicing the profession of lawyer in the host Member State

(Directive 98/5/EC)

1) *Under the home-country professional title* (e.g. „ügyvéd“ in Spain)

- must register with the competent authority of the host Member State
- may give advice on
  - home Member State law
  - EU law
  - international law

2) *Under host Member State professional title* (e.g. „Rechtsanwalt“ in Germany)

→ Based on the decision of the host Member State’s competent authority, if:

- the lawyer proves that they have effectively and regularly practiced the law of the host Member State and EU law;

or

- the lawyer has effectively and regularly practiced the law of the host Member State but for a period less than three years but has attended lectures or seminars on the law of the host Member State;

or

- the lawyer’s diploma is recognized by the host Member State.

D. *Freedom of establishment cases*

C-210/06 CARTESIO Oktató és Szolgáltató bt.

The Bács-Kiskun Megyei Bíróság, the relevant Hungarian company court denied leave for the *CARTESIO Oktató és Szolgáltató Bt.* to transfer its seat to Italy. Cartesio appealed to the Szegedi Ítélőtábla that referred among others the following questions to the ECJ:

- May a Hungarian company request transfer of its registered office to another Member State of the European Union relying directly on Community law? If the answer is affirmative, may the transfer of the registered office be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?

C-268/99 Jany and others v. Staatssecretaris van Justitie

The applicants were 2 Polish and 4 Czech prostitutes wishing to establish themselves in the Netherlands and pursue their activity. During their work, they paid rent for their premises and taxes after their revenue. Their request for establishment was denied on first and second instance, on the grounds that prostitution is not a socially acceptable line of work and may therefore not be considered an occupation.

C-9/02 Hughes de Lasteyrie du Saillant v. Ministère de L'Économie, des Finances et de l'Industrie

According to French tax rules, all taxpayers wishing to leave France and establish themselves in another state must immediately pay the tax related to the increment on their securities. Paying such tax may be delayed upon request, however, sufficient collateral must be provided. Hughes de Lasteyrie wished to leave France before the end of the tax year to relocate to Belgium.
De Lasteyrie applied to the French Conseil d'Etat to annul said regulation on the grounds that it infringes Union rules related to the freedom of establishment.

France pleaded that these rules are necessary in order to prevent abuse of EU law and tax evasion.

C-212/97 Centros Ltd v. Erhvervs- og Selskabsstyrelsen

The Brydes, a Danish couple established Centros Ltd in the UK, and in line with UK rules did not immediately make the 100 pounds capital available to the company. The couple attempted to register an office of Centros Ltd in Denmark. However, the application was denied on the grounds that the company pursued no economic activity whatsoever in the UK, therefore, the whole reason for establishing an office thereto was just to circumvent the stricter Danish rules related to company capital requirements. Denmark pleaded before the ECJ that the rejection of the application to register is based on the legitimate goal of protecting the interests of creditors and to avoid insolvency fraud.

107/83 Ordre des avocats au Barreau de Paris v Onno Klopp (Klopp)

Onno Klopp, a German national, a lawyer and member of the Düsseldorf Bar, after having successfully obtained the French law diploma, applied to take the oath as an *avocat* and to be registered at the Paris Bar, while remaining a member of the Düsseldorf Bar and retaining his residence and chambers there.

The Paris Bar Council rejected his application on the grounds that although Klopp satisfied all other requirements for admission as an *avocat* – especially as regards his personal and formal qualifications –, he did not satisfy the provisions of Art. 83 of Decree No. 72-468, which provide that an *avocat* may establish chambers in one place only, which must be within the territorial jurisdiction of the regional court with which he is registered. This rule is justified by the interest related to the sound administration of justice, which requires that avocats are available to their clients.

According to Mr Klopp, the above Decree infringes his rights under the freedom of establishment.

2/74 Jean Reyners v Belgian State

According to 428 § of the Belgian Code judiciaire, the permission to exercise the profession of *avocat* (lawyer) is dependent on the possession of Belgian citizenship. The Royal Decree issued on 24 August 1970 allows for an exception in case the country of citizenship of the lawyer concerned provides for reciprocity.

Reyners is a Dutch citizen, born and raised in Brussels where he obtained his law degree. Because there was no reciprocity as regards the permission of taking up the activity as an lawyer between the Netherlands and Belgium, the Belgian authorities denied leave for Reyners to work as an lawyer.

C-340/89 Irene Vlassopoulou v Ministerium für Justiz, Budes- und Europaangelegenheiten Baden-Württemberg

Irene Vlassopoulou, a Greek lawyer registered with the Athens Bar wished to be admitted as *Rechtsanwältin* (lawyer) in Baden-Württemberg (Germany) in 1988. Besides her Greek diplomas, Ms Vlassopoulou had a doctorate from the University of Tübingen and had been working in a Mannheim law firm since 1983 under the supervision of a German colleague.
Her application was rejected on the basis that she did not pass the BRAGO § 4 state exam and further, that her Greek diploma does not entitle her to work as an lawyer in Germany.

E. Freedom to provide and receive services

SERVICES

Article 56 TFEU

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.
(…)

Article 57 TFEU

Services shall be considered to be "services" within the meaning of the Treaties 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.

1. Check for service provider!

- Self-employed person
- Companies/ firms (see above)

→ Public service exemption!
- use of legitimate force or exercise of state privileges

2. Cross-border element

- service provider travels to host Member State to provide service
- service recipient of other Member State travels to service provider to receive service
- service "travels" from service provider's Member State to recipient's Member State

3. Check for rights restricted!

- Right to non-discrimination
  - pursuing activities
  - qualifications etc.
- Right to (temporarily) provide services in the host Member State
- Right to receive services

4. Check nature of prohibited restriction!

- direct discrimination
- indirect discrimination
- hindrances

5. Available justifications

a) Treaty justifications:

- public policy
- public security
- public health
  - → direct discrimination
  - → indirect discrimination
  - → hindrance

b) Overriding reasons in the public interest

→ indirect discrimination
→ hindrance

6. Proportionality test

- necessary and appropriate to achieve the aim (cf. justification)
- does not go beyond what is necessary to achieve the aim

F. Freedom to provide and receive services cases

C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler, Jörg Schindler

The Schindler brothers, as agents of the Süddeutsche Kassenlotterie (SKL) posted flyers and forms from the Netherlands to the United Kingdom about the 87th lottery organized by the SKL. Her Majesty's Customs and Excise (UK customs authority) seized the materials on the grounds that these violated Article 1 paragraph 2 of the 1898 Revenue Act as well as Article 2 of the 1976 Lotteries and Amusement Act.

The Schindler brothers invoked the free movement of goods and alternatively the rules related to the free movement of services and claimed that the customs authority breached these rules.

According to the customs authority the lottery bills and the related flyers are not goods in the meaning of the Treaty, further, the authority did not breach the rules on free movement, since UK laws foresee an authorization procedure for all materials related to lotteries irrespective of origin, a procedure the Schindler brothers did not apply for. The customs authority claimed that the respective UK rules intended to prevent fraud and to reduce gambling as an addiction.

C-388/01 Commission v Italy (Italian museums case)

According to the Commission, Italy breached Article 12 TEC on non-discrimination) as well as Article 49 TEC (free movement of services), since local museums only provided for the free entry of persons who are residents of the given municipality and have reached the age of 60 or 65, respectively. Thus, all other Italian citizens and union citizens were excluded from this advantage.
Italy claimed that the restriction serves legitimate aims, since museums are funded through local tax revenues, therefore, it would run counter to the coherence of the tax system if those persons, who contribute to the funding of the museum would be charged again in the form of entry tickets. Furthermore, regulating the entry to museums lies in the competence of the local municipalities, therefore, the measure in question cannot be attributed to the state.

C-58/98 Josef Corsten

Josef Corsten, a self-employed architect contracted a company from the Netherlands to lay composition floors, as the price indicated in their offer was considerably lower than that featured in offers submitted by German undertakings. The Dutch company pursues this activity lawfully in the Netherlands, however, it was not registered in the Skilled Trade Register of Germany.

The competent German administrative authority fined Herr Corsten in the amount of 2000 DEM for contracting a company not registered with the relevant chamber and breaching thereby the legislation against black market work.

115/78 J. Knoors v Staatssecretaris van Economische Zaken

J. Knoors, a Dutch citizen resided over a longer period of time in Belgium where he had worked as plumber in practice through which he acquired the qualification necessary to lawfully pursue his trade in that Member State. In the Netherlands, prospective plumbers are required to undergo specialized training to acquire the qualification to practice their trade. To comply with the Directive 64/427 ensuring the mutual recognition of qualifications however, the Netherlands' Vestigingswet Bedrijven (law on the establishment of undertakings) allowed under Article 15 para 1 item c) the competent Chamber to grant authorization to other Member States' nationals who held the qualifications required under their national law to practice their trade in the Netherlands. J. Knoors applied for such authorization, but his application was refused, on the grounds that he may not benefit from the Directive, since he is a Netherlands national.

IV.
THE FREE MOVEMENT OF CAPITAL

CAPITAL AND PAYMENTS

Article 63 TFEU

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Article 64 TFEU

1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.
2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the

Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

3. Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

Article 65 TFEU

1. The provisions of Article 63 shall be without prejudice to the right of Member States:
   (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
   (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.
3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.
4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State

concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.

Article 66 TFEU

Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

A. *Free movement of capital*

Free movement of capital = prohibition of restrictions on the free movement of

- i) Capital
- ii) Payments

→ *Capital* = investments

1. Direct investments
   - Participation in a foreign company
     → Purchasing a stake, shares
2. Real estate investments
3. Securities
4. Bank accounts, transactions
   - Opening bank and savings accounts in other MSs
5. Loans, credits, sureties, escrows
6. Physical movement of money or securities
   → where coins or notes are no longer means of legal payment (currency) = goods
   → where coins or notes are means of legal payment = capital or payment

→ *Payments* = remuneration paid or received for services, goods etc.

1. Is the investment/ payment restricted?

a. is it a lawful restriction? → no breach of Treaty!

- Member States' lawful restrictions:
  - different tax treatment based on residence or place of investment
  - supervision of tax system and financial institutions
  - prescribing declaration of capital movements for administrative or statistical purposes
    ← unless arbitrarily discriminatory or disguised restriction!

- Council's lawful restrictions:
  - introduction of protective measures (max. 6 months) under extraordinary circumstances, where capital movement causes or threatens to cause serious difficulties for the functioning of the EMU

b. is it an unlawful restriction?

2. Check nature of restriction!

- direct discrimination (→ Treaty justifications)
- indirect discrimination (→ Treaty justifications or general interest)
- hindrance (→ Treaty justifications or general interest)

3. Justifications available:

i) Treaty justifications
- public policy
- public security

ii) General interest – non-economic, must apply indistinctly

4. Proportionality test

- necessary and appropriate to achieve the aim (cf. justification)
- does not go beyond what is necessary to achieve the aim

B. Free movement of capital cases

C-370/05 Uwe Kay Festersen

In 1998 Uwe Kay Festersen, a German national, acquired a property in southern Jutland (Denmark), which, according to the land register, is designated as agricultural property. Since Festersen did not reside permanently on the property, the Agricultural Committee for Southern Jutland ordered him to fulfil the residence requirement, or alternatively, acquire an exemption from agricultural use or dispose of the property within six months. Festersen failed to comply with the order and was fined DKK 5000 and was ordered to pay a penalty of DKK 5000 for each month of delay.

Festersen claimed that the residence requirement under the Danish law on agriculture was incompatible with the provisions on the free movement of capital enshrined in the Treaty.

The Danish government argues that the residence requirement is meant to preserve the traditional form of farming in Denmark where the owner occupies the farm, it is further meant to ensure the use of available agricultural land as a scarce resource, to prevent speculation.

C-423/98 Alfredo Albore

Two German nationals bought two properties in an area of Italy designated as “being of military importance” without prior authorization. The competent registrar of property refused to register the sale of the properties due to the lack of the necessary authorization. Alfredo Albore, the notary before whom the sale and purchase of the properties was concluded, appealed to the Tribunale Civile e Penale di Napoli claiming that the requirement that only foreigners are subject to prior authorization, while public or private persons of Italian nationality are exempt from it, was incompatible with the prohibition of discrimination on grounds of nationality and the free movement of capital. It may be presumed that the authorization procedure pursues public security aims.

C-222/97 Manfred Trummer and Peter Mayer

In 1995 a German resident sold a property situated in Austria to an Austrian resident for a sum denominated in German Marks (DEM). The parties agreed to create a mortgage as a security of payment, also in DEM. The competent Bezirksgericht refused registration of the mortgage, since the Schillinggesetz prescribes that mortgages may only be registered in Austrian Schillings or by reference to fine gold. Upon appeal, the Oberster Gerichtshof asked in a reference for a preliminary ruling whether such national rule is compatible with the Treaty provisions on the free movement of capital.

C-484/93 Svensson & Gustavsson

Luxembourg residents Mr and Mrs Svensson-Gustavsson had taken out a loan for constructing their house with the Comptoir d'Escompte de Belgique SA (established in Belgium). When the couple applied for an interest rate subsidy for dependent children on their loan for the construction of their house in Luxembourg, the competent Luxembourg Ministry for housing and urban planning their application was refused. The refusal was based on Article 1(3) of the Grand-Ducal Regulation of 17 June 1991, which restricts interest rate subsidies to persons who have taken out a loan from a credit institution constituted or established in Luxembourg.

According to the Luxembourg Government, the rule pursues social policy aims of facilitating housing. Since a large portion of the subsidies paid out are recovered the profit tax imposed on financial institutions, without this rule, the housing policy of Luxembourg would be a failure or at least could not be as generous as it is at present.