INTRODUCTION TO EUROPEAN UNION INTERNAL MARKET LAW

Edited by
Raffaele Torino

Consumatori e Mercato 8

Università degli Studi Roma Tre
Dipartimento di Giurisprudenza

Collana "Consumatori e Mercato"
8

INTRODUCTION TO EUROPEAN UNION INTERNAL MARKET LAW

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RomaTrE-Press
2017

Presentazione della collana "Consumatori e Mercato"

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This book is published with the support of Centro di eccellenza Altiero Spinelli (CeAS) of University of Roma Tre

Coordinamento editoriale:
Gruppo di Lavoro *Roma TrE-Press*

Elaborazione grafica della copertina: Mosquito mosquitoroma.it
Impaginazione: Tipografia Colitti

Edizioni: Roma TrE-Press ©
Roma, dicembre 2017
ISBN: 978-88-94885-51-4

http://romatrepress.uniroma3.it

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Contents

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Raffaele Torino

The Internal Market
Short history and basic concepts

1. *Introduction*

The Internal Market (in the terminology currently used in Art. 3(3) TEU and Art. 26 of the TFEU) has always been the core of the European integration process representing the essential element of European integration since its inception.

Today, the establishment of the Internal Market finds its legal basis in Art. 3 TEU, upon which the EU sets its aims and goals.

Article 3 TEU

[…]

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between

> women and men, solidarity between generations and protection of the rights of the child.
>
> It shall promote economic, social and territorial cohesion, and solidarity among Member States.
>
> It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
>
> […]

Art. 3 TEU refers to the Internal Market in its third paragraph after the first paragraph has identified the promotion of peace, its values (as set in Art. 2 TUE) and the well-being of the peoples of the European Union as the priority aims of the Union. The second paragraph refers to the area of freedom, security and justice that the European Union offers to its citizens.

The apparent downshifting (with respect to the original version of the EEC Treaty) of the Internal Market in the hypothetical scale of the EU's goals and tasks as set by the current version of Article 3 TUE must be assessed in the context of rebalancing of the policy bases of the European integration process.

Since the establishment of the European Union (after the Maastricht Treaty) - and partially as a response to the crisis of confidence concerning its worthiness – the European integration process has been oriented towards a wider political view. New policies and regulations have tried to highlight the common political and civil values of the integration process, with particular attention to the life conditions and needs of European citizens, who are no longer regarded as mere market operators (such as workers, entrepreneurs or professionals or consumers).

In this context, the establishment and the improvement of the proper functioning of the Internal Market processes are deemed today one of the two main lines of the future of the European integration process development, not uniquely directed to the integration of Member States' economies, but enriched by sharing, respect and promotion of the values set by Article 2 TEU.

Article 2 TEU

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to

> minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Moreover, Art. 7 TFEU states that the European Union shall ensure consistency between its policies and actions, and Articles from 8 to 12 TFEU provide that in any policy or action (and, therefore, also in building up and improving the functioning of the Internal Market), the European Union pursues the objectives of anti-discrimination (Art. 10), social policy (Art. 9), environmental protection (Art. 11) and consumer protection (Art. 12).

It should also be noted that Art. 114 TFEU states that in pursuing the aim of establishing and ensuring the functioning of the Internal Market both the European Commission and Member States (the latter when put in place measures which derogate from the harmonization directives issued by European institutions) have to or may have to give due consideration to the health and safety of citizens, consumer protection and environmental protection.

The future of the Internal Market is played today, therefore, in its capacity to be a coherent instrument with the new political phase of the European integration process. The concept of the Internal Market evoluted. The Internal Market was born as an expression of the synthesis of an area without internal frontiers in which the four economic fundamental freedoms are guaranteed (the free movement of goods, persons, services and capital). Today the Internal market appears to have much broader scope, watching the entire structure of relations, not only purely economic, between market actors, and therefore open to consider and to take on the values shared by the actors in the market, which are, once again, the protection of consumers, environmental protection, respect for human rights (primarily workers), gender equality, cohesion between generations.

In this respect, the four fundamental economic freedoms - though still constitute the core of the Internal Market and that, therefore, will hereafter be individually examined (because, notwithstanding a convergence process between them, there still are divergences among them and they cannot be treated alike) - are mere elements of an "alphabet" of a much broader discourse.

The four fundamental economic freedoms are articulated and declined daily in multiple sectoral policies of the European Union (each of which would deserve discussion in its own and that are influenced and influence the concrete realization of the Internal market), by European institutions and national authorities, cross-borders businesses and European consumers

The four fundamental economic freedoms are a core part of the European multi-level legal system, according to the teleological profiles of the Internal Market outlined by Art. 3 TEU and in a day-by-day dialogue with European citizenship and the fundamental rights recognised at European level (first of all by the Charter of Fundamental Rights of the European Union).

2. *Historical evolution: from the Common Market to the Internal Market*

In 1951 the European Coal and Steel Community Treaty was signed. This first treaty established a successful common control over the coal and steel market among the six founding countries (Belgium, France, West Germany, Italy, Luxembourg and the Netherlands) and suppressed the customs duties and quantitative restrictions on these goods, as well as all discriminatory measures, aids or subsidies which were granted by such Member States to their domestic production of coal and steel.

In 1957 the same Member States decided to deepen their economic integration through the establishment of a 'Common Market' in the terms and in the manner established by the EEC Treaty.

In a political context in which predominated the Ricardian economic vision of comparative advantage theory and of the importance of free trade between states - as well as the ordoliberal theory - economic growth and efficiency gains were considered inevitable economic advantages of uniting national markets into a common market resulting from a greater division of labour between Member States and the exploitation of comparative advantages.

It was provided that the Common Market was to be implemented in stages over a transitional period of twelve years (to be completed by December 31, 1969).

In order to establish a free movement of products, Art. 3 EEC Treaty provided first of all the establishment of a customs union with regard to the movement of goods, with complete abolition of customs tariffs between Member States (now see Art. 28(1) TFEU), the elimination of quantitative restrictions on the import and export of goods, and of all measures having equivalent effect (now Articles 34 and 35 TFUE), and the adoption of a common customs tariff ('CCT') in respect to third countries.

The Common Market was completed, since its origin, by provisions allowing the free movement of production factors, *i.e.* the free movement

of workers and capital (based on the idea that liberalization of factors of production allows for the optimum allocation of labour and capital), as well as the free movement of services. In addition, common policies in agriculture and transport, an effective regime of free competition (prohibiting anticompetitive behaviour of private actors that might attempt to resurrect barriers to trade on national lines as well as State aids) and the coordination of economic policies were established.

In other words, the Common Market was well beyond a free trade area (i.e. an area where a group of States abolishes, between themselves, tariffs and quantitative restrictions to inter-State trade but have different external policies) or a custom union (*i.e.* an area combining a free trade area with a common customs policy towards the outside world). The Internal Market was envisaged to be not only an economic 'bloc' toward third countries but also an area without internal frontiers allowing the free movement of goods, persons, services and capital, eliminating nationalist 'protectionism' among Member States. The material goal of the Internal Market was and is the elimination of all obstacles to intra-Union trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal-domestic market (see *Gaston Schul*, case 15/81).

Despite the complete realization of the customs union in 1968, the progress was much slower with respect to the removal of barriers and non-tariff restrictions on the free movement of goods between Member States. The presence of such obstacles and constraints was often generated by the persistence in the legal systems of the Member States of different technical standards (concerning, for example, the security requirements of the products or packaging of the same product), differentiated regulations relating to transport sector, non-transparent procedures for public procurement, administrative and bureaucratic obstacles, disparate tax treatments. The situation was not better in relation to the free movement of persons, services and capital, with respect to which there were also obstacles, constraints and national resistance.

In the eighties of the twentieth century, the European Commission (headed by its President Jacques Delors) launched, therefore, several studies and initiatives directed to investigate the reasons and the negative economic effects (the so-called 'cost of non-Europe') of the slowdown in the establishment of the Common Market process.

In June 1985, on the occasion of the Milan European Council was presented by the European Commission a white paper on completion of the Internal Market by 1992, containing illustration of hundreds of

measures (the White Paper set out a timetable for the enactment of *circa* 300 measures) considered necessary for the removal of physical barriers (*i.e.* customs posts at frontiers and corresponding formalities), technical barriers (*i.e.* different regulatory product standards in Member States) and fiscal barriers (i.e. differences in indirect taxation, such as excise taxes); still such measures hindered the full realization of the common market.

The achievement of 1985 White Paper goals was facilitated at political level by the adoption of the Single European Act 1986 ('SEA'), by which, in order to advance in the establishment of the Common Market (in such document called 'Internal Market'), was introduced for the Council the qualified majority voting system for decisions on the internal market (the new Article 100A EEC, now Article 114 TFUE which refers to the s.c. ordinary legislative procedure). Since then, this new method of voting (thanks to which a single Member State could no longer block decisions on Internal Market) would have facilitated the adoption of measures of harmonization of national legislation and the elimination of administrative and regulatory obstacles to trade between Member States.

Article 114 TEU

> 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
>
> 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
>
> […]

It deserves to be noted that the SEA adopted for the internal market the current definition, which states clearly that the Internal Market is an area without internal frontiers with free movement of goods, persons, services and capital.

Thanks to the SEA the European Economic Community adopted by 31 December 1992 nearly three hundred regulatory measures to facilitate

completion of the opening of national markets in view of the full establishment of the Internal Market, following two main ways of intervention:

a) introduction of several common European standards replacing the different (then twelve) existing national regulations (so-called 'approximation of laws' or 'harmonization' process);

b) application of the 'principle of mutual recognition' in each Member State of the laws and regulations in force in other Member States so that the product standards would not necessarily have to be harmonized before products could be traded in the territory of the Member States (*i.e.*, if a product is lawfully manufactured and marketed in one Member State, there is no reason why it should not be sold freely throughout the Community).

As of January 1, 1993, they were then tangibly less even trade barriers in relation to the movement of goods.

The economic crisis of the end of the first decade of the twenty-first century also led the European institutions to re-verify the effectiveness of the functioning of the Internal Market, in relation to new closing nationalistic attempts of Member States' markets and economic sectors, where the principles of the Internal Market did not appear to have been fully met yet, resulting in the recruitment of a number of initiatives to further develop it.

After the Lisbon Treaty (2007) the legal basis of the establishment of the Internal Market can be found in Articles 26 and 27 TFEU.

> Article 26
>
> 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.

On the invitation of the President of the EU Commission, on 9 May 2010, Mr. Mario Monti delivered a report (*A New Strategy for the Single Market*) aimed at re-launching the Single Market.

On the basis of the s.c. 'Monti Report' and after the holding of a

public consultation between late 2010 and early 2011, the European Commission published two communications:

i) '*The act for the single market. Twelve levers to boost growth and strengthen confidence. Working together to create new growth*' in April 2011 (COM (2011) 206 final);

ii) '*The Single Market Act II. Working together to create new growth*' in October 2012 (COM (2012) 573 final).

In those communications - under the Europe 2020 Strategy, '*A strategy for smart, sustainable and inclusive growth*' (COM (2010) 2020) - the European Commission has drawn its lines of action to increase the confidence of businesses and citizens in the Internal Market and economic and employment development opportunities for growth resulting from its full realization.

Latest developments on the strategy and future steps and actions related to the establishment and improvement of the Internal Market have been set in the European Commission's communication '*Upgrading the Single Market: more opportunities for people and business*' (COM (2015) 550 final)

All the above historical steps in the establishment of the Internal Market confirm that creating a genuine integrated market is not a finite task, but rather an ongoing process, requiring constant effort, vigilance, and updating, because never-ending technological developments and ever-changing political attitudes in Member States (always trapped between protectionist attitude and an effective European spirit) result in a global context in which the single market functions are changing all the time.

Many obstacles toward a "perfect" (genuinely domestic) Internal Market have been removed, but new obstacles daily appear and need to be addressed, in a day-by-day process involving Member State and European institutions, public entities and private citizens and enterprises.

3. *Establishment of the Internal Market*

The establishment of the Internal Market is a shared competence between the Union and the Member States, as provided by Art. 4(2) TFUE.

Article 4 TFEU

[…]

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

[…]

Art. 2(2) TFUE regulates the exercise of the shared competences by the European Union and the Member States.

Article 2 TFEU

[…]

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence

[…]

Basically the establishment of the Internal Market has been realized by EU institutions and it is still realized through several ways:

a) prohibition of discriminations;

b) approximation of national regulations;

c) harmonization of technical standards.

All the above "methods" or "ways" can be classified into two different and complementary categories of integration:

a) negative integration

b) positive integration

Negative integration refers to the removal of (no more allowed) national barriers to the free movement, whereas positive integration results in the 'harmonisation' or 'approximation' of national laws and regulations realized by the EU through its legislative acts (regulations and directives).

At first instance, the European treaties establish that in the Internal Market there shall not be national barriers to trade in goods and shall be assured the free movement of workers, services and capital. Of course, the four economic freedoms apply only to situations that involve a cross-border element and the ECJ has ruled that the freedom provisions are not applicable to situations which are purely internal to a Member State (see case *Knoors*, C-115/78).

The TFEU contains specific constitutional prohibitions negating illegitimate obstacles to intra-Union trade, *i.e.*:

i) Articles 30, 34 and 35 with respect to the free trade of goods;

ii) Art. 45 with respect to the free movement for workers;

iii) Art. 49 concerning the freedom of establishment for take up and pursue economic activities;

iv) Art. 46 with respect to the freedom to provide services;

v) Art. 63 with respect to the free movement of capitals.

These prohibitions have a direct effect as recognised by the ECJ in the renowned case *Cassis de Dijon* (case 128/78) which introduced the 'mutual recognition principle' with respect to the free movement of goods: a product legally put on the market or into the jurisdiction of one Member State should be allowed to circulate freely in the common market unless mandatory requirements concerning health, fiscal supervision, fairness of commercial practices, and consumer protection could be invoked by the receiving Member State.

The 'negative integration' strategy guaranteed by the mutual recognition principle is complemented by the secondary (but not less important) positive integration strategy by which the EU adopts positive European legislation to harmonise diverse national laws. In the TFEU there are several 'harmonisation' competences conferred to the EU, among which the most famous and useful is the provision of the above mentioned Art. 114 TFUE.

The principle of subsidiarity is applicable in areas which do not fall within EU exclusive competence, as the Internal Market. This principle aims to ensure that decisions are taken as close as possible to the citizen and that constant checks are made to verify that action at EU level is justified in the light of the possibilities available at national, regional or local level.

Article 3 TFEU

[…]

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level

Institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

[…]

Pursuant to the principle of subsidiarity, the EU does not take action, unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principle of proportionality, requiring that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaties.

Two Protocols annexed to the Treaty of Lisbon are fundamental with respect to the application of the principle of subsidiarity:

a) Protocol n. 1 on the role of national Parliaments encourages national Parliaments' involvement in EU activities and requires EU documents and proposals to be forwarded promptly to them, so they can examine them before the Council takes a decision.

b) Protocol n. 2 requires the Commission to take into account the regional and local dimension of all draft legislative acts and to make a detailed statement on how the principle of subsidiarity is respected. This Protocol allows national Parliaments to object to a proposal on the grounds that it breaches the principle, as a result of which the proposal must be reviewed and may be maintained, amended or withdrawn by the Commission, or blocked by the European Parliament or the Council.

3.1 *Prohibition of discriminations and restrictive measures*

The effective implementation and respect of the four economic freedoms require that all direct and indirect discriminations on the ground of nationality are prohibited.

Direct discriminations are deemed as laws, rules and practices that explicitly put nationals (or products manufactured in other Member States) at disadvantage on the ground of their nationality or origin. The ECJ holds steadily that the four economic freedoms require the full respect of the principle of equal treatment which means that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such treatment is objectively justified (see *Nancy Delay*, case C-276/07).

Indirect discriminations (restrictive measures) are considered laws, rules and practices that apply indistinctly to nationals and non-nationals (or products manufactured in other Member States) but create detrimental effects mainly for non-nationals. The ECJ ruled that a national provision shall be deemed as indirectly discriminatory if it is intrinsically liable to affect non-nationals more than nationals and if there is a consequent risk that it will place the former at a disadvantage (see *Hartmann*, case C-212/05).

The leading case of this broad interpretation is the *Dassonville* case (case C-8/74) in which the ECJ held that Article 34 TFUE prohibits all trading rules enacted by a Member State which are capable of hindering, directly or indirectly, actually or potentially, intracommunity trade.

After the judgment in *Dassonville*, the European judges applied this broad interpretation also with respect to the other freedoms: in *Säger* (case C-76/90) for services, *Bosman* (case C-415/93) for workers and *Gebhard* (case C-55/94) for establishment.

The obligation not to discriminate applies to the institutions of central governments as well as to the institution of regional or local public authorities (see *Stopover Tax*, case C-169/08).

3.2 *Justifications for discriminations or restrictive measures*

Under specific circumstances discriminatory and/or restrictive measures can be justified.

The TFEU explicitly recognizes that public policy, public security, and public health can justify the adoption of discriminatory and/or restrictive

measures by Member States.

In particular:

a) Art. 36 TFEU provides that discriminatory and/or restrictive measures applicable to the free movement of goods can be justified on the 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, and the protection of industrial and commercial property;

b) with respect to free movement of workers, right of establishment and free movement of services discriminatory and/or restrictive measures are justified on the grounds of public policy, public security and public health as well as in case of measures concerning activities connected with the exercise of official authority (Art. 51 TFEU for the right of establishment) and the employment in the public service (Art. 45 TFEU for workers);

c) with respect to the free movement of capital discriminatory and/or restrictive measures can be justified on grounds of public policy or public security, as well as certain restrictions with regard to taxation and to capital movement to and from third countries.

There is a settled ECJ case law according to which measures that are directly discriminatory can be justified only on the basis of the exceptions expressly stated by the Treaty (see *Access to Museums*, case C-388/01, and *Temp Work Agencies*, case C-490/04).

Moreover, the ECJ recognized that such measures can be justified in consideration of other important regulatory purposes. In the leading case *Cassis de Dijon* (1979, 120/78), the European judges ruled that national measures that constitute restrictions could be justified also on grounds other than those explicitly mentioned in the Treaty; in particular, in this case the justification was represented by consumer protection.

Since then the ECJ has accepted that indirectly discriminatory and indistinctly applicable restrictive measures can be justified on the grounds of environmental protection (see *Beer Bottles*, case 302/86), protection of fundamental rights (see *Schmidberger*, case C-112/00), protection of workers (see *Arblade*, case C-369/96 and C-376/96), protection of media plurality (see *United Pan-Europe Communications*, case C-250/06), road safety (see *Italian Trailers*, case C-110/05), defence and promotion of one or several

of the official languages of a Member State (see *UTECA*, case C-222-07).

The list of public interests that can justify indirectly discriminatory and indistinctly applicable restrictive measures is deemed not-exhaustive and the Member States can decide which level of protection they wish to grant, but this possibility is subject to certain limitations: Member States cannot apply a protective standard that exceeds the standards set by EU law if the area is fully harmonized (on the contrary, if the area is subject only to a minimum harmonization, Member States can enforce higher protection standards).

It has to be underlined that ECJ does not accept justifications that serve purely economic goals (see *Campus Oil*, case 72/83), such as the protection of domestic businesses (see case *Finalarte*, case C-49/98 and other joined cases).

In order to be justified, all discriminatory and/or restrictive national measures shall in any case be 'proportionate' and the task of each Member State is to provide evidence of such 'proportionality'. With respect to such burden of the proof, the ECJ has established that it is true that it is for a Member State which involves an imperative requirement as justification for the hindrance to free movement (of goods, in such case) to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued. Anyway, such burden of proof cannot be so extensive as to require a Member State to positively prove that no other conceivable measure could enable that objective to be attained under the same condition (see case *Italian Trailers*, case C-110/05). In fact, all Member States have the power to set the degree of protection that they wish to recognize to a public interest goal and how that degree of protection is to be achieved (see *Blanco Perez*, case C-570/07 and C-571/07).

A discriminatory and/or restrictive national measure can be deemed 'proportionate' if the following requirements are respected:

a) 'appropriateness' or 'suitability': the discriminatory and/or restrictive national measure must be appropriate in order to achieve the purported regulatory goal (see *Stopover Tax*, case C-169/08) and the national legislation must pursue the goal in a consistent and systematic manner (see *Hartlauer*, case C-169-07);

b) 'necessity': the discriminatory and/or restrictive national measure must not go beyond what is necessary in order to achieve the goal. If a less restrictive measure is available to attain the same objective, this means that the proposed national measure has failed the

proportionality test (see *Solgar Vitamins*, case C-446/08).

3.3 *Approximation of national regulations*

Pursuant to Art. 114 TFEU, the European Parliament and the Council, on the basis of the ordinary legislative procedure, and after consultation of the Economic and Social Committee shall carry out the objectives set out in Art. 26 TFEU (the establishment of an area without internal frontiers where the free movement of goods, people, services and capital). The achievement of such objectives shall be guaranteed through the adoption of measures of approximation (harmonization) of the laws, regulations and administrative provisions of the Member States, which have as their purpose the establishment and functioning of the Internal market.

Article 114 TEU

> 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
>
> […]

Pursuant to Art. 115 TFEU tax provisions, free movement of persons and regulatory measures concerning rights and interests of employees require to be adopted through the special legislative procedure by the Council, acting unanimously after having consulted both the European Parliament and the Economic and Social Committee.

Article 114 TEU

> […]
>
> 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
>
> […]

In the judgment given in the famous case concerning the Directive on advertising of tobacco products (also known as *The Tobacco Advertising I*, case C-376/98) the ECJ annulled the Directive 98/43/EC relating to the advertising and sponsorship products tobacco default of the appropriate legal basis thereof and specified the scope of Art. 114 TFEU (further confirmed and delineated in *Tobacco Advertising II*, case C-380/03, and *Swedish Match*, case C-210/03), ruling that:

a) harmonization measures taken on the basis of Art. 114 TFUE must contribute to removing the barriers to trade between Member States or distortions to free competition;

b) although there is not a materiality threshold (de minimis) of the aforementioned either obstacles and distortions, the harmonization is only possible in order to remove obstacles or distortions 'appreciable' (because, otherwise, a broad interpretation of art. 114 TFEU would give to the European Union unlimited power of harmonization and that will be contrary to the principle according to which only certain European Union competences are conferred);

c) although it is acceptable that the harmonization prevents the establishment of barriers and distortions, the latter must be probable, not merely theoretical.

Another question of interpretation settled by the ECJ in relation to Art. 114 TFEU concerned the possibility of using this article not only for the purpose of direct introduction of harmonization measures, but also for the creation of mechanisms or systems aimed at the latter purpose. That possibility allowing a broader scope of Art. 114 TFEU has been positively recognized by European judges in judicial decisions given in the proceedings *Smoke flavorings* (case C-66/04) and *ENISA* (case C-217/04).

It is also settled case-law that, although recourse to art. 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade as a result of divergences in national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, case C-491/01, *Arnold André*, case C434/02, *Swedish Match*, case C210/03, *Germany v Parliament and Council*, case C380/03, and *Vodafone and Others*, case C-58/08).

In the approximation of national regulations, art. 114 TFEU confers to the EU legislature a discretion (see *Philip* Morris, case C-547/14), depending on the general context and the specific circumstances of the

matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features (judgments in *Tobacco Advertising II*, case C380/03, and *United Kingdom v Parliament* and Council, case C-270/12).

It was thus open to the EU legislature, in the exercise of that discretion, to proceed towards harmonisation only in stages and to require only the gradual abolition of unilateral measures adopted by the Member States (judgment in *Rewe-Zentral*, case 37/83).

In fact, the approximation of the national regulations is performed applying two main kind of harmonisation:

a) a 'minimum' harmonisation: in this case, the European legislation sets a minimal threshold (a set of minimum common rules) that national legislation must meet; however, national laws may exceed (implementing stricter rules for whoever shall observe such rules) the terms of the European legislation if desired;

b) a 'maximum' or 'full' harmonisation: in this case, the European legislation sets rules that national laws may not exceed (Member States cannot either retain or introduce stricter or weaker rules for whoever shall observe such rules).

Currently, *circa* 80% of the provisions aimed at establishing or improving the Internal Market are set out through directives, which have the advantage of flexibility with respect to local preferences and situations and allow Member States to adapt the approximation of laws to their national legal systems. But the directives have the downsides represented by the time-lag between the adoption at EU level and national implementation, and the risks of non-implementation or gold-plating at national level.

An alternative to the approximation by directives is represented by the approximation by regulations, which brings the advantages of clarity, predictability and more effectiveness, establishing a clearer level playing field for citizens and businesses and carrying a greater potential for private enforcement. However also regulations are not the "perfect tool", because their rigidity can hinder the internal coherence of the national legal systems.

3.4 *Indirect effect of directives*

Even if not implemented (or wrongly implemented) by Member States, European directives can have an "indirect" effect useful for the right implementation of the four economic freedoms which represent the

core of the Internal Market.

In the case *Von Colson and Kamann* (case 14/83), concerning an European directive that a Member State did not properly implement, the ECJ ruled that the national courts should interpret national laws in line with the (correct implementation of the) directive, in so far national law gives discretion to do so.

This case law was confirmed and extended in the cases *Marleasing* (C-106/89), where the concerned Member State did not implement the directive at all, *Adeneler* (C-212/04) and *Spedition Welter* (C-306/12).

3.5 *Harmonization of technical standards*

The approximation of laws of the Member States for the completion of the Internal Market has peculiarities in relation to technical standards imposed by each Member State for the manufacture of certain categories of products (from simple products - such as can be toys - to products with a high degree of technical complexity), whose diversity can severely obstacle trade between Member States.

In a first phase, which lasted until the mid-eighties of the twentieth century, also in relation to these technical standards, the European Community has operated following a mere approximation of laws by means of the harmonization directives, thereby delaying the full establishment of the Common Market, particularly if one considers the amount of types of products offered on the market and their constant evolution.

Then, in 1990, it was introduced the so called 'New Approach' in relation to the standardization of technical rules, on the basis of which the role played by the harmonization directives is much decreased (confining most directives to establishing general safety requirements for broad product categories). In the framework of the New Approach a central role has been entrusted to the European standardization agencies, including, for example, the European Committee for standardization (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) or the European Communication standards Institute (ETSI), which quickly determine, and frequently update, uniform technical standards.

The observance by producers of these uniform technical standards is voluntary and can be certified by appropriate independent certifying bodies.

The 'New Approach' provides that the producers can market only products that can be considered safe. To this end, manufacturers can ask to the independent certification bodies (different in each Member

State) to assess the conformity of their products to standardized technical requirements developed by European standardization agencies.

When an independent certification body assess its conformity, a certified product acquires a presumption of conformity with respect to the essential safe requirements required by the European law and can be marked with 'CE' mark. Therefore, such product is allowed to freely circulate, to be placed on the market and to be used freely within the territory of all Member States of the European Union (see case *Latchways and Eurosafe Solutions*, C-185/08, and case *James Elliott*, C-613/14). Member States may not impose additional requirements on certified products for their effective use on the market and within the territory (see case *James Elliott*, C-613/14).

4. *Internal market and individual rights: the principle of direct effect*

Today, Art. 26 of the TFUE - pursuant to which the Internal Market shall comprise an area without internal frontiers in which the free movements of goods, persons, services and capital is ensured - is interpreted as a set of individual rights: the right to move goods and capital freely across borders, to freely provide and receive services, and to access employment or self-employment in another Member State.

In the seminal case *Van Gend en Loos* (case C 26/62) and *Costa v Enel* (case 6/64), the ECJ established that the above rights can be directly and immediately invoked by individuals in domestic legal proceedings (even if the European law either establishing or regulating such rights has not been transposed in the national legal system or it has been wrongly transposed) and must be protected by national courts.

Since the development of such case law, national courts are called to guarantee the enforcement of such rights not only among Member States.

Pursuant to the principle of direct effect, individuals can ask to national judges to not apply the national rules conflicting with the European rules and to adjudicate the national case without taking into consideration such conflicting (and therefore voided) national rules (see *Simmenthal*, case C-106/77).

The principle of direct effect is twofold, because there is a vertical direct effect and a horizontal direct effect:

a) the vertical direct effect means that individuals can invoke a European provision with respect to the legal relationships they have

with the Member State to whom they belong to;

b) the horizontal direct effect means that an individual can invoke a European provision with respect to the legal relationships they have with another individual when they exercise their private autonomy in establishing and regulating their legal relationship. In this case, the European law creates subjective rights and obligations between individuals. Anyway, it shall be observed that the horizontal effect is recognised only to the primary legislation and regulations, while directives do not have horizontal direct effect between individuals (directives can trigger only damage actions by individuals against any Member State that has not yet or properly implemented the directive; see cases Francovich, C-6/90, Faccini Dori, C-91/92, Brasserie du pêcheur, C-46/93, Dillenkofer, C-178/94).

It has to be noted that ECJ case law is dichotomist: whereas provisions on the free movement of workers and services and the freedom of establishment was found to have horizontal direct effects (see case *Angonese,* C-281/98), provisions on the free movement of goods and capital was not (see case *Süllhofer*, C-65/86).

The principle of direct effect has a different magnitude in consideration of the type of the European provision with respect to which the principle is invoked:

a) as far as primary legislation is concerned (i.e. the Treaties), the principle of direct effect reaches its maximum extent; however, the ECJ laid down the condition that the obligations set by European law must be precise, clear and unconditional and that they do not call for additional measures, either national or European;

b) as far as the principle of direct effect relates to secondary legislation (regulations, directives, decisions), its application depends on the type of act:

   a. regulations always have direct effect: Art. 288 TFEU specifies that regulations are directly applicable in Member States. The ECJ clarified in the *Politi* case (C-43/71) that this is a complete direct effect;

   b. in certain cases the ECJ recognised the direct effect of directives in order to protect the rights of individuals. The ECJ laid down in its case-law that a directive has direct effect when its provisions are unconditional and sufficiently clear and precise and when the Member State

has not transposed the directive by the deadline (see *Van Duyn* case, 41/74);

c. decisions may have direct effect when they refer to a Member State as the addressee, but in such case the ECJ therefore recognised only a direct vertical effect (see case *Hansa Fleisch*, C-156/91).

5. *No purely internal situations*

The provisions of TFEU on the four economic freedoms do not apply to a situation which is confined in all respects within a single Member State (see *Caixa d'Estalvis i Pensions de Barcelona*, case C-139/12, *Admiral Casinos & Entertainment*, C-464/15) and it is therefore a purely internal situation, without a cross-border feature and an Internal Market relevance.

But ECJ has regarded as admissible requests for preliminary rulings concerning the interpretation of provisions of the Treaties relating to the fundamental economic freedoms, even though the disputes in the main proceedings were confined in all respect within a single Member State. The ECJ took this position on the ground that it was not inconceivable that nationals established in other Member States had been, or were interested in, making use of those freedoms for carrying on activities in the territory of the Member State that had enacted the national legislation in question; consequently, such legislation, applicable without distinction to nationals of that State and those of other Member States, was deemed capable of producing effects which were not confined to that Member State (see *Blanco Pérez and Chao Gómez*, cases C-570/07 and C-571/07, *Citroën Belux*, case C-265/12,*Venturini and Others*, cases C-159/12 to C-161/12).

Similarly, the ECJ found that, when the referring court makes a request for a preliminary ruling in proceedings for the annulment of provisions which apply not only to its own nationals but also to those of other Member States, the decision of the referring court, that will be adopted following the Court's preliminary ruling, will also have effects on the nationals of other Member States. Such opinion has justified the Court in considering the referred question even though the dispute in the main proceedings was confined in all respects within a single Member State (see *Libert and Others*, cases C-197/11 and C-203/11).

It should, moreover, be recalled that the interpretation of the fundamental

economic freedoms provided for in Articles 49, 56 or 63 TFEU may prove to be relevant in a case confined in all respects within a single Member State, where national law requires the referring court to grant the same rights to a national of its own Member State as those which a national of another Member State in the same situation would derive from EU law (see *Guimont*, case C-448/98, *Susisalo and Others*, case C-84/11, *Ordine degli Ingegneri di Verona e Provincia and Others*, case C-111/12).

The same applies in cases in which, although the facts of the main proceedings are outside the direct scope of EU law, the provisions of EU law have been made applicable by national legislation, which, in dealing with situations confined in all respects within a single Member State, follows the same approach as that provided for by EU law (see *Dzodzi*, cases C-297/88 and C-197/89, *Leur-Bloem*, case C-28/95, *Allianz Hungária Biztositó and Others*, case C-32/11).

The ECJ puts the burden of proving the existence of any of the above considered situations on the referring judge (*Ullens de Schooten*, case C-268-15). This means that national courts shall make an effort to explain why the referred case falls under any of the situations in which *prima facie* the disputes in the main proceedings were confined in all respect within a single Member State. If the national court simply makes no effort whatsoever, then the Court will declare the absence of a transfrontier link and the lack of arguments justifying the application of any of the situations that can trigger its competence.

6. *Policies completing the establishment of the Internal Market*

Since the beginning, the European policy aimed at establishing the Internal Market was accompanied by other specific policies devoted to enhance the creation of a genuine domestic market with respect to some specific product or with respect to some specific features of the market.

The common agriculture and fisheries policy is a clear example of the specific consideration that the Internal Market policy devoted to a certain kind of products which are considered with particular attention.

Article 38

1. The Union shall define and implement a common agriculture and fisheries policy.

The internal market shall extend to agriculture, fisheries and

> trade in agricultural products. "Agricultural products" means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. References to the common agricultural policy or to agriculture, and the use of the term "agricultural", shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector.
>
> 2. Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.
>
> 3. The products subject to the provisions of Articles 39 to 44 are listed in Annex I.
>
> 4. The operation and development of the internal market for agricultural products must be accompanied by the establishment of a common agricultural policy.

The rules on competition set by Title VII TFEU (Article 101 and following) - which are addressed to undertakings operating within the Internal market and to the Member States for achieving an (Internal) market structure based upon an 'effective competition' among all economic operators - are an essential element of the Internal Market.

Other European policies can influence the establishment or the better functioning of the Internal Market or are involved in its realization, *ie.* the monetary policy, the common transport policy and other policies.

The connection – in some cases very deep - of these policies with the establishment and the better functioning of the Internal Market results in the high complexity of the European and national processes and relationships in order to achieve such goals.

Anyway, all these policies will not be addressed in this introduction to the European Union Internal Market law. The limited scope of this introduction requires that it is focused only on the four economic freedoms.

In particular:

a) Chapter 2 will be focused on the free movement of goods;

b) Chapter 3 will be focused on the free movement of workers;

c) Chapter 4 will be focused on the free movement of services;

d) Chapter 5 will be focused on the free movement of capitals.

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Abstract

The introduction illustrates the historical evolution of the Internal Market and presents basic concepts and features of the Internal Market law useful to better understand the following chapters and the Internal Market within the framework of the European integration process.

Federico Raffaele

The Free Movement of Goods

1. *Introduction*

The free movement of goods has traditionally been the most important fundamental freedom within the internal market. Yet, in many respects, the free movement of goods has for a long time provided a sort of model to be followed by the other three fundamental freedoms.

Looking at this freedom diachronically, it is worth noting that, at the outset, the EEC was created in a climate of trade liberalization, as a reaction to the Second World War and the 1930s massive protectionism in response to the Great Depression. As such, in the 1950s trade in goods was at the core of all trade liberalization efforts, which was reflected in the legal structure of EEC: its core was indeed constituted by a customs union, which provided for free movement of goods among Member States unrestrained by tariffs, quantitative restrictions or measures having equivalent effects.

However, the EEC was more than just a customs union as it aimed at reaching a progressive integration of the economies of the Member States and, ultimately, a common or single market. As such, the prohibition of taxes that discriminate against imports was equally central to the single market ideal. In fact, customs duties apply when goods cross the border; a State may however discriminate against imports through differential taxes when goods are in its country.

Along the same path, the intention to reach an effective model of free

movement of goods prescribed the introduction of certain provisions which were able to prevent Member States from placing quotas on the amount of goods that could be imported, or restricting their flow by measures that have an equivalent effect to such quotas.

As a result of the foregoing, the Treaty regime for goods was split over two sites within Part III of the TFEU. Specifically, it finds its principal place in Title II, governing the free movement of goods, and is complemented by a chapter on tax provisions within Title VII. Indeed, the Treaty distinguishes between fiscal and regulatory restrictions: the former are essentially pecuniary duties specifically imposed on imports; the latter are basically measures that limit market access by regulatory means.

More particularly, the Treaty aims at eliminating all restrictions on the cross-border trade of goods with three main instruments: (*i*) a customs union, in which customs duties between Member States are prohibited and a common customs tariff in relation to third countries is established (Articles 28 - 32 TFEU); (*ii*) the prohibition of discriminatory taxation on goods from other Member States (Article 110 TFEU); and (*iii*) the abolition of all quantitative restrictions, and measures having equivalent effects, on imports and exports between Member States (Articles 34 - 36 TFEU).

Beginning from the last group of provisions, it may be worth recalling that goods originating in one Member State have the right to be exported from that State under Article 35 TFEU and the right to be imported into another Member State under Article 34 TFEU: in this respect, such rights are protected through the bans contemplated thereunder to both quantitative restrictions and measures having equivalent effects. However, both Articles 34 and 35 are subject to the exhaustive list of derogations found in Article 36 TFEU, which can be invoked by the home or host State to justify a refusal to allow the import or export of particular goods.

While Articles 34 - 36 TFEU address non-fiscal barriers to trade, Articles 28 - 30 and 110 TFEU concern fiscal barriers to trade. Specifically, Article 30 prohibits customs duties and charges having equivalent effects and concerns charges levied at the frontier of a State. By contrast, Article 110 TFEU regards charges that are levied internally within the State on imported, exported and domestic products. While Article 30 contains an absolute prohibition on duties, Article 110 bans only discriminatory taxation. In any case, there is no equivalent to the express derogations found in Article 36, in respect of Articles 30 and 110.

2. *Basic Concepts*

Prior to getting to the merits of the aforesaid three main groups of provisions and related jurisprudence of the Court of Justice (hereinafter, the Court) which has greatly contributed to shaping such articles of the Treaty, it is worth briefly analyzing certain features that appear to be equally valid in respect of all the provisions mentioned above.

For the Treaty provisions on goods to be engaged, three conditions need being satisfied: (*i*) the product must be deemed as a «*good*»; (*ii*) the good must be used in cross-border trade between Member States; (*iii*) the person to whom the provision is being applied must be an addressee of the Treaty.

The Court has defined «*goods*» as products that can be valued in money and which are capable, as such, of forming the subject of commercial transactions (see *Commission v. Italy* (*Art Treasures*), Case 7/68) and possess tangible physical characteristics (see *Jägerskiöld v. Gustaffson*, Case C-97/98). Generally, the definition of goods poses few issues. Some products, however, are difficult to classify: for example, the Court has found that electricity does fall within the concept of goods (see *Almelo v. Energi bedriff Ijsselmij*, Case C-393/92), but most other intangible products do not (see *Criminal Proceeding Against Giuseppe Sacchi*, Case 155/73)

As to the material scope of the relevant Treaty provisions, Articles 30, 34, 35, 36 and 110 TFEU apply to the movement of goods across national borders. In other words, there must be a cross-border element, meaning that goods must either originate in the Member States and be traded between them, or come from third countries and be in free circulation in the Union (Article 28(2) TFEU). Generally, where there is no cross-border movement of goods, EU law does not apply: as a result, Member States are free to apply reverse discrimination, that is, treating domestically produced goods less favorably than imports (see *Commission v. Austria*, Case C-320/03).

As to the personal scope, Articles 30, 34, 35, 36 and 110 TFEU apply irrespective of the nationality of the traders involved (see *Social Fonds voor de Diamantarbeiders v. Choral Diamond Co*, Cases 2-3/69). On the other hand, such provisions apply to Member States: however, the word «*State*» has been broadly construed so as to cover also central and local governments (see *Aragonesa de Publicidad Exterior SA v. Departmento de Sanidad y Seguridad Social de la Generalitat de Catalunya*, Joined Cases C-1 & 176/90) as well as other arms of government in whatever capacity they are acting (see *Commission v. Belgium* (*Public Warehouses*), Case 132/82) and even professional regulatory bodies and private bodies supported by the State,

either financially or *sub specie* supervision (see *R. v. Royal Pharmaceutical Society ex p. API*, Joined Cases 266 & 267/87, or *Essent Netwerk Noord v. Aluminium Delfzijl*, Case C-206/06).

The corollary of the foregoing is that the Treaty provisions on goods do not apply to private parties acting in a purely private capacity. Conversely, they apply to non-State actors only if their activities can be attributed to the State (see *Commission v. Ireland* (*Buy Irish Campaign*), Case 249/81). In other words, given that these provisions have direct effect (see *Carmine Capolongo v. Azienda Agricola Maya*, Case 77/72, *Procurer du Roi v. Dassonville*, Case 8/74, *Pig Marketing Board v. Redmond*, Case 83/78, *Fink-Frucht GmbH v. Hauptzollamt München-Landsbergerstrasse*, Case 27/67), they however have vertical, but not horizontal, direct effect. Nevertheless, Member States may be held responsible for the actions of private actors under certain circumstances (sometimes referred to "indirect" horizontal effect, see *Commission v. France* (*Spanish Strawberries*), Case C-265/95).

Finally, the Treaty provisions on goods also apply to the institutions of the EU: secondary EU law (*i.e.*, law enacted by the Union institutions) must comply with primary law, including the Treaty freedoms. In such cases, the Court has routinely acknowledged the broad discretion of the Union legislature, therefore ruling only against measures that are manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see *Alliance for Natural Health and Others*, Joined Cases C-154 &155/04).

3. *Customs Union*

As anticipated, the free movement of goods may be impeded by customs duties (or charges having equivalent effects) which make foreign products more expensive than domestic ones. Therefore, their abolition is a key issue in building a customs union and a single market.

Article 28(1) TFEU is the foundational provision of this part of the Treaty:

> 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 custom duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relation with third countries.

Article 28 makes clear that the free movement of goods has both an internal and an external dimension. From the former point of view, goods that have their origin within the EU benefit from the right of free movement among Member States. From the latter perspective, products originating outside the EU may be entitled to free movement so long as they have paid the common customs tariff, if due. In other words, whereas EU law prohibits tariffs (*i.e.*, custom duties) on goods that cross EU internal frontiers (*i.e.*, among Member States), tariffs are allowed on goods crossing the EU external frontiers (*i.e.*, coming from non-member countries). Only after paying the common customs tariff, if any, the third-country goods may legally enter the EU, being therefore in "free circulation" and enjoying the same right of free movement as the goods originating in the EU.

As we will focus only on the internal dimension of the free movement of goods, it is worth noting that Article 28 must be analyzed in conjunction with Article 30 TFEU, which reads as follows:

> Article 30 TFEU
>
> 1. Custom 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.

The absolute prohibition contained in Article 30 was shaped in the current way by the Amsterdam Treaty, which replaced the former standstill clause that could be found in Article 12 EEC, pursuant to which: «*Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other*».

As opposed to the approach under Article 12 EEC, which only prevented Member States from introducing new duties and increasing existing ones, Article 30 TFEU prohibits altogether both customs duties and charges having equivalent effects.

3.1. *Customs Duties*

In *Social Fonds voor de Diamantarbeiders v. Choral Diamond Co*, Cases 2-3/69, the Court clarified that a custom duty is a pecuniary charge imposed on goods by reason of the fact that they have crossed a frontier and paid by the importer to the host State.

In a prior case (*Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62) – where customs duties on a product named *ureaformaldehyde* were increased from 5% to 8% by the Dutch government – the Court made also clear that customs duties are *per se* unlawful under Article 30, however small they are.

Finally, according to the Court, the application of Article 30 TFEU depends upon the effect of the duty, not on its purpose (and the same conclusions apply to charges having equivalent effects), and even if the concerned measure was not designed with protectionism in mind. In fact, in *Commission v. Italy*, Case 7/68, when deciding upon a tax Italy had imposed on the export of artistic, historical, and archaeological items, the Court rejected the arguments put forward by Italy, according to which the items should not be regarded as goods for the purpose of customs union and the purpose of the tax was not to raise revenues but to protect the artistic heritage of the country.

3.2. *Charges Having an Equivalent Effect*

Article 30 TFEU prohibits not only custom duties, but also charges having an equivalent effect (hereinafter, "CHEEs"), in order to ban protectionist measures that have the same effect as a customs duty.

As such, the notion of CHEE is necessarily broader than that of customs duty. The Court provided a definition of a CHEE in *Commission v. Luxembourg* (*Gingerbread*), Cases 2-3/62: specifically, a duty, whatever is called, and whatever its mode of application, may be considered a charge having equivalent effect to a customs duty, provided that it meets the following three criteria: (*a*) it must be imposed unilaterally at the time of importation or subsequently; (*b*) it must be imposed specifically upon a product imported from a Member State to the exclusion of a similar national product; and (*c*) it must result in an alteration of price and thus have the same effect as a customs duty on the free movement of goods.

This was developed further in *Commission v. Italy* (*Statistical Levy*), Case 24/68, where the Court gave a fuller definition of CHEEs whereby any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with the domestic product.

The foregoing definition emphasizes the following aspects: (*i*) reference to «*pecuniary charges*» makes clear that Article 30 applies only to fiscal measures; (*ii*) reference to «*however small*» reminds us that no *de minimis* rule plays a role in applying Article 30; (*iii*) reference to «*whatever its designation and mode of application*» indicates that it is irrelevant how the Member State describes or qualifies the charge; (*iv*) reference to «*cross a frontier*» reinforces the point that Article 30 is different from Article 110 TFEU because the former provision applies to charges levied at the frontier (either national or regional, *i.e.*, internal to a particular State), whereas the latter provision applies to charges levied internally within the Member State; (*v*) reference to the «*effect*» as well as to the irrelevance of the purpose of the CHEEs clarifies that CHEEs themselves are prohibited regardless of (*a*) any consideration on the reason why they were introduced, and (*b*) the destination of the revenue obtained, as well as (*c*) the potentially beneficial purpose of the CHEEs or the fact that the money obtained is not used to the benefit of the national treasury.

3.3. *"Exceptions" to the Ban*

As made clear in the preceding paragraphs, Article 30 TFEU may not be derogated. However, the Court, in *Commission v. Germany*, Case 18/87, recognized that a charge is lawful if it relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike, if it constitutes payment for a service in fact rendered to the economic operator of a sum in proportion to the service, or again, subject to certain conditions, if it attaches to inspections carried out to fulfil obligation imposed by EU law.

With regard to the defense «*charges for services rendered*», it was originally an argument advanced by the Italian government in the aforementioned case *Commission v. Italy* (*Statistical Levy*). Although rejected at that time on the basis of the facts of the case before it, the Court appeared to allow some room for the potential of such justification. In fact, in the aforesaid case *Diamantarbeiders*, the Court acknowledged that although it is not impossible that in certain circumstances a specific service actually rendered may form the consideration for a possible proportional payment for the service in question, this may only apply in specific cases which cannot lead to the circumvention of the provisions of the relevant articles of the Treaty.

From that time on, this argument has been raised in many cases and the Court has repeatedly clarified that the following requirements must

apply: (*i*) the charge must be the consideration for a service that must confer a specific benefit on the individual importer/exporter; and (*ii*) the charge must be of an amount commensurate with the service provided.

In particular, in *Bresciani v. Amministrazione Italiana delle Finanze*, Case 87/75, the Court – focusing on whom benefited from the service provided in relation to a charge imposed on imported raw cowhides for veterinary and public health inspections – held that such system of public health inspections was designed for the general interest and, therefore, could not be regarded as a service rendered to the importer, so as to justify the imposition of a pecuniary charge. As such, the monetary charge was thus deemed to be a CHEE.

On the other hand, in *Ford España SA v. Estado Español*, Case 170/88, the Court stroke down a charge imposed in relation with operations incidental to customs clearance when performed in places not open to public and calculated in proportion of the declared value of the imported goods. Indeed, even if levied for a service actually rendered, the charge was to be considered as a CHEE because its amount could not be proportionate to the service provided, as it was based on the value of the goods concerned rather than the costs borne in relation to the service.

With regard to the defense relating to the inspections to be undertaken by a Member State, it is worth noting that where EU law permits an inspection, the national authorities cannot recover any fees charged from the traders (see *Commission v. Belgium*, Case 314/82). Conversely, where EU law requires a mandatory inspection to be undertaken (for example in case of veterinary inspections on the transit and importation of live animals from Member States, as in *Bauhuis v. Netherlands State*, Case 46/76, and *Commission v. Germany*, Case 18/87), a charge levied by a State to cover the cost of such inspection may escape the ban provided for by Article 30 TFEU so long as four conditions are satisfied: (*a*) the fees do not exceed the actual costs of the inspections in connection with which they are charged; (*b*) the inspections are obligatory and uniform for all the products concerned in the Union; (*c*) such inspections are prescribed by EU law in the general interest of the Union; and (*d*) they promote the free movement of goods, in particular by neutralizing obstacles which could arise from unilateral measures of inspection adopted in accordance with Article 36 TFEU (see the aforesaid cases *Bauhuis* and *Commission v. Germany*).

Other than those listed above, there are no other grounds upon which a Member State can seek to derogate from Article 30 TFEU.

3.4. *Remedies*

As recognized by the Court in *Amministrazione delle Finanze dello Stato v. San Giorgio*, Case 199/82, the general principle in the context of remedies available to the trader is that the latter may bring a restitutionary claim against the Member State to obtain the repayment of the customs duties or CHEEs that have been unlawfully levied.

However, there is an exception to the foregoing general rule. Indeed, the Court clarified that no such restitutionary claim would be available should the trader have passed the loss onto customers, since, in such a case, reimbursement may lead to the trader being unjustly enriched. Nevertheless, as the Court ruled in *Societé Comatech v. Directeur Général des Douanes et Droits Indirect*, Case C-192/95, should the burden of the charge have been passed only in part onto third parties (*e.g.*, the final consumer), on the one hand, the trader would still be entitled to recovery for the remaining part, and on the other hand, said third parties would have the right to obtain reimbursement from either the trader or the Member State. In case the trader had actually paid such third parties, it should in turn be able to be repaid by the national authorities (see also *Lady & Kid A/S v. Skatteministeriet*, Case C-398/09).

Finally, the Court recognized that, should the trader be able to show that it has suffered loss of sales caused by the circumstance that it passed onto third parties – who would likely not buy the trader's products – the charge unlawfully levied, it may then claim damages (see again *Societé Comatech*).

As decided by the Court in *Dilexport Srl v. Amministrazione delle Finanze dello Stato* (Case C-343/96), national procedural rules govern the actions for restitution and damages (in accordance with the principle of national procedural autonomy). However, they (*i*) must not be less favorable than those relating to similar charges imposed by domestic law (principle of non-discrimination), and (*ii*) must not make recovery impossible or excessively difficult (principle of effectiveness). On the other hand, national time limits also apply to the foregoing suits to the extent they are reasonable and do not infringe the two principles mentioned above (see *Edis v. Ministero delle Finanze*, Case C-231/96).

4. *Internal Taxation*

The preceding paragraph focused on Articles 28 - 30 TFEU, which address fiscal barriers to trade levied at the frontier. The focus now shifts to fiscal rules which apply internally within a Member State. Article 110 TFEU, which is the central provision, prohibits discriminatory taxes and reads as follows:

> Article 110 TFEU
>
> 1. 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.
>
> 2. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such nature as to afford indirect protection to other products.

The goal of Article 110 TFEU is to prevent the objectives of Articles 28 - 30 from being undermined by discriminatory internal taxation. As such, Article 110 is designed to prevent a Member State from disadvantaging imported products (in competition with domestic goods) by levying discriminatory taxes on such foreign products when they are inside its territory.

Specifically, Article 110 refers to national taxation systems. According to *Denkavit v. France*, Case 132/78, internal taxation can be defined as a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported products alike. Internal taxation can be therefore distinguished from customs duties and charges having equivalent effects: whereas a charge is a tax if it is part of an internal taxation system, as defined in *Denkavit*, customs duties and charges having equivalent effects are charges levied on goods by virtue of importation.

In this respect, Articles 110 and 30 TFEU are mutually exclusive because a charge cannot be at the same time a tax and a duty (or a CHEE). As a result, should the charge be considered as a duty (or a CHEE), it is altogether unlawful pursuant to Article 30; should it be considered as a tax, it may be permissible so long as it complies with Article 110.

Finally, it is worth noting that national taxation *per se* is not prohibited under EU law; rather, it is prohibited to the extent it discriminates between imported and domestically produced goods.

4.1. *Similar goods*

As seen, Article 110 TFEU draws a distinction between «*similar*» products and products in competition. The first step, therefore, to apply Article 110(1) or (2) is to determine whether the goods are «*similar*».

In a number of cases, the Court has construed «*similar*» very broadly, meaning with similar characteristics and comparable use (see *Commission v. France,* Case 168/78). At an earlier stage, this led to the adoption of the so-called globalized approach, that is, that Article 110 was taken as a whole and applied without distinction to all the products concerned.

Such approach, however, appeared to be problematic, especially because it did not clearly distinguish between «*similar*» and "competing" products. As a result, by generalizing the application of Article 110(1), due to the aforementioned broad interpretation of "similarity", the differences between the appropriate responses against the infringing State – *i.e.*, imposing the equalization of the tax burdens on the domestic and the imported goods under Article 110(1), or the removal of the protective effect pursuant to Article 110(2) – could have been *de facto* obscured.

Later cases were thus more rigorous in analyzing the «*similar*» requirement and therefore distinguishing between Article 110(1) and (2) TFEU. In this respect, the Court said that, even though similarity is wider than identity, and relates somehow with comparability, such concept must rest upon objective criteria. For instance, in *John Walker v. Ministeriet for Skatter og Afgifter*, Case 243/84, when considering the similarity of Scotch whisky and liquor fruit wine, the Court took into account the characteristics of the products, their alcohol content, their methods of manufacture and the consumer perceptions. Or in *Commission v. Italy*, Case 184/85, when deciding upon a consumption tax imposed by Italy on bananas imported from France, the Court analyzed the objective characteristics of bananas and other fruits produced in Italy (such as oranges, peaches, pears and apples), including their organoleptic properties, and their ability to satisfy the same consumer needs.

4.2. *Direct vs. Indirect Discrimination*

If the products are similar, the taxation must then be the same and the goods must not be discriminated either directly or indirectly.

Measures that tax domestic and imported goods at different rates or that tax only imported products are directly discriminatory. For example, in

Lütticke (*Alfons*) *GmbH v. Hauptzollamt Sarrelouis*, Case 57/65, the Court found that Germany directly discriminated powdered milk imported from Luxembourg because it was subject to a tax not payable by the German product. Conversely, in *Haahr Petroleum v. Åbenrå Havn*, Case C-90/94, the fact that imported goods unloaded at certain Danish ports where subject to an additional 40% surcharge on the shipping tax imposed by Denmark on domestic goods was considered by the Court as another example of direct discrimination.

In the absence of any express defense to Article 110(1), all directly discriminatory measures adopted in violation of such provision must be removed and the tax must be equalized.

On the other hand, indirect discriminatory taxation appears on its face (in law) not to discriminate products on the basis of their origin, but nevertheless has a discriminatory effect in reality (in fact) by imposing a certain burden on the imported goods. *Humblot v. Directeur des Services Fiscaux*, Case 112/84, provides a good illustration of such discrimination: French tax on cars distinguished between cars below and above 16 hp and taxed the latter much more than the former. Although "in law" the measure was not discriminatory, the Court found this system to indirectly discriminate cars manufactured in other Member States as no cars with engine capacity of over 16 hp were produced in France at that time.

Unlike directly discriminatory measures, taxes that indirectly discriminate goods on the basis of their origin may not amount to a breach of Article 110(1) to the extent they can be objectively justified on the basis of a national interest that can be invoked by the defendant Member State. However, no violation of the aforementioned provision may be detected only if: (*a*) such interest (*i*) is unrelated to the origin of the goods; and (*ii*) pursues an objective recognized by EU law as legitimate; and (*b*) the steps taken to protect said interest are proportionate. For instance, the Court considered as a valid justification for the purposes of Article 110(1) the environmental argument adopted by Greece when defending its car tax system providing for differential rates depending on diverse power rating (see *Commission v. Greece*, Case C-132/88).

4.3. *Competing Goods*

Where imported and domestic goods are not «*similar*» pursuant to and for the purposes of Article 110(1), but in competition (even if only partially, indirectly, or potentially) with each other, then Article 110(2) kicks in. The

object is to prevent differential tax ratings from affording indirect protection to the domestic products to the detriment of the imported ones.

The tests adopted to determine whether or not two products are in competition with each other include the analyses on (*i*) manufacturing processes; (*ii*) product composition; (*iii*) consumer preferences; and, more often, (*iv*) cross-elasticity of demand (that is, the positive effect on the demand of a product, which increases, due to a reduction in the availability, or an increase in price, of the other product).

For example, in *Commission v. U.K.*, Case 170/78, the Court Stated that the higher excise duties imposed by U.K. on wine, as opposed to beer, amounted to a violation of Article 110(2) because wine and beer could be substituted for by each other and both belonged to the same category of alcoholic beverages as they both were product of natural fermentation and met the same purposes as thirst-quenching and meal-accompanying beverages.

4.4. *Remedies*

As anticipated, the kind of remedy applicable in the cases at stake depends on whether a breach of Article 110(1) or (2) is actually detected.

Should Article 110(1) be applicable, the infringing Member State must – depending on the circumstances – either equalize the tax burden imposed on domestic and imported products or extend to the imported goods a tax benefit previously granted to the domestic goods alone (or, conversely, deprive the domestic goods of a benefit accorded to them).

On the other hand, should Article 110(2) be applicable, the infringing Member State must remove altogether the protective element. No equalization of the tax burden is then required.

The foregoing scenarios are relevant in case the Commission brings an action in court against the infringing Member State. However, should an individual sue the Member State on the basis of a violation of Article 110 TFEU – which can be done given that said provision is directly effective (see, amongst others, *Fink-Frucht GmbH v. Hauptzollamt München-Landsbergerstrasse*, Case 27/67, and *Mölkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn*, Case 28/67) – both a restitutionary action (for the repayment of the unlawful charges levied in breach of Article 110) and damages may be claimed (see *Hans Just I/S v. Danish Ministry for Fiscal Affairs*, Case 68/79).

5. *Restrictions on Imports and Exports and their Justifications under EU Law*

The preceding paragraphs focused on customs duties and taxes. However, the strategy for achieving a single market integration comprises also provisions on non-fiscal regulatory national barriers to trade, *i.e.,* essentially quotas on the amount of goods that can be imported (or exported) and measures having an equivalent effect (hereinafter, "MHEEs") to quotas.

The Treaty regime for regulatory barriers is set out in Chapter 3 of Title II. The chapter outlaws quantitative restrictions on imports (Article 34) and exports (Article 35). Yet it also contains a provision according to which restrictions on imports or exports can be justified (Article 36).

It is worth noting that, contrary to the legal regime governing customs duties, that concerning regulatory barriers (*i*) separately contemplates a prohibition for imports and another for exports; and (*ii*) expressly allows for exceptions.

Article 34 TFEU provides:

> Article 34 TFEU
> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35 TFEU is drafted in the same terms, but regards exports.

As anticipated, the Treaty allows national measures to prevail over the free movement of goods, subject to certain conditions. In particular, pursuant to Article 36 TFEU, such measures must be aimed at protecting substantial interests recognized as to be valuable by the Union such as:

> Article 36 TFEU
> […] 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 and archaeological value; or the protection of industrial and commercial property.

In addition, the foregoing exhaustive list of derogations must be read in conjunction with the following sentence of Article 36 TFEU pursuant to which:

> Article 36 TFEU
> […] Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Finally, the national measures must go no further than what is necessary to achieve the concerned goal. In other words, they must comply with the principle of proportionality. In *Commission v. UK* (*Imports of Poultry Meat*), Case 40/82, the Court rejected the UK government's argument for the restrictive measures due to their lack of proportionality to the risk identified.

It is also worth noting that Article 36 TFEU applies only in the absence of EU legislation governing the interest at stake. Should this be the case, Member States may not impose additional requirements, unless the said European rules expressly so permit.

5.1 *Quantitative Restrictions*

The notion of quantitative restrictions was broadly defined by the Court in *Geddo v. Ente Nazionale Risi*, Case 2/73, as measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.

As such, quantitative restrictions may include (*i*) bans on imports or exports; (*ii*) quotas limiting the quantity of goods entering or leaving a State; or (*iii*) specific limitations by a State to the import/export of a certain good whereas it is generally allowed by the same State.

In *Regina v. Hann and Darby*, Case 34/79, the Court recognized that the UK ban (the most extreme form of prohibition) on the import of pornographic materials was in breach of Article 34 TFEU. Additionally, in *Établissements Delhaize Frères et Compagnie Le Lion SA v. Promalvin SA and AGE Bodegas Unidas SA*, Case C-47/90, the Court ruled that the Spanish law provision which limited the quantity of wine that could be exported to other Member States (and which, in the instant case, prevented a Belgian company from importing 3,000 hectoliters of the Spanish wine "Rioja") resulted in a violation of Article 35 TFEU. Finally, in *Rosengren v. Riksåklagaren*, Case C-170/04, the Court considered as a quantitative restriction (prohibited as such pursuant to Article 34 TFEU) the Swedish law that prevented consumers from buying alcoholic drinks on the internet or by mail, but allowed them to buy such drinks through

the State-owned company (*Systembolaget*) which had a monopoly in retail sales of wine, beer and spirits in Sweden.

5.2. *Measures Having an Equivalent Effect*

MHEEs are more difficult to define. The Commission, at first, and the Court, then, took a broad interpretation on these measures.

In particular, all the items listed under Directive 70/50/EEC represent ways in which a State can discriminate against imported goods. Specifically, Directive 70/50 was originally a transitional measure which, although no longer formally applicable, continues to furnish guidance on the Commission's view of MHEEs. The list of measures that can constitute a MHEE is contemplated under Article 2 and comprises, *inter alia*: (*i*) imposing minimum or maximum prices for imported goods; (*ii*) fixing less favorable prices for imported products; (*iii*) lowering the value of imported goods by causing a reduction in their intrinsic value or increasing their costs; (*iv*) establishing payment conditions for imported products different from those of domestic ones; (*v*) imposing harder conditions of packaging, shape, size, weight, composition, presentation and identification for imported goods than domestic ones; (*vi*) prohibiting or limiting the publicity of imported products; (*vii*) prohibiting, limiting or requiring stocking in respect of imported goods only.

MHEEs were later defined in the seminal early judicial decision on the interpretation of MHEEs, that is *Procurer du Roi v. Dassonville*, Case 8/74. The Court, in what has become known as the "*Dassonville* formula", construed MHEEs as all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade.

Pursuant to the *Dassonville* formula, Article 34 TFEU applies to «*trading rules*», meaning that they concern the marketing stage, and not the production stage, of the economic process (see *Officier Van Justitie v. Cornelis Kramer and Others*, Case 3/76).

The Court has however subsequently clarified that the «*rules*» need not being legally binding, given that the Treaty refers to «*measures*» as opposed to specific language with technical legal meaning. As such, in *Commission v. Ireland* (*Buy Irish Campaign*, Case 249/81), the Court defined as a national practice introduced by the Irish government and prosecuted with its assistance the campaign sponsored by said Irish government, recommending the citizens to buy Irish goods, and recognized that such a practice may have a potential

effect on imports, by influencing the behavior of traders and consumers in Ireland, comparable to that resulting from binding governmental measures. Subsequently, the Court ruled that not only the term «*rules*» encompasses practices and policies, but also administrative regulations and actions that show a certain degree of consistency and generality: in fact, in *Commission v. France* (*Postal Franking Machines*), Case 21/84, the French administrative practice requiring prior approval for postal franking machines – which in the instant case was granted to French machines but not to UK ones – was deemed to be in violation of Article 34 TFEU.

In light of the foregoing, also the element «*enacted by Member States*» of the *Dassonville* formula later appeared to be misleading and, therefore, was substituted for by a broader construction of the relevant terms. In particular, a domestic measure needs not being formally enacted to fall within the scope of Article 34 TFEU so long as it amounts to a consistent policy or practice (see *Buy Irish Campaign*). In addition, the «*rules*» do not need to be «*enacted*» by the central government of a Member State, as the Court has applied Article 34 TFEU also to measures adopted by (*i*) territorial authorities of a federal State (see *Aragonesa de Publicidad Exterior SA v. Departmento de Sanidad y Seguridad Social de la Generalitat de Catalunya*, Joined Cases C-1 & 176/90, or *Commission v. Ireland* (*Dundalk Water*), Case 45/87); (*ii*) quasi-government bodies (see again *Buy Irish Campaign*, where the campaign was administered by the Irish Goods Council, a registered company whose management committee and financial resources came from the Irish government); (*iii*) bodies that regulate the conduct of a particular profession (such as the Royal Pharmaceutical Society of Great Britain – *i.e.*, the professional body for pharmacy – in *Regina. v. Royal Pharmaceutical Society ex p. API*, Joined Cases 266 & 267/87); (*iv*) other bodies – such as trade unions (see *International Transport Workers Federation v. Viking Line ABP*, Case C-438/05) – that have enough power to interfere with the free movement provisions.

Even though Article 34 TFEU has only "vertical" direct effects (and not "horizontal" ones), as it is addressed to Member States and not to private parties (see *Sapod-Audic v. Eco-Emballages SA*, Case C-159/00), a State may have to take responsibility for the actions of individuals either, directly or indirectly, because Article 34 prohibits not only State action, but also inaction (see *Commission v. France* (*Spanish Strawberries*), Case C-265/95). However, liability arises only where the State has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to individual actions that hinder free movement (see again

Spanish Strawberries), whereas less serious interference by individuals will not bring about such liability (see S*chmidberger, Internationale Transporte und Planzüge v. Republic of Austria*, Case C-112/00).

The third element of the *Dassonville* formula («*directly or indirectly, actually or potentially*») is by far the most important, especially in light of the recent trend in the Court's decisions, which have largely dropped any reference to the first two elements of the formula, given the troublesome interpretive questions that said two prongs had raised in the past, in order to adopt a more liberal approach which now focuses on any measure capable of hindering the free movement of goods (see *A.G.M.-COS.MET Srl v. Suomen valtio and Tarmo Lehtinen*, Case C-470/03). In this respect, the jurisprudence of the Court has made clear that the focus of the analysis is on the effect of the measure at stake, irrespective of the intention behind such measure.

As to the first subpart of this element («*actually or potentially*»), the Court has recognized that it may be sufficient that the measure have only a potential effect on the free movement of goods, as in *Commission v. France* (*foie gras*), Case C-184/96: even though other Member States produced very little *foie gras*, the French rules on the composition of said *foie gras* amounted to a violation of Article 34 TFEU because they were capable of hindering, at least potentially, inter-State trade. As a result, no *de minimis* rule applies in relation to Article 34 TFEU (see *Criminal Proceeding against Ditlev Bluhme*, Case C-67/97). However, especially in borderline cases, where a trading rule in the narrow sense of the term is not concerned, the Court has adopted a remoteness test whereby, should the risk for the concerned measure to hinder trade between Member States be too uncertain and indirect, Article 34 TFEU would not apply (see *H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen and Staat der Nederlanden*, Case 69/88).

As to the second subpart of the element («*directly or indirectly*»), an important distinction must be drawn between distinctly and indistinctly applicable measures. Such categories have originally been introduced by the above-mentioned Directive 70/50/EEC. Indeed, as anticipated, Article 2 of the Directive referred to measures that are not «*applicable equally*» to domestic and imported products. By contrast, national measures that are «*applicable equally*» were not generally seen as equivalent to those of quantitative restrictions. However, Article 3 exceptionally extended the concept of MHEEs to a non-exhaustive list of measures equally applicable to domestic and imported goods (paying special attention on the importance of a test of proportionality), as it provided as follows: «*This Directive also covers mea-*

sures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification, or putting up and which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules. This is the case, in particular, where: - the restrictive effects on the free movement of goods are out of proportion to their purpose; - the same objective can be attained by other means which are less of hindrance to trade».

The *Dassonville* formula adopted a different approach. According to said formula, it is irrelevant whether the measure is distinctly or indistinctly applicable. It covers both types of measures, *i.e.*, those which explicitly differentiate between domestic and imported goods (imposing heavier burdens on the latter) and those which do not do this on the face of it, but impose anyhow an indirect hurdle to trade.

Contrary to the *Dassonville* formula, the case law followed the aforesaid distinction drawn in the Directive until the early 2000s. However, more recent cases have paid less attention to whether the measure is discriminatory, focusing instead on the obstacles to market access created by such measure, thereby restoring the original market access approach found in *Dassonville*. In any case, the distinction is still relevant with regard to justifications, as we will see below.

5.2.1. *Distinctly Applicable Measures*

National distinctly applicable measures treat imported and domestic goods differently. As such, this concept is mostly synonymous with "discriminatory" measures. This is generally known as "formal discrimination", it is typically easy to be identified and examples of national distinctly applicable measures include the following: (*i*) imposing additional requirements only on imported goods (see *Firma Denkavit Futtermittel GmbH v. Minister für Ernährung*, Case 251/78); (*ii*) limiting channels of trade or distribution (see *Officier Van Justitie v. Adriaan de Peijper*, Case 104/75, or *Syndicat national des fabricants raffineurs d'huile de graissage v. Groupement d'intérêt économique 'Inter-Huiles'*, Case 172/82); (*iii*) giving preference to, or advantage for, domestic goods (so-called "buy national" rules, see *Commission v. Ireland* (*Buy Irish*), Case 249/81, or *Apple and Pear Development Council v. Lewis* (*Buy British Fruit*), Case 222/82); (*iv*) requiring an indication of the country of origin for foreign products (see *Commission v. Ireland* (*Irish Souvenirs*), Case 113/80, or *Commission v. UK* (*Origin Marking*), Case 270/83), unless such products have genuinely distinguishing qualities and characteristics due to the fact that they originated in a specific geographic area (see *Commission*

v. Germany (*Weinbrand*), Case 12/74).

Article 34 TFEU captures also material discrimination, that is when national and imported goods are treated in the same way if such equal treatment is not objectively justified. A typical case is that of price-fixing (see *Criminal Proceeding against Riccardo Tasca*, Case 65/75, or *Openbaar Ministerie v. van Tiggele*, Case 82/77): in such circumstances, a Member State sets either a minimum or a maximum price for a particular product and, in so doing, it may discriminate the imported goods either because a low maximum price may not financially take into account the costs borne for their import, or because a high minimum price may eliminate any competitive advantage they may have over domestic products.

Finally, the opposite case of "reverse discrimination", meaning that national rules discriminate against domestic goods (and not against imported ones), is not within the scope of Article 34 TFEU because such provision does not encompass wholly internal situations (see *Criminal Proceeding against Mathot*, Case 98/86).

As anticipated, the qualification of a measure as distinctly applicable (as opposed to indistinctly applicable) plays a role in determining the possible justification for such a measure: in fact, a distinctly applicable measure may only be justified by reference to one of the Article 36 TFEU derogations, not by the broader list of judicially developed «*mandatory requirements*», which apply only to indistinctly applicable measures (as we will see below).

5.2.2. *Indistinctly Applicable Measures*

Indistinctly applicable measures apply a same burden in law, but a different burden in fact (see *ATRAL SA v. Etat belge*, Case C-14/02): in other words, they apply in law to both domestic and imported goods, but impose in fact a particular burden on the imported ones. Since their "first" appearance under the abovementioned Article 3 of Directive 70/50/EEC, the Court has repeatedly declared unlawful such indistinctly applicable measures, unless they can be somehow justified by the Member State.

Product requirements – *i.e.*, rules relating to designation, form, size, weight, composition, presentation, labeling, and packaging – are the classic example of indistinctly applicable measures. Specifically, case law has dealt with measures regarding composition (see *Cassis de Dijon*, described in detail below, or *Drei Glocken GmbH v. USL Centro-Sud*, Case 407/85), packaging and presentation (see *Walter Rau Lebensmittelwerke v. De Smedt PVBA*, Case 261/81, or *Criminal Proceeding against Karl Prantl*, Case 16/83,

or *Vermin gegen Unwesen in Handel und Gewerbe Köln ev v. Mars GmbH*, Case C-470/93), designation (see *Criminal Proceeding against Miro BV*, Case 182/84, or *Commission v. Italy*, Case C-14/00) as well as production conditions (see *Alfa Vita Vassilopoulos AE*, Joined Cases C-158 & 159/04). In the past, other measures have also been deemed as indistinctly applicable, such as the so-called "market circumstances" rules, *i.e.*, measures concerning time, place, and manner of marketing products, including advertisement and sales promotion: however, these rules are now generally faced with the *Keck* «*certain selling arrangements*» test, which we will see below, as opposed to the *Cassis de Dijon* one. Finally, other measures – mainly concerning authorizations and inspections (as such not clearly classifiable as product requirements or selling arrangements) – were originally labelled as indistinctly applicable measures: nevertheless, now they will likely undergo the test pursuant to the *Italian Trailers* formula (which will be analyzed below). Therefore, it now seems that the category of indistinctly applicable measures is reduced to covering product requirements, to which the seminal decision of *Cassis de Dijon* applies.

In fact, the Court ruled for the first time on an indistinctly applicable measure in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), Case 120/78. In the instant case, German law required fruit liqueurs to possess at least 25% alcohol. *Cassis de Dijon*, a blackcurrant liqueur, was made in France and typically contained less than 20% alcohol. As a result, it could not be sold in Germany. A German importer, whom was not granted authorization to import and sell *Cassis*, challenged this decision on the basis that it contravened Article 34 TFEU.

The Court found that the application of product requirements to imports hindered their importation and, therefore, such rules amounted to MHEEs. However, the Court also clarified that the mere existence of product requirements rules is not *per se* a problem; rather their application to products imported from other Member States violates Article 34.

The trade-restricting effects of such application were dealt with by the Court by developing two ideas (which would later reveal to be two of the most important legal developments of EU law). The first is «*mutual recognition*»: each Member State is indeed required to accept products made according to the laws of other Member States as there is no reason why such products should not be sold in all other Member States, if they comply with the laws of the Member State where they are produced. The Court therefore made a choice for regulation by the country of origin.

The second idea is that of «*mandatory requirements*». In the absence of

harmonization legislation, there may sometimes be a need for derogation from the principle of mutual recognition, particularly when the application of standards to imports serves the protection of important interests such as effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of consumer.

The list was further broadened in subsequent cases, and this category is now considered to be open-ended. In such cases, there is therefore a balancing process involved, in which proportionality is the central concept.

The legal status of these derogations is odd. Article 36 TFEU provides for exceptions to Article 34 where necessary to protect substantial interests such as public health or security. However, the Court in *Cassis de Dijon* did not offer a broad interpretation of Article 36; rather, it created a new category of exceptions, in addition to those provided for by the Treaty. Whereas such exceptions cover a wider range of interest in respect of those contemplated under Article 36, they only apply to indistinctly applicable measures as the doctrine of mandatory requirements may not be invoked where a measure discriminates directly.

Later in the jurisprudence of the Court, it was debated whether the aforesaid "market circumstances" rules (*i.e.*, rules concerning "who sells the product, and when, where and how") amounted to MHEEs and, as such, were to be prohibited under Article 34 TFEU. In general terms, these rules differ from MHEEs because they neither are designed nor have the effect to protect the home market (discriminating against the imported products) as well as because they typically affect the retailers and not the producers or the importers. The Court oscillated between different approaches to "market circumstances" rules: on the one hand, they were deemed as MHEEs, albeit potentially justifiable, because of their restrictive effect on intra-EU trade (see *Criminal Proceedings against Oosthoek's Uitgeversmaatschappi BV*, Case 286/81, or *Schutzverband gegen Unwesen in der Wirtschaft v. Yves Rocher GmbH*, Case C-126/91); on the other hand, they were considered to fall outside Article 34 TFEU because they neither could generally be considered as «*trading rules*» within the meaning of *Dassonville* nor had a discriminatory effect affecting inter-State trade (see *H. Krantz GmbH & Co. v. Ontvanger der Directe Belastingen and Staat der Nederlanden*, Case 69/88). The most controversial approach to these rules was however that shown by the Court in the *Sunday trading* cases (so called because the Court was called upon to assess the compatibility with the Treaty of those laws that required shops to be closed on Sundays, see *Torfaen Borough v. B&Q*, Case C-145/88, or *U.D.S. CGT de l'Aisne v. Conforama; Criminal proceedings*

against Marchandise, Joined Cases C-312 & 332/89) where it was unclear whether the Court had adhered to its precedents following *Cassis de Dijon* or had developed a new test for assessing the proportionality of the concerned "market circumstances" rules adopted by Member States.

This eventually led to the decision of the Court in *Criminal Proceedings against Bernard Keck and Daniel Mithouard*, Joined Cases C-267 & 268/91. Here, Keck and Mithouard sold goods at a loss, that is at a price below that which they had been purchased wholesale. This was prohibited under French law. They argued that the foregoing represented a method of sales promotion which would turn into a restriction of the volume of sales of imported goods, and, therefore, the French ban was in breach of Article 34 TFEU.

In rejecting Keck and Mithouard's argument, the Court took the opportunity to distinguish between «*product requirements*» and «*certain selling arrangements*». Whereas in respect of the former the principles set out in *Cassis de Dijon* should continue to apply, with regard to the latter the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment provided that provisions 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.

In other words, domestic provisions that restrict or prohibit altogether «*certain selling arrangements*» do not breach Article 34 TFEU so long as two conditions are satisfied: (*i*) the provisions apply to all affected traders operating in the territory (so-called principle of universality), and (*ii*) the provisions are not discriminatory in law and in fact (so-called principle of neutrality, see *Deutscher Apothekeverband v. 0800 DocMorris NV*, Case C-322/01). And the rationale of the foregoing is that, so long as the aforesaid conditions are fulfilled, such rules do not prevent foreign goods from accessing the domestic market nor do they impede access for foreign products more than they impede access for domestic goods.

In light of the foregoing, the rules governing the way products are sold are not MHEEs. Member States may therefore legislate on matters such as prices, opening hours, sales techniques, and advertising, so long as these rules do not discriminate against the marketing of foreign goods. As such, while product requirements, irrespective of their discriminatory effect, fall within the scope of Article 34 TFEU in line with the *Cassis de Dijon* test,

only discriminatory selling arrangements violate the Treaty provisions on free movement of goods. Given the applicability of two different tests, the distinction between product requirements and selling arrangements has become the main issue in the post-*Keck* jurisprudence. Ultimately, for non-discriminatory measures, this has turned into a dispute on whether the national laws has classified the concerned measure as a product requirement or not (see *Familiapress v. Bauer Verlag*, Case C-365/95). Therefore, by way of examples, an Italian law requiring shops to be closed on Sundays (see *Punto Casa SpA v. Capena*, Joined Cases C-69 & 258/93), a Greek law prescribing that processed milk for infants be sold exclusively in pharmacies (see *Commission v. Greece*, Case C-391/92), and an Austrian law prohibiting the sale of certain products – including gold and silver jewelry – at private homes (see *A-Punkt Schmuckhandel v. Claudia Schmidt*, Case C-441/04) were all considered as selling arrangements. However, not every selling arrangement is *per se* excluded from the scope of Article 34 TFEU; rather, should a selling arrangement still bar non-domestic goods from accessing the market, it would be considered in breach of Article 34 (see *Konsumentombudsmannen* (*KO*) *v. De Agostini* (*Svenska*) *Förlag AB*, Joined Cases C-34 & 35 & 36/95).

Product requirements and selling arrangements do not exhaust the category of measures that may constitute MHEEs. Case law has preponderantly focused on rules that interfered somehow with the commercial chain, from production to trading until the selling of a good. Rules that limited the consumer use of a good were long considered to fall outside the scope of Article 34 TFEU.

The Court addressed this issue in *Commission v. Italy* (*Italian Trailers*), Case C-110/05. An Italian law provision prohibited the use of trailers on motorcycles and mopeds: the question was therefore whether the prohibition on using the trailers constituted or not a MHEE. Had the *Keck* test been adopted by analogy, the Italian rule would have benefited from the derogation to Article 34. Instead, the Court ruled that the Italian measure constituted a MHEE because a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behavior of the consumers, which, in its turn, affects the access of that product to the market of that Member State.

The extension of the scope of Article 34 to national measures that limit the use of a product by the final consumer was further confirmed by the Court in *Åklagaren v. Mickelsson and Roos*, Case C-142/05. The case concerned a Swedish rule that restricted the use of personal watercraft

(such as jet skis) on certain waterways, which was considered by the Court as a MHEE on the basis of a rationale very similar to that adopted in *Italian Trailers*, particularly noting that consumers, knowing that the use of a certain product permitted by the concerned national measure is very limited, have only a limited interest in buying that product.

Although *Italian Trailers* concerned a total prohibition on use, while *Mickelsson* regarded a mere restriction on the use of a product, both decisions clearly express the Court's preference for a market access test rather than the more doctrinally opaque *Keck* test: there is no need to show discrimination, yet the only concern is whether the national rules totally or greatly prevent consumers from using goods lawfully produced in other Member States. Should that be the case, the measure would hinder access to the domestic market of such foreign product and, to this extent, would amount to a breach of Article 34 TFEU.

Subsequent case law (see *ANETT v. Administración del Estado*, Case C-456/10) appeared to support the view of the Court on the market access test. However, it is still unclear whether this new test also applies to selling arrangements, thereby ultimately overturning *Keck* or, as it seems more plausible, is confined to the "new" catch-all category that includes any measure which cannot easily be classified as a distinctly applicable measure, a product requirement, or a selling arrangement (see *National Raid van Dierenkwekers en Liefhebbers VZW v. Belgische Staat*, Case C-219/07).

5.3. *Restrictions on Exports*

While Article 34 TFEU deals with imports, Article 35 is applicable to circumstances where Member States attempts to hinder the export of goods to other Member States, but does not apply to exports to third countries.

The wording of Article 35 TFEU mirrors that of Article 34: as such, it prohibits both quantitative restrictions on exports and measures having an equivalent effect.

No particular issues arise in case of quantitative restrictions because, as in the case of imports, they may be either quotas or total export prohibitions for certain goods. In *The Queen v. Ministry of Agriculture, Fisheries and Food, ex p. Hedley Lomas* (*Ireland*), Case C-5/94, the decision of the UK ministry to refuse a company a license to export live sheep to Spain, as Spanish slaughterhouses were considered not to fulfil EU standards, constituted a breach of Article 35 TFEU.

On the contrary, Article 35 TFEU was deemed to slightly differ from

Article 34 in one specific respect, with regard to measures having equivalent effects: while Article 34 TFEU prohibits both distinctly applicable (*i.e.*, discriminatory) and indistinctly applicable measures, Article 35 TFEU would only ban discriminatory measures.

A measure within Article 35 must provide some specific disadvantage for exports, by comparison with goods sold domestically, thereby encouraging domestic sales at the expense of export sales. Indeed, this was the decision of the Court in *Groenveld v. Produktschap voor Vee en Vlees*, Case 15/79: a wholesaler of horsemeat had challenged the legality of a Dutch law prohibiting the (industrial) production of horsemeat sausages. The law had been adopted in order to protect Dutch meat exports in light of the fact that the consumption of horsemeat was not allowed in the national markets of some important trading partners. The Court held that such prohibition did not constitute a measure having an equivalent effect because Article 35 TFEU concerns national measures which have as their specific object or effect the restrictions patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States. This is not so in the case of a prohibition like that in question which is applied objectively to the production of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or for export.

The *Groenveld* three-tier test to establish a possible breach of Article 35 TFEU was much narrower than the homologous *Dassonville* one: in fact, unlike *Dassonville*, the *Groenveld* test was conditional upon differential treatment and the existence of a protectionist effect. The only exception concerned agricultural products, in which cases the Court has always applied the *Dassonville* formula (see *Kakavetsos-Fragkopoulos kai v. Korinthias*, Case C-161/2009).

It took almost thirty years before the Court changed its approach, which happened in *Criminal proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA*, Case C-205/07. The case concerned a Belgian company which sold food supplements over the internet. Customers paying by credit card had to provide its number and expiry date. According to Belgian authorities, this resulted in a violation of a consumer protection law provision, which prohibited the seller from requiring the consumer to provide any form of payment before the expiry of the withdrawal period of seven working days, because providing the credit card number enabled the

company to collect the price of the goods before the expiry of the period for withdrawal. This rule applied without distinction to domestic sales as well as exports. As an indistinctly applicable measure, this rule should have been held outside the scope of Article 35 pursuant to *Groenveld*. However, this rule was actually considered as a measure having equivalent effects creating, as a matter of fact, disadvantages to the export of domestic sales contrary to Article 35 TFEU: indeed, requiring the customers to pay once they had received the goods and after the expiry of the withdrawal period, creates a significant risk of non-payment, especially with regard to customers residing in another Member State, considering the difficulties in instigating legal proceeding in another country. This, in turn, implies a more discouraging effect on sales abroad than domestic ones.

Article 35 TFEU therefore applies to all national measures which tend to make export sales more burdensome than domestic sales, whether this is by direct discrimination or simply as a matter of fact (see *Criminal proceedings against Marco Grilli*, Case C-12/02). However, alike Article 34, equally applicable measures hindering exports may be justified either by invocation of the explicit derogations listed in Article 36 TFEU or if they are necessary to meet some mandatory requirement (and are proportionate).

5.4. *Justifications*

National measures that are quantitative restrictions or measures having equivalent effects are prohibited under EU law, unless they can be justified. There are two types of justifications: firstly, the Treaty-based justifications under Article 36 TFEU; and, secondly, other justificatory grounds based on the Court's case law, alternatively called "mandatory requirements", "imperative requirements" or "overriding reasons relating to the public interest". Both categories of justifications are subject to the proportionality requirement.

Article 36 TFEU expressly exempts national laws that hinder the free movement of goods on the following grounds: (*i*) public morality, public policy or public security; (*ii*) protection of health and life of humans, animals or plants; (*iii*) protection of national treasures possessing artistic, historic or archaeological value; or (*iv*) protection of industrial and commercial property.

The Court has imposed two constraints on Member States' freedom to invoke the foregoing derogations. First, Article 36 must be interpreted strictly and the list contemplated thereunder is to be intended as exhaustive. The exceptions cannot be extended to cases other than those specifically laid down (see *Commission v. Ireland* (*Irish Souvenirs*), Case 113/80). Second, the

derogations cannot be used to serve economic objectives (see *Commission v. Italy*, Case 7/61).

In addition, Article 36 TFEU provides that such restrictions must not «*constitute a means of arbitrary discrimination or a disguised restriction on trade*». The first prong of this formula is an objective requirement: the differentiation between imported and domestic goods must be based on objective grounds. The second prong is basically a prohibition of protectionism: the negative effect on trade must be as limited as possible and, in any case, must be incidental effect and not the main purpose of the domestic measure. The burden of proof is on the national authorities to demonstrate in each case that their rules are necessary to give effective protection to the interests referred to in Article 36 TFEU (see *Criminal proceedings against Leendert van Bennekom*, Case 227/82).

Article 36 applies (*i*) to both import and export restrictions; (*ii*) to both quantitative restrictions and measures having an equivalent effect; and (*iii*) to distinctly and indistinctly applicable measures.

Despite limiting the scope of Article 36, since *Cassis de Dijon* the Court has allowed for implied derogations to such provision: the part of this decision on mutual recognition led to the conclusion that Article 34 TFEU was to outlaw all non-discriminatory obstacles to trade resulting from national disparities in product requirements. To compensate the States for the widened scope of Article 34, the Court enlarged the scope of possible justifications, even though the Court has repeatedly confirmed that mandatory requirements apply only to indistinctly applicable measures (see *Commission v. Belgium* (*Walloon waste*), Case C-2/90).

In *Cassis de Dijon*, the Court gave a non-exhaustive list of examples for these mandatory requirements (including the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of consumer). From that time onward, the Member States brought forward a large number of mandatory requirements, many of which the Court has accepted provided that (*i*) they are unrelated to the origin of the goods; (*ii*) they serve objectives considered by the Court to be legitimate; and (*iii*) there is evidence that they genuinely serve the purposes for which they are intended (see *Commission v. Belgium* (*automatic fire detection systems*), Case C-254/05).

Finally, like derogations contemplated under Article 36 TFEU, mandatory requirement are available only in the absence of harmonization EU legislation (see *ANETT v. Administración del Estado*, Case C-456/10).

They can be considered as the functional equivalent of the concept of objective justification developed in the context of indirectly discriminatory national taxes under Article 110 TFEU.

National measures that are justifiable either under Article 36 TFEU or as mandatory requirements must be proportionate. The proportionality requirement is essentially a three-pronged test. First, the national measure must be suitable or appropriate to achieve the intended goal (see *NV United Foods and PVBA v. Belgium*, Case 132/80). Second, the measure must be necessary, meaning that it must not go beyond what is necessary to achieve the intended outcomes. In other words, not only there should not be other less restrictive means of producing the same effect, but also, even if there are no such less restrictive means, the measure should not have an excessive effect on the interests concerned (see *Rosengren v. Riksåklagaren*, Case C-170/04). Finally, the measure must be proportionate *stricto sensu*, meaning that its positive effects must outweigh its negative effects (see *Commission v. Germany* (*pharmacies for hospitals*), Case C-141/07). However, the Court often reduces this test to an analysis of the «*necessity*» prong and rules that the public interest pursued must not be attainable by measures which are less restrictive of such trade (see *Aher-Waggon GmbH v. Germany*, Case C-389/96).

The national authorities bear the burden of proof to demonstrate that their measures fulfil the proportionality requirements (see *Commission v. Italy*, Case C-110/05).

Table of Cases

- Case 7/61 *Commission v. Italy* [1961];
- Cases (joined) 2 & 3/62 *Commission v. Luxembourg* (*Gingerbread*) [1962];
- Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963];
- Case 57/65 *Lütticke* (*Alfons*) *GmbH v. Hauptzollamt Sarrelouis* [1966];
- Case 27/67 *Fink-Frucht GmbH v. Hauptzollamt München-Landsbergerstrasse* [1968];
- Case 28/67 *Mölkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn* [1968];
- Case 7/68 *Commission v. Italy* (*Art Treasures*) [1968];
- Case 24/68 *Commission v. Italy* (*Statistical Levy*) [1969];
- Cases (joined) 2 & 3/69 *Social Fonds voor de Diamantarbeiders v. Choral Diamond Co* [1969];
- Case 77/72 *Carmine Capolongo v. Azienda Agricola Maya* [1973;
- Case 2/73 *Geddo v. Ente Nazionale Risi* [1973];
- Case 155/73 *Criminal Proceeding Against Giuseppe Sacchi* [1974];
- Case 8/74 *Procurer du Roi v. Dassonville* [1974];
- Case 12/74 *Commission v. Germany* (*Weinbrand*) [1975];
- Case 65/75 *Criminal Proceeding against Riccardo Tasca* [1976];
- Case 87/75 *Bresciani v. Amministrazione Italiana delle Finanze* [1976];
- Case 104/75 *Officier Van Justitie v. Adriaan de Peijper* [1976];
- Case 3/76 *Officier Van Justitie v. Cornelis Kramer and Others* [1976];
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Abstract

Chapter 2 is concerned with the free movement of goods. This can be impeded in different ways. The most obvious form of protectionism is customs duties, or charges having an equivalent effect, to make foreign goods more expensive than their domestic counterparts. This is dealt with by Articles 28-30 TFEU. A Member State may also attempt to benefit domestic goods by taxes that discriminate against imported goods. This is covered by Articles 110-113 TFEU. Finally, a Member State may seek to preserve advantages for its own goods by imposing quotas or measures which have an equivalent effect on imports, thereby reducing imported products. This is dealt with in Articles 34-37 TFEU.

Filippo Palmieri

Free Movement of Persons

1. *Introduction*

The whole EU regulation of the free movement of persons shows a common fundamental purpose, which may be found in the aim of ensuring the actual free circulation within the Internal Market of those persons who live in (and are citizens of) the Member States, and has its foundation in the key principle of the prohibition of discriminations based on the nationality (Article 18 TFEU).

It is worth noting that the Rome Treaties, under their initial structure, have not been concerning the person as such and as citizen, but rather the person as individual who exercises an activity with economic effects and, at most, the persons related (typically, for family connections) to such economical actors. Hence, the first European regulations have been solely referring to movements within the Member States' territories which showed to have a given economical significance.

Over the years, even before the entry into force of the Maastricht Treaty, the European case law and statutory framework have been then progressively extending, with a step-by-step approach, the scope of the right of free movement to all persons who are citizens of a Member State, regardless of the exercise of an economical activity, and turned to recognise the "independence" of the freedom at stake from any employment or commercial boundary.

1.1. *Free Movement of Employees*

The freedom of movement of employees was recognised by Article 48 of the Rome Treaty of 1957, which stated that such freedom of movement had to be secured by the end of the transitional period.

The principle of free movement of employees started, then, to be implemented already during said transitional period.

The first European regime was estabilished by the Council Regulation (EEC) 15/1961, which essentially granted the citizens of the Member States the right to hold an employment position in the territory of a different Member State in those cases where such job could not be assigned to a local "adequate" employee (see Article 1).

Therefore, such Council Regulation sanctioned the key (and still discriminatory) principle of the priority of the national employees. The second limitation posed to the right of free movement of employees was, then, given by the requirement of a work permit for all the employees coming from a different Member State (see Article 6).

In any case, notwithstanding the above limitations to the access to the job market, the Regulation at stake ensured, for the first time, the same treatment to the other Member States' employees with respect to their compensation, work conditions and trade unions' rights in the hosting Member States.

The second phase of the process of implementation of the freedom at stake occurred with the Council Regulation (EEC) 38/1964.

On the one hand, such Regulation broadened the range of the employees who could benefit from the right of free movement and included certain categories of employees who had been previously excluded (such as the seasonal workers). It also sanctioned the applicability of its rules to the employees who moved to a different Member State in dependence of the exercise by their employer of the right of free provision of services.

On the other hand, more significantly, the Council Regulation (EEC) 38/1964 repealed the principle of priority of the national employees and introduced the opposite and fundamental principle of the priority of the European market employees (Article 1).

However, according to said Regulation, all Member States retained the right to suspend the freedom of movement of the employees within a given region or with respect to certain activities in case of "overload" of workforce (Article 2).

The full implementation of the freedom of movement of employees

was, finally, achieved with the Council Directive 68/360/EEC and the Council Regulation (EEC) 1612/1968: in particular, the Council Directive repealed all the limitations to the entry and residence of the employees and their families in the other Member States, while the Council Regulation was essentially aimed at fully implementing the freedom of movement of the employees within the European Union and sanctioned, amongst others, the principle of the equality of treatment between the national employees and the other Member States' employees.

In a nutshell, since the end of the transitional period, no discriminatory measure based on nationality requirements has been allowed with respect to the subordinate employment relationship and the above mentioned Council Directive and Regulation have been overseeing the matter at stake for about 40 years.

As of today, Articles 45-48 TFEU govern the free movement of the EU employees and, at the same time, the "historical" Council Regulation (EEC) 1612/1968 has been replaced by the Regulation (EU) 492/2011.

1.2. *Free Movement of Citizens*

As anticipated, the right of free movement of persons has been initially conceived as a mere economical right. The purpose of extending the "scope" of such right has been, then, deeply pursued by both the European Court of Justice and the European legislator.

On the one hand, the ECJ has been extending the range of persons who could be entitled to benefit from the free movement within the European Union, overriding the "typical" cases provided for by the European statutory framework (essentially given by the free movement of employees referred to above, by the right of establishment as well as by the right of free provision of services). Such scope has been pursued firstly by interpreting in the broadest manner the categories of persons expressly listed in the European Treaties and, secondly, by introducing other categories of individuals who were not expressly mentioned therein (see § 2.1 below). In this respect, for instance, the mere search for a job in another Member State has been recognised to fall within the scope of Article 45 TFEU (see § 2.2 below).

On the other hand, over the decades, the European legislator gradually granted all the European Union citizens a "general" right of movement and residence, although under given restrictions. Also the EU legislator has been, therefore, unfastening the boundaries of the free movement's right, releasing the latter from the employment activity "essential requirement".

In such perspective, the EU statutory framework went through a significant development at the beginning of the '90 years, when the European Council enacted three Directives and more in detail:

a) the Council Directive 90/364/EEC on the right of residence of the citizens other than employees;

b) the Council Directive 90/365/EEC on the right of residence of the employees and self-employed persons who have ceased their activity; and

c) the Council Directive 90/366/EEC on the right of residence of students (see Grzelczyk, case C-184/99) (such Directive was subsequently deemed to be void by the ECJ for violation of the European Parliament competences and replaced by the Council Directive 93/96/EEC).

Through the Directives above listed, the right of residence and free movement of the persons was significantly extended, making it essentially conditional to the enjoyment of a sufficient income or pension and to the possession of an illness insurance.

The above statutory trend found its "blessing" in the Maastricht Treaty, which, in "connection" with the key concept of the European citizenship, introduced the Article which, still as of today, represents the key rule in the matter at stake, *i.e.* Article 21 TFEU (previously Article 18 (1) TCE).

Article 21 TFEU sanctions the right of each citizen of the Member States to freely move and reside within the entire territory of the Union, without any reference, any more, to the economic "value" of the activities carried out.

More recently, all the Directives above referred have been replaced by the Directive 2004/38/EC, which has been called to rationalize the previous EU statutory framework and, as of today, governs (within a consolidated act) the freedom of movement and residence of the European Citizens and of their relatives in the whole territory of the Union. More in detail, said Directive definitively implements the right of residence, also with an indefinite duration, of all the EU citizens who prove to comply with certain requirements (in particular, the possession of sufficient economical resources and of an illness insurance) (see § 3.2 below).

As a final remark, Article 21 TFEU, along with the Directive 2004/38/EC, sanctioned the definitive overruling of the previous "commercial approach" to the right of movement of the persons within the European Union territory. Hence, Europe moved from the freedom of movement of

economical actors (employees and self-employed persons) to the freedom of movement of Citizens (see, amongst others, *Baumbast*, case C-413/99).

2. *The Freedom of Movement of the Employees*

The right of free movement of the employees within the EU territory is sanctioned, as of today, by Articles 45-48 TFEU.

In particular, the leading Article 45 TFUE states that:

> 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.
>
> […]

Article 45 is a rule having direct effects (*Van Duyn*, case 41/74; *Watson and Belmann*, case 118/75; *Terhoeve*, case C-18/95) and the employees are entitled to challenge, in front of the courts or authorities of the relevant Member State, the illegitimacy of any discrimination impairing their access to the work, the employment conditions, the social security and insurance terms and any other phase of the employment relationship. The same rights as well as the existence of discriminatory measures may be invoked also by the employers who, for instance, encounter difficulties in hiring employees of different Member States due to national laws or regulations (see *Clean Car Autoservice*, case C-350/96).

As anticipated, Articles 45 and following TFEU are now "implemented" by the Regulation (EU) 492/2011.

2.1. *The Employee*

The persons who may benefit from the freedom at stake are the "employees".

In this respect, it is crucial noting that, absent a definition of employee

within the Treaties and the EU legislation, the relevant notion (as well as the concept of subordinate employment activity) must be autonomously construed, pursuant to the EU laws and case law, and cannot be interpreted, in any case, in a restrictive manner (*Lawrie-Blum*, case 66/85; *Kempf*, case 139/85; *Meeusen*, case C-337/97; *Collins*, case C-138/02). A different approach, leaving the determination of such notions to each Member State, would seriously risk to allow the latter to "unilaterally" exclude given categories of persons from the scope of the EU freedom at stake (*Unger*, case 75/63; *Levin*, case 53/81; *Bettray*, case 344/87).

The EU notion of employee is deemed to be satisfied when three conditions are met (see *Martinez Sala*, case C-85/96; *Rundgren*, case C-389/99).

Firstly, the person must be a citizen of a Member State.

However, it must be noted that, pursuing the scope of safeguarding the fundamental (and prevailing) right of integrity of the family, the requirement of the EU citizenship does not apply to the members of the family of the employee who are non-EU citizens: indeed, such persons may benefit from the right of free movement and residence as long as they are part of the family of an EU citizen employee and regardless of their citizenship (see, amongst others, *Singh*, case C-370/90; *Diatta*, case 267/83; see also Directive 2004/38/EC and § 3.2 below).

Secondly, the working activity must be carried out within a Member State other than the home Member State of the employee.

It follows that the working relationship must be localized, in any case, within the territory of the European Union or must show, at least, a strong connection with same territory. In this respect, the ECJ recognised the occurrence of such requirement even in cases where the citizen of a Member State was required to perform his activity on the ship of a different Member State (*Lopes de Veiga*, case 9/88) or the activity was carried out outside the EU territory in secondment regime (*Prodest*, case 237/83; *Boukhalfa*, case C-214/94).

As a further consequence, the regulations governing the free movement are not applicable to cases which are merely "located" within a single Member State, without any connection with one or more different Member States, and are therefore purely national (*The Queen vs. Vera Ann Saunders*, case 175/78; *Hans Moser vs. Land Baden-Württemberg*, case 180/83; *Steen I*, case C-332/90; *Kapasakalis and others*, joined cases C-225/95, C-266/95 and C-227/95). Hence, also cases of discrimination vis-à-vis the citizens of the Member State itself could occur (so-called "inverse"

discriminatory cases); in such circumstances, these cases could be solved out through the application of the national laws safeguarding the principle of equal treatment (*Steen II*, case C-132/93). On the other hand, it is worth noting that the principles concerning the freedom of movement of employees must be necessarily applied when the employee exercised his/her right of movement and, being back in the home Member State, requests to benefit from rights equivalent to those granted in the Member State of residence (*Singh*, case C-370/90).

The third condition required to apply the freedom of movement of the employees lies in the subordinate nature of the activity, which typically occurs (applying the notion offered, over the decades, by the EU case law) when a person works, for a given time period, in favour of a different person and under the supervision of the latter against the payment of a compensation, regardless of the industry where the activity is performed and of the nature of the legal relationship between the employee and the employer (*Lawrie-Blum*, case 66/85; *Brown*, case 197/86; *Asscher*, case C-107/94; *Collins*, case C-138/02; *M. Trojani vs. CPAS*, case C-456/02; *Petersen*, case C-228/07). Moreover, it is required that the activities performed by the employee are actual and true (see *Ninni-Orasche*, case C-413/01), being excluded from the scope of the freedom of movement those activities which are, in essence, merely ancillary and marginal.

As to the above requirements, pursuing the scope of the broadest application of the freedom at stake, the ECJ admitted the qualification as employment activity in several debatable cases, such as in case of:

a) activities with a reduced working time which granted the relevant person with a compensation lower than the minimum subsistence level (*Levin*, case 53/81; see also *Bernini*, case C-3/90; *Raulin*, case C-357/89 and *Hava Genc vs. Land Berlin*, case C-14/09);

b) a professional internship carried out against a consideration (regardless of the circumstance that the internship could be deemed to be a mere training in view of the performance of a true and actual exercise of the relevant profession) (*Lawrie-Blum*, case 66/85; *Kraneman*, case C-109/04);

c) activities performed for a religious community from its members, provided that the services granted by the community to its members could be deemed as to be the consideration, even if indirect, of true and actual working activities (*Steyman*, case 196/87); while, on the contrary, activities which are solely an instrument of re-integration or rehabilitation of the relevant persons cannot be qualified as employment activities (*Bettray*, case 344/87);

d) activities whose compensation was entirely paid through public funds for the re-integration to job of unemployed persons (*M. Birden vs. Stadtgemeinde Bremen*, case C-1/97);

e) an employment relationship with an international organization (*Echternach and others*, joined cases 389/87 and 390/87); and even in case of

f) a work performed by the wife of the sole owner of the relevant enterprise (*Meeusen*, case C-337/97).

More in general, the notion of economical activity required for the qualification as employment activity has been extended by the ECJ as to deem irrelevant both the limited level of compensation as well as the source of the resources for the payment of such compensation (*Bettray*, case 344/87; *Kurz*, case C-188/02; *M. Trojani vs. CPAS*, case C-456/02). Furthermore, the applicability of the rules on the freedom of movement does not require the relevant beneficiary to be qualified as employee in the home Member State, as such person may be an autonomous worker or even an unemployed person in such State; on the contrary, it is crucial that the movement to a different Member States is carried out in order to access an employment activity (see Article 1, Regulation (EU) 492/2011).

Finally, also the sport activity has been deemed to fall within the scope of the EU regime on the free movement of employees, on the assumption that this is an economical activity pursuant to the Treaties (*Walrave*, case 36/74; *Bosman*, case C-415/93; *Angonese*, case C-281/98; *Casteels*, case C-379/09; see also *Donà v. Mantero*, case 13/76; *Deliège*, case C-51/96 and C-191/97 and *Meca-Medina and Majcen v. Commission*, cases C-313/02 and C-519/04). In this respect, the ECJ stated that, when a sport activity has the nature of a subordinate employment activity or of a provision of services, as it occurs in the case of the activity performed by professional or semi-professional sport persons, then it falls within the scope of Articles 45 and following or Articles 56 and following TFUE (*Olympique Lyonnais*, case C-325/08).

2.2. *The Employee's Rights*

Article 45 TFEU provides for a (non exhaustive) list of the rights which are granted to the employees who benefit from the freedom of movement within the EU:

> 3. [The free movement of employees] shall entail the right, subject to limitations justified on grounds of public order,

> 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
>
> […]

The EU employees actually benefit from a statutory regime (governed by Article 45 and following TFEU and by the Regulation (EU) 492/2011) which translates into a significant number of rights whose scope and content has been strengthened, over the decades, by the European case law.

Such rights concern, in particular, the access to work and the exercise of the working activity.

The conditions of access to work are the first matter as to which no discriminatory measure, and in particular no criteria of priority of the national employees, may be applied (Articles 1 and 3, Regulation (EU) 492/2011). In particular, such Regulation clarifies that all the laws and regulations which make access to work of the other Member States' employees conditional upon terms that are not applicable to the national employees as well as all the laws and regulations which (even if applicable regardless of the nationality) have as scope or as exclusive or main effect the exclusion of the employees of other Member States from certain job offers are completely ineffective.

The leading case lies in *Commission of the European Communities vs. France* (case 167/73), where the ECJ ruled that the French laws (in particular, the *Code du travail maritime*) which reserved to the national citizens a certain percentage of the crew of the mercantile ships under the French flag were in clear violation of the principle of freedom of movement of the employees and of the prohibition of discriminations for nationality grounds.

As to the "meaning" of access to work, it must be highlighted that the regime of the free movement of the employees not only applies to those

individuals who move to a different Member State to accept an actual and specific job offer, but also to the individuals who move searching for a job in another Member State. Indeed, since its first judgements, the ECJ recognized the right of the EU citizens to reside in a different Member State in order to search for a job, also in the absence of an actual job offer (*Royer*, case 48/75; *Levin*, case 53/81; *Lair*, case 39/86; *Sala*, case C-85/96; *Rundgren*, case C-389/99). Such right has been granted on the ground that the scope of the freedom of movement would risk to be seriously impaired if the individuals were not allowed to search job offers in the territory of the other Member States. Hence, it is necessary that the EU legislation or (absent any EU rule) the laws of the single Member States set forth a reasonable term that allows the EU citizens to look for and assess the existing offers in the territory of the relevant hosting Member State and to perform any and all the activities necessary to be hired (see *Commission vs. Belgium*, case C-344/95, where it has also been stated that, in any case, if the relevant persons demonstrate that they are continuing to search for a job and that they have concrete possibilities to be hired, then they cannot be obliged to leave the territory of the hosting Member State even if the reasonable "national" term for the job research has expired).

The matter of access to work could also be subject to "hidden" or indirect discriminatory measures, *i.e.* measures which (even if applicable to all the employees, both national and from other Member States) *de facto* turn to be a discrimination for the latter: such discriminatory measures are absolutely banned as well.

In this respect, the EU case law has been sanctioning, over the years, several discriminatory requirements, such as the residence requirement, the condition of the knowledge of the local language (*Groener*, case C-379/87) as well as the possession of specific qualifications (*O'Flynn*, case C-237/94; *Meints*, case C-57/96).

Similarly, also the laws and regulations governing the economical relationships amongst the employers in a certain industry may constitute restrictions to the access to the relevant work so long as they impair the terms and conditions of hiring of the employees, for instance setting forth economical burdens upon the employer who intends to hire an employee coming from a different Member State: in such perspective, in the *Bosman*, case C-415/93, the ECJ stated that the regulations governing the transfer of football players from a soccer company to another, even if they concern the economical relationships between the companies (and not the employment relationship between the football companies and the players), affect

(through the obligation upon football companies to pay indemnities when they hire players coming from other companies) the possibility of the employees (*i.e.* of the football players) to find a job as well as the economical conditions of such job and are, therefore, in breach of the EU principle of free movement of employees. In the same perspective, the ECJ stated that, for the purposes of the professional experience required for a public contest, also the past experience performed in the public administration of the home Member State must be necessarily taken into consideration and duly assessed (*Commission vs. Greece*, case C-187/96; see also *Ugliola*, case 15/69 and *Scholz*, case C-419/92) and that, conversely, a national collective bargaining agreement which sets forth a career path based on the seniority and does not take into consideration the working activities carried out in another Member State is in violation of Article 45 TFEU (*Schoenig-Kougebetopoulou*, case C-15/96).

Once the employees acceded the job market of the hosting Member State, they must benefit from the right to perform their activity pursuant to the same conditions granted to the national employees.

The principle of prohibition of discrimination applies, therefore, also to any and all the conditions of exercise of the working activity (*Allué v. University of Venice*, case 33/88). Such conditions concern the compensation (see *Köbler vs. Republic Österreich*, case C-224/01), the professional training, the unemployment status, the termination of the relationship and, more in general, the whole regime of the employment relationship.

In this respect, Article 7(4) of the Regulation (EU) 492/2011 sanctions, as a general rule, the voidness of all the clauses, provided for by national collective bargaining agreements or by individual employment contracts, which set forth or allow a discriminatory treatment for employees coming from other Member States (see *Sotgiu*, case 152/73; *Walrave*, case 36/74; *Olympique Lyonnais*, C-325/08).

As to the conditions of the working activity, specific attention is paid to the matters of social and tax benefits and trade unions' rights.

Regulation (EU) 492/2011 specifies that all social and tax benefits granted to the national employees must be applied, as such, also to the employees of the other Member States (Article 7(2)).

The ECJ applied such principle in several occasions, such as, for instance, to the reduction of train rates for families with several sons (*Cristini*, case 32/75), the benefits for descendants and forefathers depending on the employee (*Castelli*, case 261/83; *Meeusen*, case C-337/97), the unemployment indemnity for young individuals looking for their first job

(*Deak*, case 94/84), the protection measures in case of dismissal for serious working inability (*Marsman*, case 44/72) and even the use of a different language during a legal proceeding when same right was granted to a national linguistic community (*Mutsch*, case 137/84).

In other words, the ECJ offered a broad and substantive interpretation of Article 7(2) of the above Regulation (EU) 492/2011, applying the right to benefit from all the social and tax "advantages" of the national employees also to those benefits which are not related to the contractual regime of the employment relationship, but are linked to the status of employee and resident person. In this respect, the EU case law stated that the notion of social benefits covers all those benefits which (related or unrelated to an employment agreement) are generally granted to the national employees in relation to their qualification as employees or to the mere circumstance of their residence in the national territory and whose extension to the employees coming from other Member States is susceptible to facilitate their right of free movement within the territory of the Union (*Martinez Sala*, case C-85/96; see also *Pubblico ministero vs. Gilberto Even and ONPTS*, case 207/78). Hence, the employees of other Member States are granted the enjoyment of services conferred, for different titles, by national public entities, regardless of the terms of the relevant employment agreement (see *F. Reina and L. Reina vs. Landeskreditbank Baden-Württemberg*, case 65/81).

The Regulation (EU) 492/2011 specifically applies the principle of equal treatment also with respect to the trade unions' rights and, in particular, with reference to the registration with the local trade unions and the exercise of all the relevant rights (Article 8) (see *Rutili*, case 36/75).

The possibility to include within the unions' rights also the right to hold executive offices in the relevant organizations had been initially debated, but a specific European regulation (Council Regulation (EEC) 312/1976) finally sanctioned the right of the employee of a different Member State to access also the executive offices of the trade unions of the hosting Member State (see now Article 8 of Regulation (EU) 492/2011).

Finally, specific rights are granted by Article 45(3)(d) TFEU and by Directive 2004/38/EC to the employees (and also to their relatives) with respect to the period following the termination of their employment relationship.

In addition to the right of permanent residence in the hosting Member State conferred to the EU citizens and their relatives who have been residing on a continuous basis in such State for at least five years (see § 3.2 below), the same right of permanent residence is granted to the employees in certain specific cases also prior to the elapse of the above 5-year term (Article 17,

Directive 2004/38/EC). In particular, the right of permanent residence is recognised to the employees who (i) have reached the pension age in the hosting Member State, (ii) have suffered from a permanent working inability after having been residing for at least two years in the hosting State or (iii) after three years of residence and working activity in the hosting Member State, start to carry out a working activity in a different Member State, but continue to reside in the hosting Member State or go back to such State at least once a week.

In the above cases, the right of permanent residence (acquired by the relevant employees) also extends to the relatives living with them, regardless of their citizenship. Moreover, the family members (falling within the scope of Regulation (EU) 492/2011) benefit from the right to remain within the territory of the hosting Member State also after the death of the employee who had accrued the right to reside therein after the termination of the employment relationship (Article 12(1), Directive 2004/38/EC).

In addition to the right of permanent residence, further rights are granted with respect to specific cases of termination of the employment relationship. On the one hand, if the termination is due to dismissal, the employee of a different Member State has the right to be provided with the same assistance that the authorities of the State where he/she has been working provide to the national citizens who are looking for a new employment. On the other hand, if the termination of the employment relationship is due to the inability of the employee or to the accrual of a given seniority time or to the achievement of the limits of the working age, then the employee has the right to benefit from the same pension and social security regime set forth by the national laws and regulations (provided that the relevant conditions listed in the applicable European social security regulations are met).

2.3. *The Family Members' Rights*

The exercise of the freedom of movement of the employees within the EU territory would turn to be actually ineffective if it was not "combined" with certain rights conferred also to the family's members of the employee. Indeed, the EU legislation has always been driven by the principle of the highest protection of the family ties also with respect to the case of free movement of employees.

As of today, the Regulation (EU) 492/2011 and the Directive 2004/38/EC grant to the spouse of the employee and to the sons up to 21

years old or still dependent on the employee and, more in general, to the relatives of the latter a number of rights aimed at preserving the family's unity (for the notion of relatives see § 3.2 below).

In particular, firstly, also the relatives of the employee benefit from the right to reside and carry out a working activity in the hosting Member State (*Royer*, case 48/75; *MRAX*, case C-459/99; see also *Diatta*, case 267/83 and *Eyüp*, case C-65/98).

Secondly, the sons of the employee enjoy the same benefits provided for by the laws and regulations of the hosting Member State with respect to the education of the national citizens (Article 10, Regulation (EU) 492/2011; previously, Article 12, Council Regulation (EEC) 1612/1968). The interpretation of such rules by the ECJ has been quite broad, as typically occurred in the matter at stake: therefore, the concept of education has been deemed to include, for instance, also scholarships and other measures of support aimed at the professional training and at the academic studies and has been applied also to cases of scholarships granted to the sons of the employee to attend courses in another Member State and even in the Member State where the employee came from (*Di Leo*, case C-308/89 and *Echternach and others*, joined cases 389/87 and 390/87).

2.4. *Social Security Regime*

The EU regulations governing the social security regime of the employees who exercise the freedom of movement are a key condition to fully ensure the actual and due exercise of same freedom.

Without an adequate regime governing such matter, the EU employees would seriously risk to be deprived of the social security rights ensured by a given national legislation and/or of the relevant rights already accrued in the home Member State (*Lepore and Scamuffa*, joined cases C-45/92 and C-46/92). This would certainly impair and, in certain cases, even prevent the exercise of the freedom of movement of employees.

The key section of the TFEU governing the social security matter lies in Article 48, which reads as follows:

> 1. The European Parliament and the Council shall […] adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

> (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
>
> (b) payment of benefits to persons resident in the territories of Member States.
>
> […]

Article 48 TFEU, which does not have direct effects (*Casteels*, case C-379/09), has been implemented, in particular, by Regulation (EC) 883/2004 (as amended by Regulations (EC) 988/2009 and 1231/2010 and by Regulation (EC) 987/2009).

It is preliminary worth noting that the above Regulations are not aimed at establishing a "common" social security system for all the Member States, but at supporting the coordination amongst the different national laws and regulations, in order to allow the employees exercising the freedom of movement to continue benefiting from the social security services accrued over the years. Such outcome is essentially achieved through the aggregation of all the accrued insurance periods. As a consequence, still today each Member State continues to autonomously govern its own social security system and the relevant rights and benefits.

More in detail, Regulation (EC) 883/2004 applies to the employees (and also to the self-employed workers) who are (or have been) subject to the legislation of one or more Member States and are EU citizens as well as to their relatives and successors (see, for the past, *Kermaschek*, case 40/76; *Cabanis-Issarte*, case C-308/93 and *Ruhr*, case C-189/00). Most significantly, such Regulation also applies to the public employees and to the retired individuals.

The above Regulation covers all the "typical" areas of the social security and, namely, the sickness benefits, the maternity and equivalent paternity benefits, the invalidity assistance, the old age assistance, the survivors' benefits, the assistance with respect to accidents at work and occupational diseases, the death grants, the unemployment assistance, the pre-retirement benefits and the family benefits (Article 3(1)) Regulation (EC) 883/2004).

Moreover, the Regulation also covers all the social security schemes, general and special, whether contributory or non-contributory, provided that they are related to the above mentioned risks (Article 3(2)). On the other hand, the areas of the social and medical assistance are out of the scope of such Regulation (Article 3(5)).

The coordination achieved through the Regulation (EC) 883/2004 is based on three fundamental principles: (i) the equality of treatment between the employees who benefit from the freedom of movement and the "national" employees; (ii) the identification of the applicable law and (iii) the aggregation of the insurance periods.

The principle of equality of treatment, sanctioned by Article 4 of the above Regulation, is the key principle also in the social security matter. Therefore, the Member States are called to remove any and all the discriminatory measures and, in particular, those commonly based on the residence requirement (Article 7) (see *Maris*, case 55/77).

As to the identification of the applicable law (governed by Articles 11-16 of the above Regulation), the principle here is that the law applicable to the matter at stake should be only one, which is given by the law of the State where the working activity is performed, regardless of the place of residence of the employee. However, there are certain exceptions to such choice-of-law principle, which mainly apply to cases of secondments, to the employees working in the international transportation industry and to the employees working in two or more Member States (see *Bentzinger*, case 73/72 and *Foot-Ball Club d'Andlau*, case 8/75).

The third key and more significant principle lies in the aggregation of all the insurance periods, which grants to the employee who has been subject to the laws of two or more Member States the right to aggregate the insurance periods accrued pursuant to the laws of each of the relevant States (*Petroni*, case 24/75). It follows that a strong cooperation between the public administrations of the relevant Member States is necessary in order to fully and duly implement such principle. It is worth noting that the aggregation of periods is carried out in those cases where the application of just one legislation would not grant to the employee the right to entirely or partially benefit from the relevant social security scheme, as such employee has not accrued enough insurance periods or as such periods would provide him/her with social security benefits lower that the maximum applicable.

Finally, it should be also noted that the Lisbon Treaty added a final provision to Article 48 TFEU, which risks to seriously weaken the entire social security statutory framework.

Indeed, as of today, Article 48(2) states that:

> 2. Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system,

> including its scope, costs or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended.
>
> After discussion, the European Council shall, within four months of this suspension, either:
>
> (a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or
>
> (b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

It follows that each Member State is actually granted the right to suspend the relevant legislative process when it deems that a proposal in the social security matter is susceptible to impair, in particular, the financial structure of its national social security framework. This power will certainly need to be exercised carefully by the Member States as to avoid a continuous impasse of the development of the social security EU legislation.

2.5. *Free Movement Restrictions*

Pursuant to the EU legislation, the freedom of movement of employees may be subject to restrictions in two different cases: with respect to employments in the public administration or when grounds of public order, public safety or public health occur.

Firstly, Article 45(4) TFEU states that the entire regime governing the free movement of employees does not apply to the employments in the public administration.

The EU case law has been clearly stating, since its first judgments, that such exception must be interpreted with a really narrow approach and that it covers only those employment relationships which imply a (direct or indirect) participation to the exercise of public powers and those functions which aim at safeguarding general interests of the State or of public entities (*Commission v. Belgium*, case 149/79).

Even more, also with respect to the employment relationships falling within the above categories, the ECJ stated that the application of restrictions to the free movement of employees must be assessed on a case-by-case basis (and not in relation to whole employment categories) (see *Commission v.*

Luxembourg, case C-473/93). Such assessment is required as it is necessary to actually verify if the single case entails the significance of the special duty of solidarity and loyalty which ties the citizens to their own State (see *Commission v. Belgium*, case 149/79).

It follows that formal criteria as such, as the public or private regime of the employment relationship or the professional title related to the single employment, have no relevance in such matter.

As a consequence, the restriction at stake has been interpreted in a really restrictive manner (see, amongst others, *Allué v. University of Venice*, case 33/88; *Kraneman*, case C-109/04). For instance, the ECJ excluded that such restriction to the free movement could be applied to the researchers of the Italian National Centre of Research (*Commission v. Italy*, case 225/85), to the employees of public entities which handled the supply of water, gas and electricity (*Commission v. Belgium*, case 149/79), to public schools' teachers (*Bleis*, case C-4/91; *Commission v. Italy*, case C-371/04) as well as to specialist doctors (*Schoenig-Kougebetopoulou*, case C-15/96).

Secondly, Article 45(3) TFEU states that the freedom of movement of employees may be limited (or even denied) based on grounds of public order, public safety or public health (see also Articles 27 and following of Directive 2004/38/EC). Such exceptions are common to all the four key freedoms of the EU internal market.

Also in this respect the EU case law adopted a very strict approach in the interpretation and implementation of the above exceptions, also to avoid that each single Member State could autonomously determine the scope of same restrictions (see *Yiadom*, case C-357/98). In such perspective, it has been clarified that the restriction for public order or public safety grounds cannot have an economic scope and, more in general, must be based on requirements of public order or safety as typically recognised within a democratic society. For instance, the restriction at stake cannot be relied upon if the scope of the relevant measure is to limit or prevent trade unions' rights.

Furthermore, the Directive 2004/38/EC clarifies that any measure impairing the freedom of movement for public order or safety reasons must be necessarily founded on a personal and specific behavior of the relevant person (Article 27(2)). EU case law specified here that a measure of expulsion of a different Member State citizen, based on public order grounds, may be justified only by serious and actual threats to the public order and the public safety concerning the relevant individual; hence, the

Member States adopting a measure of expulsion of a EU citizen must take into consideration (in addition to the fundamental principle of the freedom of movement of persons) also the impairment of such measure on other fundamental rights and, in particular, on the right to the significance of the family life as set forth by Article 8 of the European Convention on Human Rights (see *Commission v. Germany*, case C-441/02).

It is also worth noting that the public order or public safety grounds which justify the adoption of the relevant restrictive measure must be immediately communicated to the affected employee, as to allow the latter to adequately challenge same measure (*Pecastaing*, case 98/79). The proceedings for the safeguard of the rights of the employee in such cases are those provided for by the national law, being understood that they cannot be less favorable than those applicable to the national employees.

Finally, it must be noted that, in any case, all the above restrictions, related to the employments in the public administration or to public order, public safety and public health grounds, being restrictions to a fundamental EU freedom, must always comply with the general limitations posed to all the restrictions to key european freedoms and, therefore, must comply with the principle of proportionality, be adequate to pursue the relevant scope and not exceed the measures which are necessary to safeguard the interest to be protected in the actual case (see *Kraneman*, case C-109/04; *Köbler vs. Republic Österreich*, case C-224/01).

3. *The Freedom of Movement of the Citizens*

As anticipated, the "leading" rule governing the right of free movement of the EU citizens lies in Article 21 TFEU, which reads as follows:

> 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

Such Article sanctions, then, the right of all the citizens of the Member States to freely move and reside within the entire territory of the Union, without any reference, any more, to the economic "value" of the activity carried out (*Grzelczyk*, case C-184/99) and, therefore, also regardless of

any activity performed by the person (citizen) in a different Member State.

Article 21 TFEU was introduced by the Maastricht Treaty and may be considered as one of the most significant "ramifications" of the European Citizenship. In such perspective, the right of free movement and residence of persons has its foundation in the EU Citizenship and not in the exercise of an economic activity and it turns to be an instrument for the integration of the European society itself and not merely of the European Market.

Indeed, said Article is inserted in Part II of the TFEU (titled "*Non-Discrimination and Citizenship of the Union*") and must be read jointly with Article 20(2) TFEU, which states that:

> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
>
> (a) the right to move and reside freely within the territory of the Member States.
>
> […]

as well as jointly with Article 3(2) TEU, which reads as follows:

> 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured […].

The ECJ clarified that Article 21 TFEU is a rule having direct effects and grants rights which may be claimed by the European citizens vis-à-vis the hosting Member State where they have no right to reside for any other title (see *Baumbast*, case C-413/99) and also vis-à-vis their own Member State (*D'Hoop*, case C-224/98).

Article 21 TFEU has been recognised on several occasions by the ECJ as one of the most significant rules of the Treaties and the scope of said Article has been extended as to cover several "border-line" cases. In one of the leading cases of the matter at stake, the ECJ recognized to a mother (citizen of a non-EU State), who was in charge of the custody of her child (EU citizen), the right to reside with the latter in a Member State, notwithstanding such case was not expressly covered by the EU laws and regulations (*Zhu and Chen*, case C-200/02; see also *Metock and others*, case C-127/08, *Rhimon Chakroun*, case C-578/08 and also *Zambrano*,

case C-34/09). Such decision was essentially based on the ground that the refusal to grant the work permit to the mother in charge of the custody of her child, who was underage, would have deprived the right of residence of the latter of any effect whatsoever.

However, it is also worth noting that the European case law clarified that the right of movement and residence granted by Article 21 TFEU is not an absolute right, but that the exercise of such right is conditioned upon the limitations and the conditions provided for by the Treaties and the relevant EU legislation (as also set forth by same Article 21).

In any case, such limitations and conditions, which the Member States are entitled to pose for the exercise of the right of movement and residence of the EU citizens (such as, typically, the availability of enough economical sources and of a illness insurance, for the person and his/her relatives), must comply with the principle of proportionality (*Grunkin & others*, case C-353/06, and *Rottmann*, case C-135/08). Therefore, the conditions posed by the national regulations to safeguard the legitimate interests of the Member States (generally, to avoid to suffer from a disproportionate burden for the public finance) cannot exceed the limits of those measures which are necessary for the fulfillment of the relevant legitimate scope. In such perspective, it has been deemed that the lack of an insurance to cover the first aid expenses given in the hosting Member State was not sufficient to justify a measure of denial of the exercise of the right of residence (*Baumbast*, case C-413/99; but see also *De Cuyper*, case C-406/04).

The fundamental principle set forth by Article 21 TFEU has been finally implemented by the Directive 2004/38/EC, which is essentially a consolidated act which combines the complex statutory framework previously in force in the matter at stake and governs, as of today, the right of the EU citizens and of their relatives to freely move and reside within the territory of the Union.

3.1. *The Right of Entry*

The freedom of movement of the EU citizens, as set forth by Article 21 TFEU and by the Directive 2004/38/EC, translates into the right (essentially "unlimited") of entry in the territory of all the other Member States as well as into the right of residence (at certain conditions) in such States and may also bring to the granting of the right of permanent residence in a Member State other than the home State.

The right of entry is granted to all the EU citizens and also to their relatives, regardless of their citizenship (for the notion of relatives see § 3.2 below).

The exercise of the right of entry of the EU citizens in a Member State other than the home Member State may be subject solely to the possession of a valid identity card or passport, regardless of the grounds leading the citizens to move within the EU territory (Article 5, Directive 2004/38/EC).

Further requirements, conditions or limits are not allowed. In particular, controls at the borders which turn to be a regular practice or the requirement of a (exit or entry) travel visas or even the mere application of a stamp on the identity card or on the passport are banned (Article 5(1), Directive 2004/38/EC). The same applies to the request of information, for instance, of the reasons of the entry, which is allowed only to the extent that the relevant answer does not result into a condition for the entry into the hosting Member State (*Commission v. the Netherlands*, case C-68/89). On the other hand, as to the non-EU relatives of the EU citizen, their entry may be subject to a visa, pursuant to Regulation (EC) 539/2001, even if it must be noted that the authorities of the Member States must grant such visas through a quickest procedure which does not pose any financial burden upon the applicant.

As a further remark, the hosting Member State may require that the citizens of a different Member State declare their presence in the national territory within a reasonable and not discriminatory term, being understood that the breach of such obligation may trigger only proportionate sanctions. In this respect, the ECJ stated that a national law which provides for a criminal sanction if the declaration of stay is not effected within 3 days from the entry of the EU citizen is in clear violation of the TFEU principles (*L. Messner* [1989], case C-265/88).

3.2. *The Right of Residence*

As to the right of residence of the EU citizens, three different cases may occur.

Firstly, the right of entry in a different Member State triggers the right to "freely" reside in such State up to three months (Article 6, Directive 2004/38/EC).

In this respect, it is worth noting that the right of residence entails the right to the full equality of treatment as compared to the citizens of the hosting Member State, with significant ramifications such as the right to aid in case of birth of a child pursuant to the same conditions of the "national" citizens (not being allowed in this case the application of any further requirement, e.g. the elapse of a given period of residence within the relevant Member State) (*Commission v. Luxembourg*, case C-111/91).

Secondly, all the EU citizens (and, therefore, not only the employees or the individuals exercising the right of establishment or the right to the free provision of services) have the right to reside in a different Member State also after the elapse of the above mentioned 3-month period.

However, such residence right is subject to the occurrence of the conditions set forth in Article 7(1) of Directive 2004/38/EC; in particular, it is required that the relevant EU citizens:

a) have sufficient resources for themselves and their relatives and have an adequate illness insurance coverage in such State (as not to become a burden for the social security system of the hosting Member State during the residence period); or

b) are registered at a (private or public) institute of the hosting Member State to attend a study course, have an adequate illness insurance coverage in such State and guarantee to have sufficient resources (for them and their family members) not to be a burden for such State.

As a noteworthy remark, the right of residence is granted also to the relatives of the EU citizens who exercise such right, regardless of their citizenship.

The notion of relatives, provided for by Article 2(2) of the Directive 2004/38/EC, includes:

a) the spouse;

b) the partner who contracted with a EU citizen a registered partnership pursuant to the legislation of a Member State, in such cases where the legislation of the hosting Member State equalizes the registered partnerships to the marriage and in compliance with the conditions provided for by the relevant legislation of the hosting Member State;

c) the direct descendants who are under the age of 21 or are dependent on the EU citizen as well as those of the spouse or partner as defined under letter (b) above; and

d) the direct relatives in the ascending line who are dependent on the EU citizen as well as those of the spouse or partner as defined under letter (b) above.

Moreover, Article 3(2) of the Directive 2004/38/EC states that the hosting Member States, consistently with their national legislation, must facilitate the entry and residence of (i) any other relative of the EU citizen

(regardless of their citizenship) if such relative is dependent on or lives, in the home State, with the EU citizen or if, due to serious health reasons, the EU citizen must assist such relative personally, and (ii) the partner with whom the EU citizen has a permanent relationship, duly certified. The Article at stake essentially translates into a mere "invitation" to the Member States to approve national laws and regulations extending the reunification rights also the above persons, even if same Article 3(2) specifies that the hosting Member State must perform an in-depth analysis of the relevant personal situations above indicated and must justify the denial (if any) to the entry or residence of the above persons.

In general terms, the EU legislator appears to be fully aware that the actual implementation of the principle of free movement of citizens necessarily depends also on the preservation of the family ties and that the cohabitation in case of exercise of the freedom of movement is a crucial value. In such perspective, the family reunification also supports the integration of the citizens of other Member States in the hosting State and contributes to the achievement of the economical and social cohesion which is one of the key objectives of the EU Treaties.

Articles 2 and 35 of such Directive allow, in any case, the Member States to implement also all the measures necessary to deny or revoke the granting of the relatives' movement and residence right in case of abuse or fraud, such as it may typically occur in case of fictitious marriages.

It is also worth noting that the Directive 2004/38/EC repealed the requirement of the "residence card" for the EU citizens and allowed the hosting Member States to require, only in case of the exercise of a right of residence exceeding the 3-month period, the registration with the competent authorities, with the obligation of the latter to immediately release the relevant certificate. Moreover, the conditions which the Member States may pose for granting such certificate are strictly governed by Article 8 of the above mentioned Directive, to avoid that the release of the relevant document results into a limitation to the citizen's right of free movement.

Thirdly, pursuant to Article 16 and following of Directive 2004/38/EC, the EU citizens as well as their relatives, who have been residing legally on a continuous basis for at least five years in a different Member State, acquire the right of so-called "permanent residence" in such State. Such right is not subject to any condition, even if it must be noted that, once acquired, the right of permanent residence is extinguished in case of absence from the hosting Member State for a period exceeding 2 consecutive years.

As a final note, the only restrictions allowed to the exercise of the freedom

of movement of the EU citizens and of their relatives are those based on public order, public safety or public health grounds, being understood that such restrictions must be proportionate and based on the personal behavior of the relevant person. The above grounds cannot be invoked to justify a restrictive measure based on economic reasons (see Article 27 and following, Directive 2004/38/EC).

To assess whether the concerned individual is a danger for the public order or safety, the hosting Member State is entitled (if this is necessary) to request to the home Member State and the other Member States where the person has been residing information on his/her criminal records. However, such request of information cannot turn to be systematic as to constitute an illegal impairment on the rights granted by the EU legislation.

With specific reference to the public order or safety restriction, as anticipated (see § 2.5 above), the ECJ on several occasions clarified that same restriction must be interpreted with a narrow approach as it impairs the exercise of a EU fundamental freedom, which may not be limited in general terms but only based on clear and specific conditions.

As to the proportionality requirement, it is worth mentioning that the existence of criminal convictions cannot justify, per se, the adoption of leaving measures, unless such convictions certify that the presence of the EU citizen (or of his/her relatives) in the territory of the hosting Member State is a an actual threat to the social safety of such State. Moreover, a measure of leave from the national territory cannot be ordered as autonomous sanction or provision ancillary to a criminal sanction if the above conditions are not met.

As a consequence, all the restrictions to the freedom of movement must be founded on the personal behavior of the concerned person, which must represent an effective, actual and serious risk susceptible to impair a fundamental interest of the hosting Member State. Hence, grounds having a general scope, with punitive or preventive purposes, cannot be adduced to justify any measure restrictive of the freedom of movement and residence (see *Orfanopoulos and others*, case C-482/01; *Oliveri*, case C-493/01; see also *Bonsignore vs. Oberstadtdirektor der Stadt Köln*, case 67/74).

As a further "limitation" to the scope of the above restrictions, prior to the adoption of any measure of expulsion for public order or safety reasons, the hosting Member State must take into account a number of additional mandatory "assessment criteria", which are given by the duration of the residence of the concerned person in its territory, his/her age, the health conditions, the family situation and the level of integration reached within the territory as well as his/her connections with the home Member State. In

particular, the hosting Member State is entitled to implement measures of leave of persons who acquired the permanent residence right only for serious reasons of public order or safety, while, on the other hand, solely imperative reasons of public safety may justify the leave order to persons who have been residing in the hosting Member State for at least 10 years or who are underage (Article 28, Directive 2004/38/EC).

Finally, as to the public health grounds which legitimate the adoption of restrictive measures, it is worth noting that the Directive 2004/38/EC sets forth the various diseases which may justify the deny of entry, but also specifies that the occurrence of a sickness after the elapse of three months from the date of entry of the EU citizen does not allow the hosting Member State to order the leave of the citizen (see Article 29).

3.3. *The Schengen Treaty*

As of today, the freedom of movement and residence within the EU territory is a right recognised to all the EU citizens and their relatives.

However, as mentioned, such right does not entail the abolition of the borders' controls as the same statutory framework set forth by the EU provides for the obligation to show a valid identity card or passport for the exercise of the right of entry into a different Member State. All the past legislative proposals to proceed to the repealing of such controls found the strong resistance of certain Member States.

Therefore, an increasing number of Member States decided to enter into separate treaties in this respect and, in particular, to execute the so-called Schengen Treaty.

The Schengen Treaty has been executed firstly on 1985 and then subsequently amended (in particular, following the various deeds of adherence of several States). Currently, it applies to 26 States and, more in detail, to 22 EU Member States (with the exclusion of United Kingdom, Ireland, Romania, Bulgaria, Cyprus and Croatia) and 4 non-EU States (namely, Island, Norway, Switzerland and Liechtenstein). With the Amsterdam Treaty, the Schengen Treaty and the relevant agreements and, therefore, the whole Schengen *acquis* have been finally "incorporated" in the EU legal and institutional framework.

The key principle set forth by such Treaty lies in the absence of the obligation, for the individuals of the relevant participant States, to show any document when crossing the internal EU borders and, therefore, in the freedom for the citizens to cross the borders without any control (save for those justified by public order and safety grounds).

Such Treaty also entails a significant cooperation between the police officers of all the adhering States, in particular to fight criminal phenomena and irregular immigration cases.

It is also worth mentioning that, due to the recent migrant crisis and the terroristic attacks in the European territory, the Schengen Treaty has been recently partially suspended by certain adhering States (see, in particular, Commission's Communication "*Back to Schengen - A Roadmap*" COM (2016) 120 final).

In any case, most significantly, with particular reference to the EU Member States, the Schengen Treaty aims at achieving the ultimate scope of having the territory of all the relevant Member States fully "combined" as one sole territory and, therefore, at ensuring the fullest implementation of the freedom of movement of the Citizens within the EU territory.

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Abstract

Chapter 3 illustrates the evolution of the free movement of persons from the free movement of employees to the free movement of citizens, investigating also the family members' rights and the issues related to the social security regime.

Arianna Paoletti

Freedom to Provide Services and Freedom of Establishment

1. *Free movement of services*

1.1. *Legislative provisions and historical evolution*

The idea of an action programme aimed at removing barriers to the freedom to provide services had already been envisaged by the founders in the original Articles 59-66 of the Treaty of Rome (Treaty establishing the European Economic Community), where it was provided for that such restrictions were to be "progressively abolished".

Indeed, given the specific nature of self-employment and given the presence of different national laws regulating the exercise of such activities,

the European legislator considered it appropriate to provide for an autonomous and specific set of regulations from the outset with respect to the one foreseen for the movement of persons.

Currently, rules governing the free movement of services are included in Part III ('Union policies and internal actions'), Title IV ('Free movement of persons, services and capital'), Chapter 3 ('Services'), Articles 56 to 62 of the TFEU. In particular, Art. 56, paragraph 1, TFEU, provides for freedom to provide services within the European Union.

> Article 56 TFEU
>
> 1. 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.
>
> […]

Subsequent articles explain what a service is (Art. 57, TFEU), address aspects of certain specific services (Art. 58, TFEU) and aspects relating to the process of liberalisation and harmonisation (Articles 59 to 61, TFEU). Finally, Art. 62 extends the applicability of provisions of Articles 51 to 54, TFEU, regarding freedom of establishment, to matters covered by freedom to provide services. The application of such rules will be subject to a specific analysis in paragraph 2.

The above-mentioned Articles 56 to 62, TFEU, merely reproduce earlier regulations set forth in Articles 49 to 55 of the European Community Treaty (as amended by the Maastricht Treaty).

Indeed, except for the substitution of the consultation procedure by the ordinary legislative procedure (see, for example, Art. 59, para. 1, TFEU), the Lisbon Treaty has only made merely formal changes such as the introduction of the term 'Union' instead of 'Community' (Art. 49, para. 1, TFEU) or the reference to 'Treaties' instead of 'Treaty' (Art. 57, para. 1, TFEU). Direct application of Art. 56 *et seq.* TFEU is completed by Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

Moreover, there is much case law to consider and this will be analysed in the following paragraphs.

1.2. *What are services?*

Within the meaning of the Treaties, 'service' can be briefly defined as *(i)* any self-employed economic activity, *(ii)* having a temporary nature and *(iii)* normally provided for remuneration.

In the light of the above, the following paragraphs will separately analyse the elements making up definition of a service, identified in the self-employed, temporary and remunerated character of its performance.

1.2.1. *Self-employed economic activity*

The service must have been provided by a self-employed person, outside of an employment relationship, under his sole responsibility, and therefore not under the direction of an employer (*C.P.M. Meeusen*, case C-337/97, para. 15; *Aldona Malgorzata Jany and others*, case C-268/99, paras. 34, 70, 71).

Moreover, Article 57, para. 2, TFEU, specifies which provisions fall within the regulations of freedom to provide services, expressly mentioning: *(i)* activities of an industrial character; *(ii)* activities of a commercial character; *(iii)* activities of craftsmen; *(iv)* activities of the professions.

> Article 57
>
> […]
>
> '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.
>
> […]

The above-mentioned list, as highlighted by unanimous case law and doctrine, is merely illustrative: indeed, free movement of services applies, in principle, to the generality of economic activities.

Finally, it must be underlined that the rules concerning transport, governed by Articles 90-100, TFEU, as well as banking and insurance services connected with movements of capital, whose regulation shall be effected in step with the liberalisation of movement of capital, do not fall within the application of Articles 56-62, TFEU.

> Article 58
>
> 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.

1.2.2. *Temporary nature*

In order to fall within the provisions on freedom to provide services, the service must have a temporary nature.

The above-mentioned requirement is based on Art. 57, paragraph 3, TFEU, according to which, in the event involving movement by the service provider from one Member State to another Member State, the person who provides the service may 'temporarily' pursue such activity in the State where the service is provided.

> Article 57
>
> […]
>
> 3. 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 Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

The temporary nature is the discriminating threshold between freedom of establishment and freedom to provide services. Indeed, while the concept of freedom to provide services presupposes a temporary nature, freedom of establishment requires a lasting presence in another Member State.

The European Court of Justice has pointed out that the temporary nature of the provision of services has to be determined with reference to its regularity, periodicity, duration and continuity from an economic point of view (*Reinhard Gebhard*, case C-55/94, paras. 27 - 39).

However, there is not any provision of the Treaty establishing the duration or frequency beyond which one might speak of freedom to provide service or freedom of establisment. Consequently, the freedom to provide services can encompass economic activities of different natures, including services which are provided for an extended period of time, even years (Joint cases *Duomo Gpa Srl*, case C-357/10, *Gestione Servizi Pubblici Srl*, case C-358/10 and *Irtel Srl*, case C-359/10, para. 32; *Bruno Schnitzer*, case C-215/01, paras. 30 and 31).

1.2.3 *Self-employed economic activity normally provided for remuneration*

As we have mentioned above, according to Article 57, paragraph 1, TFEU, services "*are normally provided for remuneration*". The essential characteristic of remuneration consists in the fact that it constitutes consideration for the service in question (*Herbert Schwarz*, case C-76/05, para. 38; *Belgian State*, case C-263/86, para. 17; *B.S.M. Geraets-Smits*, case C-157/99, para. 58; *Rolf Dieter Danner*, case C-136/00, para. 26; *Freskot AE*, case C-355/00, para. 55; *Försäkringsaktiebolaget Skandia (publ.) and Ola Ramstedt*, case C-422/01, para. 23).

> Article 57
>
> 1. 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.
>
> […]

On this point, the European Court of Justice has specified that the consideration must be paid either directly by the beneficiary of the service or indirectly by a third party, regardless of the relationship between the recipient of the service and the payer. For instance, medical services were considered as falling within the freedom to provide services even if services are not paid directly by the patient but indirectly by the National Health Service (*The Queen, on the application of Yvonne Watts*, case C-372/04, para. 86; *Georgi Ivanov Elchinov*, Case C-173/09, para. 36).

On the contrary, services for which there is no provision of any consideration or other financial consideration do not fall within the definition.

In the light of the above, the European Court of Justice stated that courses taught in an institute which form part of the national education system cannot be regarded as services. Indeed, in such cases, the State is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields, through the public budget. Moreover, the European Court of Justice has specified that even small payments that a State requires students to pay cannot be held to be a consideration if they are essentially symbolic fees in order to merely contribute to the operating expenses of the system (*Stephan Max Wirth*, case C-109/92, para. 15; *Belgium State*, case C-263/86, 1998, paras. 18 and 19).

On the other hand, education given by a private school establishment

constitutes a service since it is essentially financed by private funds and seeks to make an economic profit (*Stephan Max Wirth*, case C-109/92, para. 15).

However such an approach shows some ambiguity: what will be the applicable law in the event that a course is financed half by public funds and half from student fees?

Finally, the European Court of Justice has stated that Articles 56 *et seq.* apply even if the consideration is paid much further in advance than for the provision of service, as is the case for occupational pension insurance (*Försäkringsaktiebolaget Skandia (publ.) and Ola Ramstedt*, case C-422/01).

1.3. *Essence of the freedom to provide services: prohibition of direct and indirect discrimination on the basis of nationality or residence*

The principle characterising the rules is, *in primis*, that of 'national treatment'. In other words, beneficiaries of freedom to provide services are entitled to receive the same treatment that the host State reserves for its citizens, without facing direct or indirect discrimination based on nationality.

In addition to discrimination based on nationality, European legislation also prohibits discrimination based on residence. Indeed, because the provider carries out only a temporary provision in the host State, in some cases, the application of national treatment may not be an appropriate measure in order to realise the free movement of services.

> Art. 61
>
> 1. 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 56.

Moreover, the European Court of Justice has also clarified that Article 56, TFEU, requires not only the elimination of all discrimination on the basis of nationality against providers of services who are established in another Member State, but also the abolition of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Joint cases *Federico Cipolla*, case C- 94/04, and *Stefano Macrino*, case C-202/04, paras. 56 and 57; *Manfred Säger*, case C- 76/90, para. 12).

In the light of the above, the European Court of Justice has stated that the Italian provision requiring that undertakings established in Italy have to maintain their registered office or a branch office on Italian territory, and to lodge a guarantee with a credit institution having its registered office or a branch office on Italian territory, is contrary to the freedom to provide services (*Commission of the European Communities*, case C-279/00, paras. 34 and 41).

It should be noted that rules of a Member State do not constitute a restriction within the meaning of Article 56 *et seq.*, TFEU, solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory (*European Commission*, case C-565/08, para. 49; *Commission of the European Communities*, case C-439/99, para. 63).

Furthermore, mere domestic situations which have no connection with more than one Member State are also excluded from the operation of this provision. Indeed, purely domestic situations whose elements are confined within a single Member State or which have no connection with the European legal system are excluded from the operational scope of that provision (Joined case *Airport Shuttle Express scarl and Giovanni Panarisi*, case C-162/12, and *Società Cooperativa Autonoleggio Piccola arl and Gianpaolo Vivani*, case C-163/12, para 43; *Unità Socio-Sanitaria Locale n. 47 di Biella (USSL)*, case C-134/95, para. 19).

The provisions on freedom to provide services, in fact, apply only to situations which have a link with intra-Community trade. Whether that is the case depends on findings of fact which are for the national court to ascertain (*Procureur du Roi*, case C-52/79, para. 9).

Moreover, while reiterating that the rules on freedom to provide services do not apply to purely domestic issues, the European Court of Justice has repeatedly ruled on this point, considering that such a ruling would however be useful in the case in which national law imposed recognition of the same rights for a national citizen as those from which, in the same situation, the citizen of another member State would benefit on the basis of EU law (Joined case *Airport Shuttle Express scarl and Giovanni Panarisi*, case C-162/12, and *Società Cooperativa Autonoleggio Piccola arl and Gianpaolo Vivani*, case C-163/12).

Cases of reverse discrimination may well occur in those cases where cross-border economic operators who have benefited from freedom of movement are accorded more favourable legal treatment, under European law, than that accorded to national service providers.

The provisions of Articles 56 to 62, TFEU, apply both to individuals

and to legal persons.

In particular, referring to individuals, applicability of the above-mentioned provisions is subject to the possession of the citizenship of a Member State, as stated in Art. 56, para. 1, TFEU, which forbids restrictions in respect of nationals of Member States.

The applicability of freedom of service to legal persons results from the combined provisions of Articles 54 (relating to the establishment of companies) and 62, TFEU. In particular, in order to be treated in the same way as individuals, legal persons have *(i)* to be formed in accordance with the law of a Member State and *(ii)* have their registered office, central administration or principal place of business within the European Union.

It should be noted that the TFEU does not extend the benefit of freedom of service to providers who are citizens of non-member Countries, even if they are established within the European Union, and the provision refers to an intra-EU service (*FKP Scorpio Konzertproduktionen GmbH*, case C-290/04, para. 68). However, according to Art. 56, para. 3, TFEU, the European Parliament and the Council may extend the provisions of freedom of service to nationals of a third Country who provides services and who are established within the European Union.

> Article 56
>
> […]
>
> 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

In any case, despite the proposed directives on this point, the provision referred to in Art. 56, para. 2, TFEU, has not been implemented in practice so far.

There are four ways in which free movement of services finds concrete application: *(i)* through movement of the provider; *(ii)* through movement of the beneficiary; *(iii)* through movement either of the provider or the beneficiary into a third Member State; *(iv)* through movement of the service itself, without any movement of the provider and the beneficiary.

1.3.1. *Movement of the provider*

The TFEU expressly specifies the case where the service provider moves from the State of establishment to the beneficiary's Member State in order to temporarily carry out an economic activity. Indeed, by virtue of Art. 57, para. 2, TFEU: "*the person providing a service may (…) pursue his activity in the Member State where the service is provided*".

This principle was put in place by the European Court of Justice, according to which Art. 56, TFEU, requires the abolition of any limitation on the freedom to provide services based on the ground that the person providing a service is established in a Member State other than the one in which the service is provided (*FKP Scorpio Konzertproduktionen GmbH*, case C-290/04; *FidiumFinanz AG*, case C-452/04, para. 31).

1.3.2. *Movement of the beneficiary*

Case law of the European Court of Justice has clarified that freedom to provide services shall also apply when the beneficiary of the service moves to the provider's Member State in order to receive the service on the same conditions as which the service is offered to the citizens of that Member State (Joint cases *Graziana Luisi*, case C-286/82, and *Giuseppe Carbone*, case C-26/83; *Ian William Cowan*, case C-186/87*; European Commission*, case C-211-08; *Société d'investissement pour l'agriculture tropicale SA (SIAT)*, case C-318/10).

The leading case law for this approach comes from joint cases of the European Court of Justice No. 286/82 and No. 26/83 where two Italian citizens (Graziana Luisi and Giuseppe Carbone) were fined for having used means of payment abroad, for the purposes of tourism and medical treatment, at an exchange value greater than the maximum permitted limit under Italian law. In particular, in case No. 26/83, the plaintiff in the main proceedings affirmed that the foreign currency purchased by him had been used for a stay of certain months in the Federal Republic of Germany as a tourist. In Case No. 286/82, the plaintiff stated that she had exported the currency in question for the purpose of various visits to France and the Federal Republic of Germany as a tourist and in order to receive medical treatment in the latter Member State.

Both plaintiffs stated that the restrictions on the export of means of payment in foreign currency for the purpose of medical treatment or tourism were contrary to the provisions of the EEC Treaty.

As touched upon, the European Court of Justice stated that while the TFEU expressly mentioned only the case where the person providing the service moves to the Member State where the person for whom it is provided

is established, the opposite case (where it is the person for whom the service is provided who moves to the State in which the person providing the service is established) is the necessary corollary thereof, which fulfils the objective of liberalising all gainful activity not covered by the free movement of goods, persons and capital (para. 10).

It follows that freedom to provide services includes the freedom for the beneficiaries of services to move to another Member State for receive a service there, without being limited by restrictions, even in relation to payments; in the light of the above, persons receiving medical treatment, tourists and persons travelling for the purpose of business or education are to be considered as recipients of services (para. 16).

1.3.3. *Movement of the provider and the beneficiary in a third Member State*

Another form of mobility concerns the case in which both parties, the provider and the recipient of the service (from different Member States or both established on the same) are moving simultaneously towards a third Member State where the service will be performed (*Commission of the European Communities*, case C-180/89; *ITC Innovative Technology Center GmbH*, case C-208/05).

Here we will analyse one of the most important cases on this specific matter: European Court of Justice case law of 28 October 1999, *Skatteministeriet v. Bent Vestergaard* (case C-55/98).

This case law refers to a Danish citizen, Bent Vestergaard, who had attended a tax training course on the island of Crete. This course was organised solely by a firm of Danish auditors in conjunction with a travel agency. Out of the seven days spent in Greece, only three whole days and two half days were dedicated to the course. Moreover, costs related to participation in the course, travel and accommodation were paid by the company of which Vestergaard was a partner.

The Danish National Tax Tribunal ('Landsskatteret') stated that the expenses referring to Vestergaard's participation in the course in Crete could not therefore be deducted from his taxable income according to the Danish law.

Vestergaard appealed against this decision before the competent court, claiming, *inter alia*, the incomptibility of the Danish law with the provisions on freedom to provide services within the European Union.

It is important to point out that in order for services such as the organisation of professional training courses, to fall within the provision on freedom of service, it is sufficient for them to be provided to citizens of a Member State on the territory of another Member State, regardless of the place of establishment

of the provider or recipient of the services.

Indeed, the European Court of Justice underlined that freedom on service applies not only where a person providing a service and the beneficiary are established in different Member States, but also when a provider of services offers those services in a Member State other than the one in which he is established (para. 19).

1.3.4. *By way of circulation of the service itself, without any movement of the provider and the beneficiary*

Finally, the European Court of Justice has brought within the scope of Article 57 TFEU also the circumstances in which only the service circulates, without any physical movement of the supplier and the recipient (*Her Majesty's Customs and Excise*, case C-275/92, para. 37; *Stichting Collectieve Antennevoorziening Gouda and others*, case C-288/89). We refer, for instance, to services provided over the internet, telecommunications or television.

In this regard, an important leading case is the case law *Piergiorgio Gambelli and Others* (case C-243/01), relating to the gambling sector.

In particular, the Italian Court of Ascoli Piceno asked the European Court of Justice for a preliminary ruling on the compatibility of the provision on the freedom to provide services with the Italian domestic legislation which prohibits 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 (para. 24).

The above-mentioned question was raised in a criminal case brought against Mr Gambelli and other people who were accused of having unlawfully organised clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud according to Italian law.

On this respect, the European Court of Justice stated that where a provider established in a Member State offers a service via the internet — and thus does so without moving — this falls within the provisions of the freedom to provide services. Consequently, any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services (para. 54).

1.4. *The residual character of the freedom to provide services*

According to Art. 57, par. I, second part, TFEU, the definition of 'service' plays a residual role in relation to the other fundamental economic freedoms

of movement. In other words, the chapter on the free movement of services will apply only when the rules on the free movement of persons, goods and capital cannot apply.

> Article 57
>
> 1. 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.
>
> […]

That is not all. The free movement of services also has a residual nature with respect to the rules on freedom of establishment. In other words, only in the event that the specific case cannot fall within the scope of freedom of establishment will the provisions on the free movement of services apply.

> Article 57
>
> […]
>
> 1. 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 Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

This principle has also been reaffirmed by the European Court of Justice which in the Gebhard case held that "*the provisions relating to services apply only if those relating to the right of establishment do not apply*" (case C-55/94, para. 22).

1.5. *Exceptions to the exercise of freedom of establishment*

The rules on freedom to provide services (as well as that on the freedom of establishment) come up against legal limits in the case in which *(i)* the activity is connected with the exercise of official authority; *(ii)* there are grounds of public policy, public security or public health.

In addition to the above limits, the law has provided for the possibility of waiving the rules on freedom to provide services (as well as on the freedom of establishment) where there are overriding grounds of public interest, as we shall see in greater detail in the following paragraphs.

1.5.1. *Exercise of official authority*

Under Art. 51, TFEU, the rules on freedom to provide services do not apply in cases where the activity exercised is connected, even occasionally, with the exercise of official authority.

> Art. 51
>
> 1. 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.
>
> This framework, dictated with specific reference to freedom of establishment, is applicable to the freedom to provide services by virtue of the reference made by Art. 62, TFEU.
>
> Art. 62
>
> 1. The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

The *ratio* for this waiver is to allow each State to reserve for its citizens activities which, consisting in the exercise of official authority, imply a close fiduciary relationship with the State itself.

The European Court of Justice has stressed that, because it is an exception, this framework must be interpreted restrictively.

In this regard, the Court has stated that a traineeship performed at a magistrate's office does not constitute an exercise of official authority insofar as it is carried out under the supervision and in accordance with instructions given by the training principal (*Pesla*, case C-345/08, para. 30/33).

1.5.2. *Grounds of public policy, public security or public health*

Under Art. 52, TFEU – applicable, as we have seen, by virtue of the reference made by Art. 62, TFEU – Member States may adopt measures restricting the freedom to provide services where such measures are justified on the grounds of public policy, public security or public health. In other words,

when there are the above grounds, Member States may impose measures that discriminate on the basis of nationality or residence.

> Art. 62
>
> 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.
>
> […]

As in the case *ex* Art. 51, TFEU, such restrictions should be interpreted restrictively and, in any case, must be proportionate to the objective pursued.

1.5.3. *Overriding grounds of public interest: further restrictions introduced by case law*

As we saw in the preceding paragraphs, Member States may adopt regulations that discriminate on the basis of nationality or residence only in cases provided for in Articles 51 and 52, TFEU; that is, when the activity involves the exercise of official authority (Art. 51) or there are grounds of public policy, public security or public health (Art. 52). While the possibility of introducing discriminatory measures exists only in those cases, the Court has recognised the possibility of introducing measures which restrict the freedom to provide services where these are *(i)* applicable without distinction to all EU citizens and *(ii)* there are grounds of public interest.

The concept of grounds of public interest is quite large and will include, for example, the protection of workers (*Guio*t, case C-272/94, para. 20-22); of consumers (joint cases *De Agostini*, case C-34/95, case C-35/95 and case C-36/95, para. 53); and of national historic and artistic heritage (*Commission of the European Communities*, case C-180/89).

Furthermore, because a restriction on the freedom to provide services can be applied in addition to the above conditions (*(i)* and *(ii)*), it is also necessary that *(iii)* the restrictions introduced are necessary to achieve the purpose; *(iv)* the measure adopted do not go beyond what is necessary to attain it (principle of proportionality); *(v)* the interest that is to be protected does not already have adequate protection in other provisions (*Commission of the European Communities*, case C-219/08).

2. *Freedom of establishment*

2.1. *Legislative provisions and historical evolution*

The rules on freedom of establishment are contained in Part III ('Union policies and internal actions'), Title IV ('Free movement of persons, services and capital'), Chapter II ('Right of establishment'), Articles 49 and 55, TFEU. As with the freedom to provide services, the Lisbon Treaty has made no substantial changes to the rules.

Indeed, the amendments concerned the introduction of the term 'Union' instead of 'Community' (Art. 50, para. 2, lett. *b)*), the reference to the ordinary procedure instead of the co-decision (Art. 50, para 1; Art. 51; Art. 52, para 2), the unification of the paragraphs 1 and 2 of the previous Article 47 TCE (Art. 53, para. 1, TFEU) and the European Parliament increased powers (Art. 50, para 2).

In addition, as for the freedom to provide services, the direct application of Art. 49 *et seq.*, TFEU, is completed by Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

Freedom of establishment can tentatively be defined as the right to move to a Member State other than that of origin in order to pursue in a stable way an economic activity that is not subject to the same conditions as provided for its own nationals by the host Member State.

> Article 49
>
> 1. 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.
>
> 2. 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.

In practical terms, therefore, freedom of establishment can be attained:

i) through the creation or transfer of a place of business or profession in a Member State other than that of origin (Art. 49, paragraph 2, TFEU); or

ii) through setting up one or more secondary locations (branches, agencies or subsidiaries) in a Member State other than that of origin (Art. 49 paragraph 1, TFEU).

In the first case, it is customary to speak of primary establishment, while in the second case of secondary establishment, insofar as the main activity continues to be conducted in the State or origin.

2.2. *Freedom of establishment and freedom to provide services*

As in the case of freedom to provide services, freedom of establishment regards non-subordinate work activities. Moreover, while the freedom to provide services applies to activities carried out on an occasional and temporary basis, freedom of establishment concerns activities carried out continuously and permanently.

Consider, for example, the case of a doctor, a German national, who decides to carry out his activities exclusively (or at least mainly) in France. In this case, we will have a hypothesis of freedom of primary establishment.

In the case in which, however, the same doctor of German origin decides to carry out his activity in his country of origin and only occasionally provide services in France, we would fall under the rules on freedom to provide services.

Moreover, the difference between the freedom of primary establishment and freedom to provide services is quite clear, the difference between the latter and the freedom of secondary establishment is less clear, given that it does not appear easy in practice to distinguish between cases where the provider relies on a secondary establishment, rather than on a simple infrastructure which functions merely in the context of the provision of cross-border services. In fact, in both cases, the main activity is carried out within the State of origin. In this case, the difference comes from the different intensity of the link with the 'host' State: with a secondary establishment, the self-employed person will carry out an activity, albeit not the main activity, in a stable manner, whereas in the case of the freedom to provide services the worker will exercise the activity only occasionally. In practice, however, this distinction is not always so clear, given that the European Court of Justice

has held that the existence of an office or study does not rule out the nature of the freedom to provide services as part of the activity, to the extent that this structure appears necessary for the performance of the service (*Gebhard*, case C-55/94).

2.3. *Essence of the freedom of establishment*

The rules on freedom of establishment apply to both individuals and legal persons, and, as for the freedom to provide services, do not apply to activities whose relevant elements are confined within a single Member State (*Government of the French Community and Walloon Government*, case C-212/06; *Criminal proceedings against Jean-Louis Aubertin, Bernard Collignon, Guy Creusot, Isabelle Diblanc, Gilles Josse, Jacqueline Martin and Claudie Normand*, case C-29/94, case C-30/94, case C-31/94, case C-32/94, case C-33/94, case C-34/94 and case C-35/94; *Ministère public*, case C-20/87, para. 12. See also para. 1.3).

In both cases, as for the freedom to provide services, regulation rotates around the principle of national treatment. Moreover, considering the different problems that have arisen from the practice, we will address the freedom of establishment of individuals and legal persons separately in the following paragraphs.

2.3.1. *Freedom of establishment of individuals*

The prerequisite for the application of freedom of establishment of individuals is possession of the nationality of a European Union State.

As for the freedom to provide services, freedom of establishment includes the prohibition of discrimination, either direct or indirect, on the basis of nationality. This implies the obligation for the host Member State to reserve for natural or legal persons the same treatment as for its own citizens or for their bodies, with any discrimination based on nationality being prohibited. On the other hand, the State of origin may not impede the natural or legal person who decides to settle in another Member State.

In the light of the above, the European Court of Justice has, for example, established the obligation of national authorities – to which an application has been submitted for authorisation to practise as a lawyer from an EU citizen already admitted to practise the profession in his country of origin – to assess to what extent the knowledge and qualifications certified by the diploma obtained by the person concerned in his Country of origin

correspond to those required in the regulations of the host State. Only if there is only a partial match between those diplomas, are the national authorities in question entitled to require the person concerned to prove that they have acquired the knowledge and qualifications which are lacking (*Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, case C-340/89).

As regards exceptions to the rules on freedom of establishment, refer to para. 1.5 for identity of essence.

2.3.2. *Freedom of establishment of legal persons*

As regarded as legal persons, Art. 54, paragraph 2, TFEU, specifies that freedom of establishment applies to all 'companies', as defined by the Treaty itself.

> Article 54
>
> […]
>
> 2. '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.

Furthermore, in order for the freedom of establishment to apply, the following conditions need to occur: *(i)* the company has to be incorporated under the laws of a Member State; and *(ii)* its registered office or central administration or principal place of business has to be located within the European Union.

With regard to legal persons, freedom of primary establishment is embodied in the possibility of transferring their headquarters to another Member State. In this regard it is necessary to point out that, at present, European legislation leaves it up to each Member State to identify what the connecting factor is for a company to be regarded as incorporated. More precisely, at international-privatistic level there are two criteria on the basis of which to determine which is the law applicable to a company (so-called *societatis lex)*: *(i)* that of incorporation (*Incorporation doctrine*) and *(ii)* that of the real headquarters (*Real Seat doctrine*).

According to the first theory, the *lex societatis* applicable is that of the State in which the company was incorporated (without detecting any transfers of headquarters) while, according to the "Real Seat doctrine", the

law of the State in which the administrative headquarters of the company is located is applied.

In the light of the above, the European Court of Justice stated that a Member State has the power to define both the connecting factor required of a company in order to be considered as incorporated under the law of that Member State and that required in order to be able subsequently to maintain that status. The above-mentioned power includes the possibility for that Member State not to permit a company governed by its law to maintain that status if the company decides to move its seat to the territory of another Member State, breaking the connecting factor required under the national law of the Member State of incorporation (*The Queen*, case C-81/87, par. 19; *Oktató Cartesio és Szolgáltatóbt*, case C-210/06, par. 110). Otherwise, the right of a company to transfer its registered office to another Member State, with a change as regards the national law applicable, where the company is converted into a form of company which is governed by the law of the Member State, falls within the scope of application of Articles 49 *et seq.*, TFEU (and therefore protected). Any imposition by the State of destination of compulsory dissolution of the company and its reconstitution is, in fact, contrary to freedom of establishment. In other words, companies are free to become companies under the law of another Member State to the extent to which it is allowed by that law.

Furthermore, the European Court of Justice has given wide recognition to freedom of establishment on a secondary basis, recognising the right of companies to open branches in other Member States even when the branch is carrying out the entire activity in the Member State of destination as its sole purpose.

According to the European Court of Justice, in fact, the decision to incorporate a company in the Member State in which the rules of company law are less strict, and subsequently create branches through which to carry out the entire economic activity in other Member States, may not in itself constitute an abuse of the right of establishment (*Centros Ltd*, case C-212/97).

Moreover, the right of establishment covers cross-border merger operations. Indeed, according to the European Court of Justice it is contrary to freedom of establishment to refuse to register in the commercial register a merger between a company established in that State and one established in another Member State (*Systems AG*, case C-411/03, para. 30).

3. *Freedom to provide services and freedom of establishment: secondary legislation*

3.1. *Services Directive (Directive No. 2006/123/EC)*

Turning now to the secondary legislation, we see that the rules on the movement of independent activities (performed both through the establishment of the economic operator and on a temporary and occasional basis, as happens in the freedom to provide services) are covered by a specific rule in Directive No. 2006/123/EC (also known as the 'Bolkestein Directive' from the name of the internal Commissioner rapporteur of the first draft).

The need for such regulatory intervention, as is apparent from recital 6 of the Services Directive, arise from the consideration that direct application of Articles 56 TFEU *et seq.* (freedom to provide services) and 49 TFEU *et seq.* (freedom of establishment) does not allow full realisation of those two freedoms.

> Recital no. 6
>
> Those barriers [to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States] cannot be removed solely by relying on direct application of Articles 43 and 49 of the Treaty, since, on the one hand, addressing them on a case-by case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation. As the European Parliament and the Council have recognised, a Community legislative instrument makes it possible to achieve a genuine internal market for services.

Hence the need to proceed with targeted action in order to give effectiveness to the provisions of the Treaty and, at the same time, the goal set by the European Council in Lisbon on 23 and 24 March 2000, namely making the European Union the economy based on the most competitive and dynamic knowledge in the world by 2010, with more and better jobs.

The definition of 'provision of services' and 'establishment' refers to the definitions used by the Treaty.

Article 4

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

1) 'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty;

2) 'provider' means any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service;

3) 'recipient' means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service;

4) (…);

5) 'establishment' means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out;

[…]

According to Article 2, para. 2, the Services Directive does not apply, *inter alia*, to the following activities: non-economic services of general interest (letter a); financial services (letter b); electronic communications services and networks (letter c); services in the field of transport (letter d); healthcare services (letter f); gambling activities (letter h); private security services (letter k); services provided by notaries and bailiffs (letter l). Moreover, the above-mentioned Directive does not apply even to the field of taxation (Art. 2, para. 3).

On the other hand, the following, *inter alia*, fall within the scope of the Services Directive: management consultancy, certification and testing; facilities management, including office maintenance; legal or fiscal advice; real estate services, such as estate agencies; construction, including the services of architects; distributive trades; the organisation of trade fairs; car rental; travel

agencies; as well as services in the field of tourism, including tour guides, leisure services, sports centres and amusement parks (Recital No. 33).

3.1.1. *Essence of the Services Directive*

The measures adopted by the Services Directive relate in particular to: *(i)* administrative simplification (chapter II); *(ii)* freedom of establishment (chapter III); *(iii)* free movement of services (chapter IV); *(iv)* quality of services (chapter V); *(v)* administrative cooperation (chapter VI).

In particular, European legislation assumes that one of the major difficulties encountered by companies exercising an economic activity in another Member State comes from the complexity, length and legal uncertainty of administrative procedures.

> Recital 43
> One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures.

To this end, the Services Directive, on the one hand, requires Member States to check whether the procedures for exercising a service activity are sufficiently simple and, if not, to simplify them (Art. 5, para. 1) and, on the other, imposes specific obligations on them.

More specifically, the aforementioned Directive obliges Member States, *inter alia*, to *(i)* accept certificates, attestations or any other document proving that a requirement has been satisfied, issued by another Member State which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied (Art. 5, para. 3); *(ii)* set up points of single contact at which providers can complete all formalities and procedures for carrying out their activities (Art. 6); *(iii)* receive all the necessary information in a clear manner (Art. 7); *(iv)* enable the completion of administrative procedures and formalities at a distance and by electronic means (Art. 8).

With reference to freedom of establishment, the Services Directive provides that Member States may subordinate access to and exercise of an economic activity to an authorisation scheme only if *i)* the authorisation scheme does not discriminate against the provider (Art. 9, para 1, letter *a)*); *ii)* the need for an authorisation scheme is justified by an overriding reason in the public interest (Art. 9, para 1, letter *b)*).; *(iii)* the objective pursued

cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective (Art. 9, para 1, letter *c)*).

The procedures for granting authorisation must also be characterised by clarity, made public in advance (Art. 13, para. 1) and not have the effect of unduly delaying provision of the service (Art. 13, para. 2).

Furthermore, the authorisation requested should not in any case duplicate controls to which the provider is already subject in another Member State (Art. 10).

With regard to the freedom to provide services, the provision which is relevant is Art. 16, according to which the Member States must respect the right of providers to provide a service in a Member State other than that in which they are established (Art. 16, para. 1).

In particular, Member States may not restrict the free movement of services by imposing on the provider, *inter alia*, the obligation of being established on their territory (Art. 16, para. 2, letter *a)*); the obligation of obtaining authorisation from the competent authorities, except where provided for by the Services Directive or other instruments of European law (Art. 16, para. 2, letter *b)*); a ban on the provider setting up a certain form or type of infrastructure on their territory (Art. 16, para. 2, letter *c)*); an obligation on the provider to possess an identity document issued by their competent authorities specific to the exercise of a service activity (Art. 16, para. 2, letter *e)*).

Restrictions on freedom to provide services are possible when there are grounds of public policy, public security, public health or environmental protection and, in any case, in compliance with the principles of non-discrimination, necessity and proportionality (Art. 16, para. 3).

Moreover, the Services Directive provides for a series of measures designed to promote the quality of services. These measures consist first of all in the obligation of providers to provide recipients of the service with a range of information, such as, for example, the name of the provider, his legal status and form (Art. 22, letter *a)*); any clauses and conditions used by the provider (Art. 22, letter *f)*); the existence of an after-sales guarantee, not imposed by law (Art. 22, letter *h)*); the main features of the service (Art. 22, letter *j)*).

Furthermore, Member States are required to adopt accompanying measures designed to ensure the quality of services on a voluntary basis.

Article 26

Policy on quality of services

1. Member States shall, in cooperation with the Commission, take accompanying measures to encourage providers to take action on a voluntary basis in order to ensure the quality of service provision, in particular through use of one of the following methods: (a) certification or assessment of their activities by independent or accredited bodies; (b) drawing up their own quality charter or participation in quality charters or labels drawn up by professional bodies at Community level.

[…]

Finally, as regards administrative cooperation, the Services Directive also stipulates that Member States have an obligation of cooperation and mutual assistance in order to ensure the supervision of providers and their services (Art. 28). This assistance is embodied, in particular, in the right of a State to request information, inspections or investigations of another Member State and, conversely, the obligation of the latter to satisfy the request received without delay.

An alert mechanism is also provided for whereby a Member State must promptly inform the Commission and the other Member States concerned of any behaviour of a service provider which could cause serious damage to the environment, health or safety of persons (Art. 32).

3.1.2. *Special legislation*

Under Art. 3, para. 1, where an activity is subject to a specific rule, the latter will prevail over the rule of the Services Directive. By way of example, the Directive itself recalls *(i)* the Directive concerning the posting of workers in the framework of the provision of services (Directive 96/71/EC); *(ii)* the Regulation on the application of social security schemes to employed persons and their families moving within the Community (Regulation EEC No 1408/71); *(iii)* the Directive on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the provision of audiovisual media services (Directive 2010/13/EU); *(iv)* the Directive on the recognition of professional qualifications (Directive 2005/36/EC).

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Abstract

Chapter 4 discusses the European Union legislative provision on the freedom to provide services and the freedom of establishment. It examines what the expression 'services' and 'establishment' mean, when such freedoms apply and when they not.

Ilaria Ricci

Free Movement of Capital and Payments

1. *Historical overview*

At the origin of the European Union, the stability of economic and monetary policy of the Member States were subject to the capital and payments movements controlled by Member States.

The movement of capital and payments was not liberalized together with the other three fundamental freedoms.

The original EEC provisions on capital and payments movements appeared to be more prudent and less imperative than the other three freedoms, since they were drafted in a more cautious way that the other freedoms, providing that restrictions on free capital flows would only be removed through positive integration and to the extent necessary for the common market.

The original provisions of the freedom of capital movements lacked direct effect, but with the entry into force of the Maastricht Treaty the original EEC rules have been amended and replaced and the movement of capital and payments became a directly applicable freedom.

The free movement of capital and payments has been considered crucial for the building of the Internal Market, empowering the growth of integrated and competitive financial market and services in the European Union.

Although the free movement of capital and payments has been developed later than the other fundamental freedoms, currently it appears to be a relevant and powerful freedom, broadly explored by the ECJ case law.

The free movement of capital and payments covers today both discriminatory and non-discriminatory restrictions and it is the sole freedom which can apply to *intra*-Union as well *extra*-Union restrictions.

Actually the free movement of capital and payments has the broadest scope of all TFEU freedoms, also covering the relationships between Member States and third countries.

The level of liberalization of the freedom of capital and payments movements, especially with reference to *intra*-Union transactions, is clearly intended to grow forward, so that the scope of this freedom is deemed to be further strengthened, also by means of the relevant case law to be developed by the ECJ.

1.1 *Evolution of the Free Movement of Capital*

The original provision concerning the freedom of capital movement was contained in Art. 67 EEC which provided that member States, in the course of the transitional period and to the extent necessary for the proper functioning of the Common Market, had to progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or place of residence of the parties or on the place where such capital is invested, while current payments connected with movements of capital between Member States had to be freed from all restrictions not later than at the end of the first stage.

According to Art. 68 EEC, Member States were required to be as liberal as possible in granting exchange authorizations.

Furthermore, the original Art. 71 EEC pointed out that Member States had to endeavour to avoid introducing within the Community any new exchange restrictions which could affect the movement of capital and current payments connected with such movement, and making existing rules more restrictive.

In this background, a specific role was played by the Council and the Commission.

The Council, as provided by Art. 69 EEC, had the power to issue Directives for the implementation of Art. 67, acting by a qualified majority from the beginning of the third stage (i.e. January 1, 1996).

With reference to capital movements between Member States and

third countries, as set in Art. 70 EEC, the Commission had to propose to the Council measures for the progressive coordination of the exchange rate policies of the Member State, while, according to Art. 72 EEC, the Member States had to keep the Commission informed of any known movement of capital to and from third countries.

Finally, Art. 73 EEC enabled the Commission to authorise a Member State to take protective measures in the event of movement of capital leading to disturbances in the functioning of the capital market.

The ECC provided also protection clauses under the second paragraph of Art. 71 EEC, and under Art. 108 EEC and Art. 109 EEC, in order to promote a certain moderate degree of liberalization of the movement of capital and payments.

Notwithstanding that, the provisions of the EEC concerning movement of capital and payment soon turned out to be too vague and less 'mandatory' compared to the other three fundamental freedoms.

The conditional commitments meant that the original provisions of the EEC about movement of capital and payments did not have direct effect, not being able to give rise to rights enforceable by individuals before their national courts.

In the lack of direct effects, the positive integration of the free movement of capital and payments relied on legislative implementation.

To this aim, the Council adopted Directives on the basis of Art. 69 EEC, provided that the first paragraph of Art. 67 EEC did not abolish restriction on the movement of capital by the end of the transitional period.

The first Council Directive was enacted on May 11, 1960, soon amended by Directive 63/21/CEE.

According to the recitals of these Directives, the relevant legislative bedrock was not found entirely under Art. 67 EEC and Art. 69 EEC but also under the second paragraph of former Art. 106 EEC, on current payments.

The above-mentioned Directives divided all movement of capital into four lists A, B, C and D, annexed to the Directives, each of them with a different degree of liberalization.

With reference to transactions or transfers mentioned in list A (including, *inter alia*, direct investments in an undertaking in another Member State, investment in real estate, some personal capital movements, short and medium-term credits related to commercial transactions or provisions of services, death duties and damages concerning the capital), Member State had to grant 'all foreign exchange authorizations', while in respect of the movements covered by list B (such as transactions in securities, acquisition

and liquidation by non-residents of domestic listed securities or by resident of foreign listed securities) Member State had to grant 'general permission'. In the case of movement covered by list C (including the issue and placing of a foreign undertaking on the domestic capital market, cross-border acquisitions and liquidations of units in unit trusts) Member States were required to maintain or reimpose exchange restrictions in the event that free movement of capital would have formed an obstacle to the achievement of its economic policy objectives. Finally, movements set out in List D (such as physical importation and exportation of financial assets, including bank notes, opening and placing of funds on current or deposit accounts) did not have to be liberalized.

The mentioned legal context was modified by Directive 86/566, which merged the list A and B of Directive 63/21/CEE into a new list A together with certain movements from the old list C (such as the issue and placing of securities of a domestic undertaking on a foreign capital market, granting and repayment of long-term credits and cross-border acquisitions and liquidation of units in unit trusts), while list C was renamed list B and still subject to the possibility for Member State to maintain or reintroduce exchange restrictions effective as of the date of the entry into force of the Directive itself, in the event that free movement of capital could be an obstacle for the relevant Member State to achieve its economic policy objectives. Lastly, the old list D became list C, but not yet liberalized.

In this legal framework, the absence of direct effect of the provision concerning the movement of capital was confirmed by the case law of the ECJ.

In its fundament case *Casati* (case 203/80), in 1981, the ECJ rejected the direct effect of the original provisions of the free movement of capital, ruling that complete freedom of movement of capital might undermine the economic policy of one of the Member State or create an imbalance in its balance of payment, thereby impairing the proper functioning of the common market. For these reasons, the ECJ pointed out that Art. 67(1) EEC was different from the provisions on the other three fundamental freedoms since there was an obligation to liberalize capital movements only 'to the extent necessary to ensure the proper functioning of the common market'.

According to the ECJ in the *Casati* case, Art. 67 EEC did not require to simply abolish restrictions on the movement of capital, since the scope and the restriction might vary in time and depend on 'an assessment of the requirements of the common market' and 'on an appraisal of both the advantages and risks which liberalization could entail for the latter', also taking into account the level of integration attained in matters in respect

of which capital movements are 'particularly significant'.

The ECJ also pointed out that such an assessment was a matter for the Council and that the obligation to abolish restrictions on movement of capital could not be separated from the Council's assessment of the necessity to liberalize such transactions.

The ECJ therefore concluded that Art. 67 EEC was not a provision which a national court and even the ECJ could apply directly, but a question of policy of the Council, which the ECJ was just required to examine in order to verify whether the Council had overstepped the limits provided by the same rule.

It is from the second half of the eighties that the liberalization of the capital movements became a priority for the creation of the Internal Market, as mentioned in the White Paper from the Commission to the European Council dated 28-29 June 1985 (COM 310/1985) and in the Programme for the liberalization of capital movements in the Community dated 23 May 1986 (COM 86/292), which enshrined the principal actions to put in place in this matter.

The most important legislative measure of this early period was Directive 88/361 enacted for the implementation of Art. 67 EEC, which established the full liberalization of capital movements within the European Union with effect, for most Member States, from July 1, 1990.

Art. 1(1) of Directive 88/361 expressly provided that Member States were required to abolish restrictions on movements of capital taking place between person resident in Member State. In order to facilitate the application of such provision, the Directive provided with a nomenclature in the Annex.

Directive 88/361 stated that Member State had to abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate the application of such Directive, capital movements had to be classified in accordance with the annexed nomenclature. Furthermore, according to the same Directive, in order to achieve the liberalization of capital movements, it was required the abolition of foreign exchange restrictions and the removal of all obstacles to the execution of the capital transactions. As a consequence, the Directive gave access to the financial system of any Member State to individuals and financial service firms.

The *erga omnes* effects of the provision under Art. 1 of Directive 88/361 were confirmed by Art. 7 of the same Directive, which, also if not in imperative terms, provided that in the treatment of transfers in respect of movements of capital to or from third countries, the Member States shall endeavour to attain the same degree of liberalization as that which applies to operations with residents of other Member State.

The Directive 88/361 was the basis of the process of liberalization of financial services.

In 1992 the Maastricht Treaty replaced the old provisions on free movement of capital and payment by adopting a new set of rules.

In a single chapter, the Maastricht Treaty brought together the provisions on capital, amended to reproduce the content of Directive 88/361, and the provisions on payments.

This legislative action turned the provisions on free movement of capital and payments from being a weak freedom to be a strong freedom both within and outside the European Union.

The provisions governing the freedom of movement of capital are currently contained in Art. 63, 64, 65 and 66 within Chapter 4 of Title IV ('Free Movement of Persons, Services and Capital') of the TFEU.

In detail, current Art. 63(1) TFUE - (which was Article 73b(1) EEC, the Maastricht Treaty number, renumbered at Amsterdam as Art. 56(1) EEC and at Lisbon as Art. 63(1) TFUE) - provides that:

> Art. 63 TFUE
>
> 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.
>
> […]

1.2 *Evolution of the Free Movement of Payments*

As per the provisions concerning the free movement of capital, also the provisions concerning the free movement of payments were original drafted in prudent terms.

The wording of Art. 106 EEC, contained in Title II (Economic Policy), Chapter 2 (Balance of Payment) provided that each Member State had to undertake to authorise, in the currency of the Member State in which the creditor or the beneficiary resides, any payments connected with the exchange of goods, services or capital, and also any transfers of capital and wages, to the extent that the movement of goods, services, capital and persons was freed as between Member State.

Such a provision required Member States to authorize means of payment as consideration for trade in goods, persons, services or capital.

The interpretation of the provisions on free movement of payments was also developed by means of the case law of the ECJ.

In case *Thompson* (case 7/78), the ECJ pointed out that Art. 106(1) EEC was one of the most important provision in the original version of the EEC for the purpose of achieving a common market.

In the leading case *Luisi and Carbone* (case 286/82 and 26/83), the ECJ ruled that Art. 106(1) EEC was directly effective, giving rise to rights enforceable by individuals before their national courts, at a time when the EEC provisions on free movement of capital were not directly effective.

In the *Luisi and Carbone* case it appeared that there was a clear distinction between movement of capital and current payments, even though the mentioned Directives on free movement of capital enacted under the original Art. 67 EEC seemed to have considered both types of transactions.

In the case *ED Srl* (case 412/97), the ECJ pointed out that the provision on payments was intended 'to enable a person liable to pay a sum of money in the context of a supply of goods or services to discharge that contractual obligation voluntarily without undue restriction and to enable the creditor freely to receive such a payment'.

With the decision in the *Lambert* case (case 308/86), the ECJ clarified the distinction between Art. 106(1)EEC and Art. 67 EEC.

The ECJ pointed that Art. 106 covered current payments (*i.e.*: transfers of foreign exchange being the consideration within the context of an underlying transaction of goods, persons, services or capital), while Art. 67 ECC covered movements of capital (*i.e.*: financial operations essentially concerned with the investments of funds, rather than with consideration for a service).

The provisions governing the freedom of movement of payments, such as those concerning the freedom of movement of capital, are currently contained in Art. 63, 64, 65 and 66 within Chapter 4 of Title IV ('Free Movement of Persons, Services and Capital') of the TFEU.

In detail, current Article 63(2) TFUE, replacing Art. 106 EEC, provides that:

Art. 63 TFUE

[…]

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

2. *Definitions and scope*

2.1 *Definition of 'Capital' and 'Payments'*

The TFEU does not contain a definition of 'capital' or 'payment'.

Legislative definitions were specified in the above-mentioned annex to Directive 88/361, which contained a nomenclature of capital movements which the ECJ has accepted as of an 'indicative value' for the purposes of defining the notion of capital movements, as it did before the entry into force of Art. 63 TFUE.

In the case *Trummer and Meyer* (Case 222/97) the ECJ stated that, since Art. 63 TFEU substantially reproduces contents of Art. 1 of Directive 88/361, and even though that Directive was adopted on the basis of Art. 69 and Art. 80(1) EEC, which have been then replaced by Art. 63 TFEU, the nomenclature in respect of movement of capital annexed to Directive 88/361 still has the same indicative value, subject to the qualification contained in the introduction to the nomenclature, since the list set out therein is not exhaustive.

In the *Trummer and Meyer* case the ECJ pointed out that mortgages was a transaction covered by the nomenclature and so was 'inextricably linked to a capital movement'.

The ECJ also stated that investments in real property, its administration and its sale constituted a movement of capital.

A capital movement is also considered to be a 'direct investment' in a company by means of a shareholding with the view of effectively participating in the management and control of a company as ruled by the ECJ in one of the *Golden shares* cases (case 367/98, *Commission v. Portugal*).

It is possible to consider as movements of capital also inheritances, banknotes and coins, gifts in money or in kind, guarantees granted by non-residents to residents or by residents to non-residents, and granting of credit on a commercial basis.

In the case *Verkooijen* (case 35/98) the ECJ ruled that the receipt of dividends from a foreign company, although not listed in the mentioned annex, fell within the scope of the Treaty since it was linked to some of the measures in the annex.

Therefore, even if not listed in the annex, a transaction could still constitute a capital movement within the meaning of Art. 63(1) TFEU.

The notion of capital within the European Union is therefore able to go beyond the broad categories listed in the Directive 88/362, being even able to extensively expand its scope.

2.2 *Territorial scope*

In spite of the original Art. 67 EEC and Art. 1 of Directive 88/361, the current provision of Art. 63 TFUE takes into consideration the territorial presence of the capitals instead of the nationality of the persons or their residence within the European Union, being a condition to have a link between the movement of capital and (at list) a Member State.

This entails that also a person resident in another Member State could take advantage of such a freedom, as long as the relevant capitals are located in the territory of a Member State.

More in detail, with respect to inter-state movement, in order to apply Art. 63(1) TFEU, there must be a movement of capital between Member State, but the rule is not always self-evident.

In the *Block* case (case 67/08) the ECJ considered to be an inter-state movement and therefore applied Art. 63(1) TFEU to the situation of an inheritance being located both in Germany and Spain.

Furthermore, Art. 63 TFEU applies also to movement of capital between member State and third countries.

This extension of the rights of free movement of capital and payment to third countries goes beyond all the other fundamental freedoms.

The extension of the territorial scope of the free movement of capital contributes to the principle of an open market economy pursuant to Art. 119 TFEU.

2.3 *Direct effect of Art. 63 TFEU*

In the above-mentioned *Casati* case (case 203/80) the ECJ ruled that Art. 67 EEC was not directly effective, considering that the provisions on free movement of capital were not yet liberalized at that time.

With the case *Sanz de Lera* (joined cases 163/94 and 250/94) the ECJ ruled that Art. 73 (b1) EEC, now Art. 63(1) TFEU, was directly effective.

Accordingly, the ECJ, in the *A* case (case 101/05) ruled that Art. 63(1) TFEU 'lays down a clear and unconditional prohibition for which no implementing measure is needed and which confers rights on individuals which they can rely on before the courts'.

As confirmed by the case law of the ECJ, Art. 63 TFEU is therefore vertically directly effective.

In spite of that, the question whether Art. 63 TFEU might have hori-

zontal direct effect seems to be not yet solved, even though the position of the ECJ in the case *Volkswagen* (case 112/05) appears to be contrary to the attribution of horizontal direct effect to Art. 63 TFEU.

The ECJ also clarified that Art. 63 TFEU is directly effective with regard to capital movements between Member State and third countries.

In the *Sanz de Lera* case the ECJ pointed out that the expression 'within the framework of the provisions set out in this Chapter' contained in Art. 63 TFEU relates to the whole chapter in which it appears. The provisions should therefore be interpreted in that context. The ECJ also stated that the exception in Art. 64(1) TFEU concerning the application to non-member countries of the restrictions existing on 31 December 1993 under national law or Union law regarding the capital movements listed in it to or from non-member countries is 'precisely worded', with the result that no latitude is granted to the Member States or to the Union legislature regarding either the date of applicability of the restrictions or the categories of capital movements which may be subject to restrictions. Furthermore, according to the ECJ, the power to adopt measures granted to the Council by Art. 64(2) TFEU of the Treaty relates only to the categories of capital movements to or from non-member countries listed in that provision. The ECJ also ruled that the adoption of such measures is not a prerequisite for implementing the prohibition laid down in Art. 63(1) TFEU, 'since that provision relates to restrictions that do not come within the scope' of Art. 64(1) TFEU.

The ECJ therefore ruled that Art. 63 TFEU conferred directly enforceable right on individuals with reference to capital movements both between Member States that between Member States and third countries.

3. *Prohibition of Discriminatory and Non-Discriminatory National Rules*

The original provision of Art. 67 EEC provided for the abolition 'of all restrictions on the movement of capital' and 'any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested'.

The current wording of Art. 63(1) TFEU does not contain any reference to 'discrimination', since the Maastricht Treaty amended Art. 67 EEC removing the reference to 'discrimination' and referring solely to 'restrictions'.

Notwithstanding that, according to the legislative field of application of the other three freedoms, it seems that Art. 63(1) TFEU prohibits

national measures being both directly and indirectly discriminatory as well as non-discriminatory measures which are capable to be an obstacle to the free access to the market.

This interpretation seems to be in line with the provision on free movement of services which prohibits discriminations on all the same grounds (*i.e.*: on the grounds of nationality, place of residence of the parties and place where capital are invested).

Accordingly, in its decisions the ECJ took into consideration both the discrimination approach and the restrictions approach, in order to remove measures interfering with the free movement of capital, even though deciding on the basis of the current wording of Art. 63(1) TFEU.

The ECJ confirmed that Art. 63 TFEU could cover non-discriminatory capital restrictions.

Moreover, according to the ECJ case law, Art. 63 TFEU may apply both to direct and indirect discriminations.

With reference to direct discriminations, in the *Sandoz* case (case 439/97) the ECJ ruled that the imposition of a stamp duty on loans by the national Austrian legislation was likely to deter national residents from obtaining loans from persons established in other Member State, being considered a restriction to capital movements under Art. 63 TFEU.

In *Golden Share* cases (see, *inter* alia, cases 367/98, 483/99, 503/99) the ECJ confirmed that Art. 63 TFEU deals also with non-discriminatory measures.

In brief, such cases concerned the possibility for Member State to influence, in various manner, shareholder structures and corporate decisions by means of national legislation.

These cases arose in context where many European States had decided to re-privatise formerly nationalised companies providing public services. In order not to lose influence on those companies, national governments tried to maintain a certain degree of control over them by limiting the transfers of shares to certain investors or by issuing 'golden shares'.

More in detail, in the case *Commission v. France* (case 483/99), the ECJ had to decide upon a national decree allowing the French government to secure influence over a national company by means of the issuing of a golden share. National provisions required the prior approval from the domestic government when a person, acting alone or in conjunction with others, exceeded a fixed part of the capital or of voting rights in a company.

In the case *Commission v. Belgium* (case 503-99) the ECJ had to solve a dispute concerning the possibility for the Belgian government, according to its domestic legislation, to preclude investors from carrying out transactions

in certain domestic companies active in the energy sectors, in case the relevant Minister would have considered that such operations could adversely affect domestic interests in the energy sector.

In the case *Commission v. Portugal* (case 367/98), national rules precluded investors from buying more than a given number of shares in certain privatized Portuguese companies operating in specific sensitive sectors.

Moreover, in the case *Commission v. Portugal*, Portugal claimed that national legislation on the matter was a non-discriminatory measure that fell outside current Art. 63 TFEU, but even so the ECJ ruled that it had to be considered a restriction of the free movement of capital. In detail, the ECJ specified that even though 'the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. They are therefore liable, as a result, to render the free movement of capital illusory. In those circumstances the rules in issue must be regarded as a restriction on the movement of capital within the meaning of Art. 73b of the Treaty. It is therefore necessary to consider whether, and on what basis, that restriction may be justified'.

Therefore in these three cases the ECJ ruled that, also taking into consideration Directive 88/361 and the nomenclature annexed to it, the disputed regulations fell under the scope of the movement of capital and payments according to Art. 53(1) of the EEC. In accordance with the above-mentioned annex, capital movements included direct investments involving the control and administration of a company.

The ECJ then ruled that the disputed domestic provisions involved unequal treatment of nationals of other Member States and restricted the freedom of movement of capital.

With reference to possible impairments of the freedom of establishment under Art. 43 EEC by the mentioned domestic legislation, in the mentioned *Golden Share cases* the ECJ considered that, in the cases of Portugal and France, restrictions on the freedom of establishment are direct consequence of the obstacles to the movement of capital and that, in the case of Belgium, as for restrictions on the movement of capital, it is possible to justify possible restrictions to the freedom of establishment.

In the *Golden Share* cases of 2003, *Commission v. United Kingdom* (case 98/01) and *Commission v. Spain* (case 463/00), the ECJ, following the case *Alpine Investments* (case 384/93), ruled that non-discriminatory measures which hinder access to the market breached Art. 63(1) TFEU unless they could be justified.

The mentioned case *Commission v. United Kingdom* concerned the 1986 'Airport Act' that privatised the British Airport Authority and permitted the Secretary of State for Transport to retain a special share allowing its owner to block certain business decisions within such company.

In such a case, the ECJ stated that Art. 63 TFEU would go 'beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets' and pointed out that although national rules limiting the acquisition of shareholdings over a certain level applied without distinction to both residents and non-residents, 'it must nonetheless be held that they affect the position of a person acquiring a shareholding as such and are this liable to deter investors from other Member States from making such investments and, consequently, affect access to the market'.

The ECJ had therefore ruled that the government's golden share was to be considered a restriction on the free movement of capital.

The ECJ has also ruled cases on possible indirect discriminatory national rules, even though such decisions are rarer than those on possible direct discriminatory national provisions.

In the case *Hollman* (case 443/06), the ECJ found to be an unjustified breach of Art. 63(1) TFEU the Portuguese national law which imposed to non-residents a higher rate of capital gains tax than residents, that being considered an indirect discriminatory national legislation.

4. *Restrictions on the Free Movement of Capitals and Payments*

4.1 *Third-Country Restrictions (grandfathered provisions)*

The free movement of capital and payments between Member State and third countries is subject to potential restrictions both provided by the TFEU or established by the case law of the ECJ and based on exceptions contained in the TFEU.

The most important restriction to the free movement of capital and payments is the 'grandfathered restrictions', provided by Art. 64(1) TFEU.

It allows Member State to continue to apply restrictions which existed with regard to third countries involving direct investment, including in real estate establishment, the provisions of financial services or the admission of securities to capital markets (but not payments) in force on 31 December

1993 (or, in case of Bulgaria, Estonia and Hungary, on 31 December 1999).

4.2 *Other Third-Country Restrictions*

Specific restrictions are provided by TFEU with reference to movements of capital and payments to and from third countries.

Another restriction is provided by Art. 64(2) TFEU, stating that:

> Art. 64 TFUE
>
> […]
>
> 1. Whilst endeavouring to achieve the objective of free movement of capital between Member State and third countries to the greatest extent possible and without prejudice to the other Chapter 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 market.

Furthermore, Art. 64(3) TFEU allows the Council, acting unanimously in accordance with the special legislative procedure, and after consulting the Parliament, to adopt measures which 'constitute a step backwards in Union law as regards the liberalization of the movement of capital from or to third countries'.

The Lisbon Treaty added a relevant important provision under Art. 65(4) TFEU providing that:

> Art. 65 TFUE
>
> […]
>
> 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.
>
> […]

The above-mentioned provision could be considered unusual, since it allows the Council, and not the ECJ, to rule on the legality of national measures.

Other restrictions concerning transaction to and from third-countries are provided by Art. 66 TFEU and concerns balance of payment.

It allows the Council to take safeguard measures for up to six months, 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'.

4.3 *Tax Restrictions*

Many cases under Art. 63 TFEU concern national measures on direct taxation.

The cases focused on the question whether the taxation rule constituted a restriction on free movement; more recently the cases are discussed on a discrimination-base analysis and the ECJ describes any such discriminatory treatment as a restriction on the free movement of capital which is, in principle, forbidden by Art. 63(1) TFEU.

In the *Sandoz* case (439/97) the ECJ applied a restriction-based approach with respect to tax rules.

The case concerned the Austrian national rules providing that, where a natural or legal person resident in Austria entered into an agreement outside Austria for a loan not set down in a written instrument and the existence of the loan was recorded by an entry in the borrowers' book of and record account, he was liable to pay a stamp duty.

The ECJ found that provision to be discriminatory according to the place where the loan was contracted and stated that discrimination of that nature was likely to deter residents from contracting loans with persons established in other Member States.

According to the ECJ such national provisions constituted a restriction to the principle of the free movement of capital within the meaning of Art. 73b(1) TFEU.

The ECJ decisions also concerned the question whether a dual fiscal

burden through double taxation violated or not the Internal Market and in particular Art. 63 TFEU, considering that double taxation exists where two countries claim tax sovereignty over a cross-border situation.

In the case *Verkooijen* (case 35/98), a Dutch employee of a Belgian company claimed that the company shares he received as part of an employee's saving plan were both subject to dividend tax in Belgium and to income tax in the Netherland, despite the fact that the Dutch rules excepted dividends received from Dutch companies from income tax. He therefore pointed out that the limitation of the income tax exemption to national companies violated the free movement of capital.

The ECJ ruled that such legislative provision had the effect of dissuading nationals of a Member State from investing their capital in companies having their seat in another Member State. According to the ECJ such a provision had a restrictive effect as regards companies established in other Member States.

Also in the case *Test Claimants (II)* (case 35/11) the ECJ ruled that since European Union law 'as it currently stands does not lay down any general criteria for the attribution of areas of competence between the Member State in relation to the elimination of double taxation within the European Union', each Member State remains free to organise its system for taxing distributed profits, provided, however, that the system in question does not entail discrimination prohibited by the TFEU.

In its decisions, the ECJ adopted an international model based on the fiscal sovereignty of the Member State.

In this context, Member States are only prevented from adopting domestic discriminatory measures, since a direct tax may violate Art. 63 TFEU in case it offers a less favourable treatment in foreign capital.

Therefore, any Member State can apply its tax system to capital being within its jurisdiction, but it has to maintain a neutral and coherent domestic tax system.

4.4 *Prudential Restrictions*

Moreover, certain prudential measures are provided by Art. 65(1b), stating that:

> Art. 65 TFUE
>
> 1. The provisions of Article 63 shall be without prejudice to the rights of Member States:

> […]
>
> (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 the grounds of public policy or public security.
>
> […]

These measures must not represent a means of arbitrary discrimination or a distinguished restriction in the meaning of Art. 65(3) TFEU.

In this context, the ECJ ruled that the difficulty in blocking capital once it has entered a member State may justify various treatment of transactions involving foreign direct investment.

In the case *Église de Scientologie* (case 54/99), the ECJ had to decide whether Article 73d(1)(b) of the Treaty, which provides that Article 73b thereof is without prejudice to the right of Member States to take any measures which are justified on the grounds of public policy or public security, permits national legislation to require prior authorisation for direct foreign investments which are such as to represent a threat to public policy or public security.

The ECJ clarified that the provision of national law which submits a direct foreign investment to prior authorisation constitutes a restriction on the movement of capital within the meaning of Article 73b(1) TFEU, but that the question arsing was whether Article 73d(1)(b) of the Treaty (which provides that Article 73(b) thereof is without prejudice to the right of Member States to take any measures which are justified on grounds of public policy or public security) permits national legislation to require prior authorisation for direct foreign investments which are such as to represent a threat to public policy or public security.

To this aim the ECJ firstly stated that while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, those grounds must, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, according to the ECJ, public policy and public security may be relied on only if there is a genuine and

sufficiently serious threat to a fundamental interest of society (see, to this effect, the *Rutili* case). Secondly, the ECJ pointed out that measures which restrict the free movement of capital may be justified on public-policy and public-security grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.

The ECJ also expressed that, in case of direct foreign investments, the difficulty in identifying and blocking capital once it has entered a Member State may make it necessary to prevent, at the outset, transactions which would adversely affect public policy or public security. It follows that, in the case of direct foreign investments which constitute a genuine and sufficiently serious threat to public policy and public security, a system of prior declaration may prove to be inadequate to counter such a threat.

In this case, however, the essence of the system in question is that prior authorisation is required for every direct foreign investment which is 'such as to represent a threat to public policy [and] public security, without any more detailed definition'. Thus, the investors concerned are given no indication whatever as to these specific circumstances in which prior authorisation is required.

The ECJ clarified that such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Art. 73(b) TFEU. The ECJ therefore ruled that 'The answer to the question submitted must therefore be that Article 73d(1)(b) of the Treaty must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required.'

That being so, the system established seems to be contrary to the principle of legal certainty.

4.5 *Public Security Restrictions*

Restrictive measures may be taken by Member States also pursuant to Art. 52(1) TFEU, which allows Member States to take restrictive measures if justified by public policy or public security reasons.

The ECJ clarified that exceptions to the fundamental principles of the TFEU must be allowed narrowly and in a suitable, proportionate and

transparent way, subject to judicial review, as decided in the case Église de Scientologie (case 54/99).

In the case *Albore* (case 423/98) the ECJ ruled that the requirements of public security cannot justify derogation from the TFEU rules such as the freedom of capital movements unless the principle of proportionality is observed, which means that any derogation must remain within the limits of what is appropriate and necessary to achieve the aim in view and must not go beyond what is necessary to secure the objective.

The ECJ also expressed that under Article 73d(3) of the EEC Treaty the requirement of public security may not be relied on to justify measures constituting a means of arbitrary discrimination or a disguised restriction on the free movement of capital.

In that regard, according to the ECJ, a mere reference to the requirements of defence of the national territory of the Member State concerned does not fall within the scope of Article 224 of the EEC. It cannot be therefore sufficient to justify discrimination on grounds of nationality against nationals of other Member States regarding access to immovable property on all or part of the national territory of the first State. The Court ruled that the position would be different only if it were demonstrated, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would substantially expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

Moreover, with reference to third countries, in case A (case 101/05), the ECJ declared that the extent to which the Member States are authorised to apply certain restrictive measures on the movement of capital cannot be determined without taking account of the fact that movements of capital to or from third countries take place in different legal contexts from that which occurs within the Community, but the third country has to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where the reason would not constitute a valid justification for a restriction on capital movements between Member State.

By means of the same decision, the ECJ acknowledged that the liberalisation of the movement of capital with third countries may pursue objectives other than that of establishing the internal market. However, it stated that the Member States enshrined the principle of free movement of capital in the same article of the EEC and in the same terms for movements of capital taking place within the Community and those relating to relations

with third countries, whilst at the same time providing safeguard clauses and derogations which apply specifically to the movement of capital to or from third countries.

In addition, Art. 75 TFUE, as redrafted after Lisbon Treaty, allows the European Parliament and Council to define a framework for administrative measures, aimed at preventing and combating terrorism and related activities, concerning capital or payments, such as freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

4.6 *Other Restrictions established by the ECJ Case Law*

The ECJ has pointed out that the free movement of capital and payment may be substantially restricted only by national rules justified by reasons related to Art. 65(1) TFEU or by 'overriding requirements of the general interest' and which are applicable to all persons and undertakings pursuing an activity in the territory of the host member State. Furthermore, 'in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality' (case 367/98, *Commission v. Portugal*).

The ECJ case law has considered to be important and prevalent interests those concerning services and supplies of general interests, such as the postal service in the case *Commission v. the Netherlands* (joined cases 282/04 and 283/04), or the public telecommunications network service in the case *Radiosistemi* (case 429/00), or services in the energy sector, as in the case *Commission v. Spain* (case 463/00).

Other justifications have been found in the measures aimed to protect national values, as broadly considered. In the case *Commission v. Austria* (case 10/10), the ECJ recognised that the promotion of research and development could constitute a public interest requirement.

The ECJ also ruled that public interest requirements may be found in the protection of interest of third parties. In the case *VBV* (case 39/11) the ECJ recognised 'the need to guarantee the stability and security of the assets administrated by an undertaking for collective investment created by a severance fund, in particular by the adoption of prudential rules' as a public interest requirements.

Since there is not a fixed definition of general interest requirements in the TFEU, the list is intended to be widely expanded by the ECJ case law.

5. *Free movement of Capital and Payments and the other fundamental Freedoms*

The TFEU considers the possibility of overlap between the freedom of capital movement and the other fundamental freedoms.

With reference with the freedom of establishment, Art. 49 TFEU provides that the freedom of establishment is 'subject to the provisions of the Chapter relating to capital', while the provisions on capital 'shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties'.

The ECJ seems to prefer not to apply both the freedom simultaneously.

As a matter of example, when the ECJ manages a case in which the investors has gained 'definitive influence' in the foreign company, the freedom of establishment applies and the exam of the freedom of capital movement is no more necessary (case 196/04, *Cadbury Schweppes*).

Furthermore, where a national restriction concerns 'ordinary shareholder', the ECJ ruled that free movement of capital will apply and that there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment', where the establishment restriction was 'a direct consequence of the obstacles to the free movement of capital' to which it is 'inextricably linked' (case 367/98, *Commission v. Portugal*).

In the event of cases concerning *intra*-Union capital movements, the ECJ has recognised the possibility to have a parallel application of both the freedoms. When, instead, a third-country restriction is concerned, only the free movement of capital should be apply (as in case 35/11, *Test Claimants (II)*).

The ECJ explained this external limitation of Art. 63 TFEU in the mentioned case *Test Claimants (II)*), where it stated that 'since the Treaty does not extend freedom of establishment to third countries, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom'.

The relation between free movement of capital and payments and free movement of service is instead contained in Art. 58(2) TFEU, which provides that

Art. 58 TFUE

[…]

1. The liberalization of banking and insurance services connected with movement of capital is to be effected in step with the liberalization of movement of capital.

[…]

The ECJ used to apply the Treaty provisions on services together with those on capital.

Most recently, the ECJ seems to prefer to examine the 'centre of gravity' of the national rules and then applies either the provisions on services or those on capital, as the case may be (case 452/04, *Fidium Finanz*).

In the mentioned *Fidium Finanz* case, the ECJ ruled that 'contrary to the chapter of the Treaty concerning the free movement of capital, the chapter regulating the freedom to provide services does not contain any provision which enables service providers in no-member countries and established outside the European Union to rely on those provisions'. Thus, according to the ECJ, the question concerned 'the delimitation of and the relationship between, first, the Treaty provisions concerning the freedom to provide services and, second, those governing the free movement of capital'. Where a national measure relates to the freedom to provide services and the free movement of capital at the same time, it is necessary to consider to what extent the exercise of those fundamental liberties is affected and whether, in the circumstances of the main proceedings, one of those prevails over the other'.

The ECJ also pointed out that it will examine 'the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it'.

In the *Fidium Finanz* case, using the centre-of-gravity approach, the ECJ found that the freedom of services was predominant and the restrictions on capital were a consequence of the restrictions imposed on the provisions of services.

The free movement of capital and payment, by means of the relevant case law to be developed by the ECJ, is therefore still adjusting its scope, especially with respect to its relationships with other freedoms.

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Abstract

Chapter 5 – The free movement of capital and payments has been very important for the building of the Internal Market, empowering the growth of an integrated and competitive financial market and services in the European Union.

Even thought it was not liberalized together with the other three fundamental freedoms, the free movement of capital and payments is currently a relevant freedom, covering both discriminatory and non-discriminatory restrictions.

It is the sole freedom which can apply to intra-Union as well extra-Union restrictions and it covers also the relationships between Member States and third countries.

The scope and the level of liberalization of the freedom of capital and payments movements, especially with reference to intra-Union transactions, is intended to be further strengthened, also by means of the relevant case law to be developed by the ECJ.

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The book is a short introduction to the EU Internal Market Law and illustrates and analyzes the evolution of the Internal Market regulation and its basic concepts and features (Ch. 1 – Raffaele Torino), the free movement of goods (Ch. 2 – Federico Raffaele), the free movement of persons (Ch. 3 – Filippo Palmieri), the free movement of services and the freedom of establishment (Ch. 4 – Arianna Paoletti) and the free movement of capital and payments (Ch. 5 – Ilaria Ricci).

Roma TrE-Press
2017