

FREEDOM OF ESTABLISHMENT AND TO PROVIDE SERVICES

1. CENTRAL ISSUES

- i. In addition to the category of workers, the EC Treaty has two separate chapters on self-employed persons who move on a permanent or temporary basis between Member States. These are the chapters on freedom of establishment and freedom to provide services.
- ii. The central principles governing establishment and services are laid down in the EC Treaty and have been developed through case law. Important developments have also been brought about through secondary legislation in sectors such as insurance, broadcasting, financial services, electronic commerce, telecommunications, and other 'services of general economic interest'. However, with the exception of the two general directives mentioned in (iii), this chapter focuses on the broad constitutional principles applicable to every sector and not on the particularities of the secondary legislation in specific sectors.
- iii. Two important general pieces of secondary legislation dealing with services and establishment were adopted in 2005 and 2006 respectively. In 2005, a consolidating Directive on the recognition of professional qualifications replaced most of the previous general and sectoral legislation on this issue.¹ And in 2006, after a lengthy and politically controversial debate, a general Directive on services in the internal market was adopted.²
- iv. Articles 43–48 (ex Articles 52–58) EC on freedom of establishment require the removal of restrictions on the right of individuals and companies to maintain a permanent or settled place of business in a Member State. Establishment is defined as 'the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'.³
- v. Articles 49–55 (ex Articles 59–66) EC on the free movement of services require the removal of restrictions on the provision of services between Member States, whenever a cross-border element is present. This element can result from the fact that the provider

¹ Dir. 2005/36/EC of the European Parliament and of the Council of 7 Sept. 2005 on the recognition of professional qualifications [2005] OJ L255/22.

² Dir. 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market [2006] OJ L376/36.

³ Case C-221/89 *R. v. Secretary of State for Transport, ex p. Factortame* [1991] ECR I-3905, para. 20.

is not established in the State where the services are supplied, or that the recipient has travelled to receive services in a Member State other than that in which he or she is established. A movement of services within the scope of Articles 49–50 (ex Articles 59–60) may also occur without the provider or the recipient moving, e.g., where the provision of the service takes place by telecommunication.⁴

- vi. The Treaty provisions governing the free movement of services are residual, in that they apply only in so far as the provisions concerning capital,⁵ persons, or goods do not apply. Nonetheless it is often difficult, in contexts such as broadcasting or telecommunications, to separate the issues concerning goods from those concerning services,⁶ and several of the Treaty freedoms are often affected by a single national measure.⁷
- vii. Although the principle of non-discrimination in Article 12 (ex Article 6) EC is an important aspect of these two Treaty chapters,⁸ the ECJ has ruled, just as in the case of the other internal market freedoms, that non-discriminatory obstacles are also *prima facie* caught by the relevant Treaty provisions. However, the concept of 'discriminatory measures' is not sharply defined, and the distinction between discriminatory and non-discriminatory measures is often unclear.
- viii. In addition to the Treaty-based exceptions to freedom of movement on grounds of public policy, security, and health, the ECJ has ruled—just as in the cases of goods and workers—that a range of other public-interest justifications may be invoked by Member States to restrict the free movement of services and freedom of establishment.

2. DIFFERENCES AND COMMONALITIES BETWEEN THE FREE MOVEMENT OF PERSONS, SERVICES, AND ESTABLISHMENT

(a) COMPARING THE TREATY CHAPTERS

There are several points of similarity between the various chapters on the free movement of persons and services, including also now the Treaty provisions on EU citizenship. Advocate General Mayras in *Van Binsbergen* pointed out that the principle of equal treatment on grounds of nationality underpinned workers, services, and establishment alike.⁹ Articles 39 (ex Article 48) on workers and 43 (ex Article 52) on establishment are comparable, in that each requires equal treatment for persons who are *settled* in a Member State, having exercised

⁴ See, e.g., Case C-384/93 *Alpine Investments BV v. Minister van Financiën* [1995] ECR I-1141; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

⁵ See, e.g., Case C-423/98 *Albore* [2000] ECR I-5965.

⁶ See, e.g., Case C-390/99 *Canal Satélite Digital v. Administración General del Estado* [2002] ECR I-607, paras. 31–33. For a case in which the ECJ treated the goods and services dimensions of a restriction on alcohol advertising separately, but reached the same conclusion in each case, see Case C-405/98 *Konsumentombudsmannen v. Gourmet International Products* [2001] ECR I-1795. For fishing permits as services rather than goods see Case C-97/98 *Jägerskiöld v. Gustafsson* [1999] ECR I-7319. For an early case on the relationship between goods and services see Case 155/73 *Sacchi* [1974] ECR 409.

⁷ See, e.g., Case C-150/04 *Commission v. Denmark* 30 Jan. 2007; Case C-522/04 *Commission v. Belgium* 3 Oct. 2006, *Stix-Hackl AG*, concerning taxation of pension benefits and insurance.

⁸ Case 2/74 *Reyners v. Belgium* [1974] ECR 631, paras. 15–16.

⁹ Case 33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

their freedom of movement,¹⁰ the essential difference being whether they are working in an employed or a self-employed capacity.¹¹ The overlap between workers (Article 39) and temporary service providers (Article 49) can be seen in a series of cases concerning posted workers in which the ECJ distinguished the two by ruling that 'workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work'.¹²

The similarities between establishment and services are evident when considering at what stage a self-employed person providing regular services into or within a Member State may be considered to be sufficiently connected with that State to be established, rather than merely providing services there.¹³ The factors which go to distinguish the temporary provision of services from the exercise of the right of establishment in a Member State were addressed by the ECJ in *Gebhard*.¹⁴

25. The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of Member State other than his state of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see *Reyners* para. 21).

26. In contrast, where the provider of services moves to another Member State, the provision of the chapter on services, in particular the third paragraph of Article 60, envisage that he is to pursue his activity there on a temporary basis.

27. As the Advocate General has pointed out, the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.

The crucial features of establishment are the 'stable and continuous basis' on which the economic or professional activity is carried on, and the fact that there is an established professional base within the host Member State.¹⁵ For the provision of services, the temporary nature of the activity is to be determined by reference to its 'periodicity, continuity and regularity', and providers of services will not be deemed to be 'established' simply by virtue of the

¹⁰ See, e.g., Case C-345/05 *Commission v. Portugal* [2006] ECR I-10633; Case C-104/06 *Commission v. Sweden*, 18 Jan. 2007, dealing simultaneously with Arts. 39 and 43 on workers and establishment, and Art. 18 on citizenship.

¹¹ See Mayras AG in Case 2/74 *Reyners*, n. 8 above, and the ECJ in Case C-107/94 *Asscher v. Staatssecretaris van Financiën* [1996] ECR I-3089. See also Case C-268/99 *Jany v. Staatssecretaris van Justitie* [2001] ECR I-8615, paras. 68-70, in the context of the EU-Poland Association Agreement.

¹² See, e.g., Case C-49/98 *Finalarte Sociedade Construção Civil v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I-7831, paras. 22-23.

¹³ See Case 205/84 *Commission v. Germany* [1986] ECR 3755, para. 22; Case 33/74 *Van Binsbergen*, n. 9 above, para. 13. See also the Opinion of Jacobs AG in Case C-76/90 *Säger v. Dennemeyer & Co. Ltd.* [1991] ECR I-4221.

¹⁴ Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

¹⁵ Where a person or company establishes in a Member State to provide services to recipients there for an indefinite period, this does not fall within the Treaty provisions on freedom to provide services: Case C-70/95 *Sodemare v. Regione Lombardia* [1997] ECR I-3395.

fact that they equip themselves with some form of infrastructure in the host Member State.¹⁶ The ECJ's graduated distinction between establishment and temporary service-provision has been adopted by the consolidating Directive on the recognition of professional qualifications in 2005.¹⁷

In the past, it was suggested that Article 49 was more concerned with liberalizing the mobility of services and setting up a single market,¹⁸ and had more in common with the Treaty provisions on free movement of goods¹⁹ than with the Treaty provisions on workers and establishment, which were based primarily on the principle of non-discrimination. In recent years, however, a robust approach has been adopted to the rights of establishment too, placing as much emphasis on liberalization as on equal treatment, and thus bringing the law on establishment and services closer together.²⁰ It will be evident from the discussion in this chapter that the gradual extension of EC rules to cover genuinely non-discriminatory restrictions on establishment and services has reached into sensitive areas of national policy, often with a deregulatory emphasis, and that many controversies have arisen as a result.

(b) ARE THE FREEDOMS HORIZONTALLY APPLICABLE?

We saw in Chapter 21 that the ECJ ruled that, unlike Article 28 on the free movement of goods, the provisions of Article 39 are binding not only on the State but also on private bodies.²¹ In the field of services, the ECJ ruled in the early case of *Walrave and Koch* that the Treaty rules applied not only 'to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services'.²² It remains unclear however, even after the case of *Angonese* in the field of free movement of workers,²³ whether the Treaty provisions on establishment and services are fully horizontally applicable, in the sense of imposing legal obligations on all individuals and not only on powerful, self-regulating collective actors such as sporting organizations, which possess powers akin to public law. In *Wouters* the ECJ applied the *Walrave* ruling to a regulatory measure adopted by the Netherlands Bar Council concerning partnerships between barristers and accountants, but gave no further guidance on the applicability of the Treaty rules to purely individual private conduct.²⁴

¹⁶ Case C-215/01 *Schnitzer* [2003] ECR I-14847. Further, providers of services cannot be made subject to a particular type of mandatory 'employment' relationship, since that would deprive them of their self-employed status: see Case C-398/95 *SETTG v. Ypourgos Ergasias* [1997] ECR I-3091; Case C-255/04 *Commission v. France* [2006] ECR I-5251.

¹⁷ See Art. 5(2) of Dir. 2005/36 [2005] OJ L255/22, discussed below.

¹⁸ See Warner AG in Case 52/79 *Procureur du Roi v. Debaue* [1980] ECR 833, 872.

¹⁹ See Jacobs AG in Case C-76/90 *Säger*, n. 13 above, 4234-4235, and Gulmann AG in Case C-275/92 *HM Customs and Excise v. Schindler* [1994] ECR I-1039, 1059; J. Snell, *Goods and Services in EC Law* (Oxford University Press, 2002).

²⁰ See, e.g., Case C-212/97 *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; Case C-55/94 *Gebhard*, n. 14 above.

²¹ Case C-415/93 *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman* [1995] ECR I-4921, paras. 83 and 84; Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, para. 32.

²² Case 36/74 *Walrave and Koch* [1974] ECR 1405.

²³ Case C-281/98 *Angonese*, n. 21 above.

²⁴ Case C-309/99 *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para. 120. See also Case C-411/98 *Ferlini v. CHL* [2000] ECR I-8081, para. 50.

(c) THE 'OFFICIAL AUTHORITY' EXCEPTION

Article 45 EC, which is extended by Article 55 to cover the chapter on services, states that the provisions of the chapter on freedom of establishment shall not apply 'so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority'. This provision has a similar role to that of the public-service derogation for workers in Article 39(4). Advocate General Mayras defined it as follows:

Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens.²⁵

The wording of Article 45 refers to those 'activities' which are connected with the use of official power, rather than to professions or vocations within which official authority might, under certain circumstances, be exercised. In *Reyners*, the ECJ was asked whether the whole of the legal profession of *avocat* was exempt from the Treaty rules, by reason of the fact that it comprised activities connected with the exercise of such authority. According to the Luxembourg Government, the whole profession should be excepted because it was 'connected organically' with the public service of the administration of justice.

Case 2/74 Reyners v. Belgium
[1974] ECR 63

[Note ToA renumbering: Arts. 52 and 55 are now Arts. 43 and 45 respectively]

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43. Having regard to the fundamental character of freedom of establishment and the rule on equal treatment with nationals in the system of the Treaty, the exceptions allowed by the first paragraph of Article 55 cannot be given a scope which would exceed the objective for which this exemption clause was inserted.

44. The first paragraph of Article 55 must enable Member States to exclude non-nationals from taking up functions involving the exercise of official authority which are connected with one of the activities of self-employed persons provided for in Article 52.

45. This need is fully satisfied when the exclusion of nationals is limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority.

46. An extension of the exception allowed by Article 55 to a whole profession would be possible only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.

47. This extension is on the other hand not possible when, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole.

²⁵ Case 2/74 *Reyners*, n. 8 above, 664.

Ultimately the Court ruled that the professional activities of an *avocat*, involving regular and official contact and even compulsory co-operation with the courts, did not amount to the necessary connection with the exercise of official authority since it left the discretion of judicial authority and the free exercise of judicial power intact.

The ECJ has continued to interpret the official-authority exception narrowly in response to attempts by Member States to invoke it for a range of somewhat unlikely professions.²⁶ In *Thijssen*, the Court ruled that the post of commissioner of insurance companies and undertakings was not covered by the exception, since although the post involved monitoring companies and reporting on possible infringements of the penal code, the power to prevent insurance companies from implementing certain decisions was not a definitive or final one.²⁷

(d) THE PUBLIC POLICY, SECURITY, AND HEALTH EXCEPTIONS

Article 46 in the chapter on establishment and Article 55 in the chapter on services provide that the provisions of those chapters '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'. In their application to natural persons these derogations are regulated, together with their application to workers, by the provisions of Directive 2004/38.²⁸ In their application to companies the derogations are governed by the Treaty and by the general principles of Community law,²⁹ and more recently by the relevant provisions of the Services Directive.³⁰ The general principles of Community law articulated by the ECJ include the principles of non-discrimination and of proportionality, which are also part of the test for justifying public-interest restrictions on freedom of movement which have been judicially developed alongside the Treaty derogations.³¹ Further, the ECJ has ruled that Article 46 does not permit a Member State to exclude an entire economic sector from the application of the principles on freedom of establishment and services.³²

(e) LEGISLATION GOVERNING ENTRY, RESIDENCE, AND EXPULSION

As seen in Chapter 21, Directive 2004/38 governs the terms and conditions of entry of all EU citizens and their families into a host Member State, as well as their right to remain there after

²⁶ Case C-306/89 *Commission v. Greece* [1991] ECR I-5863 on traffic accident experts; Case C-272/91 *Commission v. Italy* [1994] ECR I-1409 on operating a computerization system for a national lottery; Case C-263/99 *Commission v. Italy* [2001] ECR I-4195 on transport consultants; Case C-114/97 *Commission v. Spain* [1998] ECR I-6717; Case C-355/98 *Commission v. Belgium* [2000] ECR I-1221, and Case C-283/99 *Commission v. Italy* [2001] ECR I-4363, on private security activities.

²⁷ Case C-42/92 *Thijssen v. Controledienst voor de Verzekeringen* [1993] ECR I-4047.

²⁸ See Ch. 21, sect. 8.

²⁹ For examples of the application of Arts. 46 and 55 to companies see Case 3/88 *Commission v. Italy* [1989] ECR 4035; Case 352/85 *Bond van Adverteerders v. Netherlands* [1988] ECR 2085; Case C-114/97 *Commission v. Spain* [1998] ECR I-6717; Case C-355/98 *Commission v. Belgium* [2000] ECR I-1221. For a failed attempt see Case C-171/02 *Commission v. Portugal* [2004] ECR I-5645.

³⁰ For further discussion see sect. 6(b) below.

³¹ See more generally on the role of EC law in a situation which was not covered by the Treaty's free-movement provisions, given the special geographical status of the British Channel islands, Case C-171/96 *Pereira Roque v. Governor of Jersey* [1998] ECR I-4607.

³² Case C-496/01 *Commission v. France* [2004] ECR I-2351.

having pursued an economic activity, and the conditions under which their rights may be restricted or revoked.³³ This includes self-employed persons and service providers, so that the discussion of Directive 2004/38 in sections 6 and 8 of Chapter 21 is equally relevant here.

The provisions of the earlier legislation governing self-employed persons, Directive 73/148, which regulated rights of 'abode' and rights of temporary residence for the duration of the services, have been replaced with the simple right of residence for self-employed persons in Article 7(a) of Directive 2004/38. Further, as we shall see in greater detail in Chapter 23 on citizenship, even where a self-employed person is no longer engaged in economic activity, the right of residence as an EU citizen continues unless that person has, through lack of sufficient resources, become an unreasonable burden on the host State.

3. THE RIGHT OF ESTABLISHMENT

Article 43 EC provides:

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

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

Paragraph one requires the *abolition of restrictions* on freedom of primary and secondary establishment, whereas paragraph two provides for the right to pursue self-employed activities *on an equal footing* with the nationals of the Member State of establishment. The reference to capital acknowledges that there is a separate chapter on the free movement of capital, which has been subject to a different and more gradual regime of liberalization.³⁴

Article 43 on its face appears to give rights only to persons in a Member State other than their Member State of nationality. Secondly, it appears to prohibit discrimination, and to imply that its requirements are satisfied if the person exercising the right of establishment is treated in the same way as a national. However, we shall see that Article 43 has been given a broader reading on these two points. First, nationals may in appropriate circumstances rely on Article 43 against their own State, and secondly Article 43 prohibits not merely unequal treatment but also unnecessary obstacles to freedom of establishment.

Article 44 originally required the Council to draw up a General Programme for the abolition of restrictions on establishment (which it did in 1961³⁵) and to issue directives to attain freedom for particular activities. Article 47 contains the requirement for the Council to issue directives—by qualified majority other than where the existing principles governing

³³ Dir. 2004/38 [2004] OJ L158/77, replaces the previously existing Dir. 73/148 [1973] OJ L172/14, in this respect.

³⁴ See Ch. 20.

³⁵ OJ Spec. Ed., Second Ser., IX.

professional training and access are being amended³⁶—for the mutual recognition of diplomas and other qualifications, and Article 48 places companies in the same position as natural persons for the purpose of the application of this chapter of the Treaty.

(a) THE EFFECT OF ARTICLE 43

In 1974 in *Reyners*, the ECJ ruled that Article 43 EC was directly effective, despite the fact that the conditions for direct effect set out in *Van Gend en Loos* were arguably not met,³⁷ and despite the Council's failure to adopt the necessary implementing legislation envisaged by the Treaty provisions. Such legislation had not yet been adopted at the time of *Reyners*, partly on account of the slow progress of legislation in the Council in the aftermath of the Luxembourg Accords, and partly on account of the opposition within Member States to the process of opening the professions, and in particular the legal profession, to non-nationals.³⁸

Reyners was a Dutch national who had obtained his legal education in Belgium, and who was refused admission to the Belgian Bar solely because he lacked Belgian nationality. The ECJ ruled that, despite the Treaty requirement that directives should be adopted, Article 43 laid down a precise result which was to be achieved by the end of the transitional period, namely the requirement of non-discrimination on grounds of nationality. The fulfillment of this result had to be made easier by, but was not made dependent on, the implementation of a programme of progressive measures.³⁹ Thus he could invoke Article 43 directly. The ECJ acknowledged, however, that the directives had 'not lost all interest since they preserve an important scope in the field of measures intended to make easier the effective exercise of the right of freedom of establishment'.⁴⁰

However, even before the relevant secondary legislation had begun to be adopted, it was argued to the ECJ that where a national restriction was based not on nationality but on the adequacy of qualifications, Article 43 could be relied on by an EC national seeking to practise a profession in another Member State. In *Thieffry*, a Belgian national, who obtained a doctorate in law in Belgium and practised as an advocate in Brussels, subsequently obtained French university recognition of his qualifications as equivalent to a degree in French law, and obtained a certificate of aptitude for the profession of *avocat*.⁴¹ He was refused admission to the training stage as an advocate at the Paris Bar on the ground that he lacked a degree in French law. According to the ECJ, the responsible professional bodies had a duty to ensure that their practices were in accordance with Treaty objectives:

Consequently, if the freedom of establishment provided for by Article 52 can be ensured in a Member State either under the provisions of the laws and regulations in force, or by virtue of the practices of the public service or of professional bodies, a person subject to Community law cannot be denied the practical benefit of that freedom solely by virtue of the fact that, for

³⁶ For discussion of the different voting procedures see the challenge brought to Dir. 98/5 on establishment for lawyers [1998] OJ L77/36 in Case C-168/98 *Luxembourg v. Parliament and Council* [2000] ECR I-9131. For commentary see P. Cabral (2002) 39 *CMLRev.* 129.

³⁷ Case 2/74 *Reyners*, n. 8 above; see Ch. 8 on direct effect.

³⁸ *Ibid.*, Mayras AG, 658.

³⁹ *Ibid.*, para. 26.

⁴⁰ *Ibid.*, para. 31.

⁴¹ Case 71/76 *Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

a particular profession, the directives provided for by Article 57 of the Treaty have not yet been adopted.⁴²

Since Thieffry had already obtained what was recognized in France, for both professional and academic purposes, to be an equivalent qualification, and had satisfied the necessary practical training requirements, the state authorities were not justified in refusing to admit him to the Bar solely on the ground that he did not possess a French qualification, despite the absence of EC directives in the field.⁴³

In subsequent cases the ECJ went further still and ruled that Article 43 precluded the competent national authorities from simply refusing, without further explanation, to allow nationals of another Member State to practise their trade or profession on the ground that their qualification was not equivalent to the corresponding national qualification. Instead, the Treaty provisions imposed specific, positive obligations on national authorities and professional bodies to take steps to secure the free movement of workers and freedom of establishment, even in the absence of Community or national legislation providing for equivalence or for the recognition of qualifications.

In *Heylens* the ECJ ruled, in the case of a Belgian football trainer working in France whose application for recognition of the equivalence of his Belgian diploma was refused by the French Ministry of Sport, that Member States were entitled, in the absence of harmonizing directives, to regulate the knowledge and qualifications necessary to pursue a particular occupation. However:

[T]he procedure for the recognition of equivalence must enable the national authorities to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. That assessment of the equivalence of the foreign diploma must be effected exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training which the diploma certifies that he has carried out.⁴⁴

Further, where employment was dependent on possession of a diploma, it must be possible for a national of a Member State to obtain judicial review of a decision of the authorities of another Member State, and to ascertain the reasons for refusing to recognize the equivalence of a diploma.

In *Vlassopoulou*, a Greek national who had obtained a Greek law degree and had practised German law for several years in Germany applied for admission to the Bar there. Her authorization to practise was rejected on the ground that she lacked the necessary qualifications because she had not passed the relevant German examinations. The ECJ began by ruling that even the non-discriminatory application of national qualification requirements could hinder the exercise of freedom of establishment.

⁴² *Ibid.*, para. 17.

⁴³ See also Case 11/77 *Patrick v. Ministre des Affaires Culturelles* [1977] ECR 1199.

⁴⁴ Case 222/86 *UNETEF v. Heylens* [1987] ECR 4097, para. 13.

**Case 340/89 Vlassopoulou v. Ministerium für Justiz, Bundes und
Europaangelegenheiten Baden-Württemberg**
[1991] ECR 2357

[Note ToA renumbering: Art. 52 is now Art. 43]

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16. Consequently, a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.

Thus the national authorities must consider any education and training received by the holder of the diploma or certificate, and must compare the knowledge and skills acquired with those required by the domestic qualification.⁴⁵ If they are found to be equivalent, the State must recognize the qualification, and if they are not so found, the State must assess whether any knowledge or practical training the person may have acquired in the host Member State is sufficient to make up for what was lacking in the qualification.

Vlassopoulou highlights the extent to which the effectiveness of Article 43 was bolstered by the ECJ in the years following *Reyners*, which had held that in the absence of legislation only the non-discrimination 'core' of the Article was directly effective. By the time of *Vlassopoulou* it had been held that, despite the diversity of national educational and training systems and despite the lack of EU co-ordinating legislation, Article 43 imposed a precise obligation on national authorities to examine thoroughly the basis for the qualification held by a Community national, to inform the person concerned of the reasons if the qualification is deemed not to be equivalent, and to respect their rights in the process. The effect was that a Member State could no longer simply refuse someone entry to a profession or to practise a trade solely on the ground that he or she lacked the domestic qualification, even where there was as yet no domestic recognition of the equivalence of the foreign qualification.⁴⁶

The approach adopted by the ECJ in *Vlassopoulou* closely reflected the provisions of Council Directive 89/48 on the mutual recognition of higher-education diplomas which had been adopted around that time,⁴⁷ but not in time to be applicable in the case of *Vlassopoulou*. Directive 89/48 has since been replaced by the consolidating Directive 2005/35, which embodies the same approach and the same principles. Further, as we shall see, the principles articulated in the *Vlassopoulou* and *Heylens* cases continue to be applicable to situations which are not covered by the secondary legislation.

⁴⁵ See also Case C-104/91 *Borrell* [1992] ECR I-3001.

⁴⁶ See also Case C-164/94 *Arantis v. Land Berlin* [1996] ECR I-135.

⁴⁷ See n. 222 and text below. For proceedings brought against Italy concerning inadequate implementation of Dir. 89/48 in relation to lawyers see Case C-145/99 *Commission v. Italy* [2002] ECR I-2235.

(b) THE SCOPE OF ARTICLE 43

(i) *Non-discriminatory Restrictions*

It was noted above that the wording of Article 43 emphasizes the requirement of equal treatment of nationals and non-nationals. In some of its earlier case law, such as *Commission v. Belgium*⁴⁸ and *Fearon*,⁴⁹ the ECJ appeared to suggest that in the absence of discrimination, rules which restricted the right of establishment would not violate Article 43. However, in keeping with the pattern of its case law on the free movement of goods, services, and workers, the ECJ moved away from the emphasis on unequal treatment.

In *Klopp*, a German lawyer who was refused admission to the Paris Bar on the sole ground that he already maintained an office as a lawyer in another Member State successfully challenged the rule under Article 43, even though the rule applied equally to nationals and non-nationals alike.⁵⁰ The ECJ ruled that Article 43 specifically guarantees the freedom to set up more than one place of work in the Community, and there were less restrictive ways, given modern transport and telecommunications, of ensuring that lawyers maintain sufficient contact with their clients and the judicial authorities, and obey the rules of the profession.

Klopp was not of itself authority for a general proposition that even non-discriminatory rules may breach Article 43, given that Article 43 expressly guarantees the right to secondary establishment which was being denied in that case,⁵¹ but it demonstrated that freedom of establishment requires more than equal treatment in certain circumstances. In *Wolf*,⁵² *Stanton*,⁵³ and *Kemmler*,⁵⁴ the ECJ ruled that certain indistinctly applicable national rules on social-security exemptions for the self-employed were impermissible, because they constituted an unjustified and excessive impediment to the pursuit of occupational activities in more than one Member State, even though the rules contained no direct or indirect discrimination on grounds of nationality.⁵⁵ Similarly in cases concerning non-discriminatory registration requirements, the ECJ found a violation of Article 43 in the absence of objective justification.⁵⁶

The *Gebhard* ruling gave the clearest indication of the Court's broad interpretation of Article 43, where it indicated that the same principles underpin all of the Treaty provisions on freedom of movement, and stated that the provisions on goods,⁵⁷

⁴⁸ Case 221/85 *Commission v. Belgium* [1987] ECR 719 on clinical biology services.

⁴⁹ Case 182/83 *Fearon v. Irish Land Commission* [1984] ECR 3677, on a residence requirement for exemption from compulsory purchase of land. For other cases concerning nationality and residence restrictions on land use see Case 305/87 *Commission v. Greece* [1989] ECR 1461; Case C-302/97 *Konlev. Austria* [1999] ECR I-2651.

⁵⁰ Case 107/83 *Ordre des Avocats v. Klopp* [1984] ECR 2971.

⁵¹ See also Case 96/85 *Commission v. France* [1986] ECR 1475; Case C-351/90 *Commission v. Luxembourg* [1992] ECR I-3945, condemning other similar single-practice rules for doctors, dentists, and vets. See also Case C-106/91 *Ramrath v. Ministre de la Justice* [1992] ECR I-3351; Case C-162/99 *Commission v. Italy* [2001] ECR I-541.

⁵² Cases 154-155/87 *RSVZ v. Wolf* [1988] ECR 3897.

⁵³ Case 143/87 *Stanton v. INASTI* [1988] ECR 3877.

⁵⁴ Case C-53/95 *INASTI v. Kemmler* [1996] ECR I-704. See also Case C-68/99 *Commission v. Germany* [2001] ECR I-1865, concerning social insurance law affecting artists. Compare however Case C-249/04 *Allard v. INASTI* [2005] ECR I-4535, where the rules were not an impediment to freedom of establishment.

⁵⁵ Case 143/87 *Stanton*, n. 53 above, para. 9.

⁵⁶ Case 292/86 *Gullung v. Conseil de l'Ordre des Avocats* [1988] ECR 111; Case 271/82 *Auer v. Ministère Public* [1983] ECR 2727, para. 18.

⁵⁷ Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837, Case 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649; Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097; Cases C-34-36/95 *de Agostini* [1997] ECR I-3843; Case C-254/98

services,⁵⁸ workers,⁵⁹ and establishment should be similarly construed.⁶⁰ *Gebhard* concerned a German national against whom disciplinary proceedings were brought by the Milan Bar Council for pursuing a professional activity as a lawyer in Italy on a permanent basis. He had set up his chambers using the title *avvocato*, although he had not been admitted as a member of the Milan Bar and although his training, qualifications, and experience had not formally been recognized in Italy. Having established that in the absence of Community rules, Member States may justifiably subject the pursuit of self-employed activities to *bona fide* rules relating to organization, ethics, qualifications, titles, etc., the ECJ continued:⁶¹

It follows, however, from the Court's case law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (*Kraus*, paragraph 32).

There is no mention in this paragraph of a requirement of discrimination, whether direct or indirect. Instead, any national rule which is liable to hinder or make less attractive the exercise of the 'fundamental' freedom of establishment (or any of the other fundamental freedoms) may violate the Treaty unless it is justified by an imperative requirement and applied in a proportionate and non-discriminatory manner.⁶² Moreover while rules which create 'equally applicable' obstacles to freedom of establishment often impose a heavier burden in practice on non-nationals than on nationals,⁶³ not all equally applicable rules are indirectly discriminatory in this way. The essence of *Gebhard*, adopting an obstacle approach rather than a discrimination approach, has been affirmed by the Court on many occasions since.⁶⁴

It should be noted, however, that the discriminatory nature of a restriction is not irrelevant, for several reasons. First, if a restriction on establishment discriminates directly on grounds of nationality, it will, without further question, fall within the scope of the Treaty prohibition (whereas not every non-discriminatory restriction is likely to constitute a sufficient hindrance, by analogy with the case law on goods⁶⁵ and on workers, as in *Graf*⁶⁶). Secondly, it seems that, at least in certain contexts, if a restriction is directly or deliberately discriminatory, the Member State may rely for justification only on the express derogations on grounds of

Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH [2000] ECR I-151. See more generally the discussion in Ch. 19.

⁵⁸ See, e.g., Case C-384/93 *Alpine Investments*, n. 4 above; Cases C-369 and 376/96 *Arblade* [1999] ECR I-8453.

⁵⁹ Case C-415/93 *Bosman*, n. 21 above, paras. 82-84.

⁶⁰ Case C-55/94 *Gebhard*, n. 14 above.

⁶¹ *Ibid.*, para. 37.

⁶² See also Case C-108/96 *MacQuen* [2001] ECR I-837, paras. 26-27.

⁶³ G. Marenco, 'The Notion of a Restriction on the Freedom of Establishment and the Provisions of Services in the Case Law of the ECJ' (1991) 11 *YBEL* 111.

⁶⁴ See, e.g., Case C-108/96 *MacQuen*, n. 62 above; Case C-212/97 *Centros*, n. 20 above, para. 34; Case C-289/02 *AMOK Verlags GmbH v. A. & R. Gastronomie GmbH* [2003] ECR I-15059, para. 36; Case C-8/02 *Leichtle v. Bundesanstalt für Arbeit* [2004] ECR I-2641, para. 32; Case C-346/04 *Conijn v. Finanzamt Hamburg-Nord* [2006] ECR I-6137; Case C-433/04 *Commission v. Belgium* [2006] ECR I-10653. See also Case C-19/92 *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663 and the comment by P. Stanley (1996) 33 *CMLRev.* 713.

⁶⁵ See Cases 267 and 268/91 *Keck*, n. 57 above, and the discussion in Ch. 19.

⁶⁶ Case C-190/98 *Graf v. Filzmoser Maschinenbau* [2000] ECR I-493.

public policy, security, and health in Article 46 EC.⁶⁷ On the other hand, when the obstacle stems from an equally applicable rule which does not constitute deliberate discrimination, it seems that a wider and open-ended range of public-interest grounds (which are referred to *inter alia* as mandatory requirements, imperative requirements, objective justifications) may be relied upon to justify the restrictive measure. It should be noted, however, that the internal-market case law on what constitutes discrimination, whether direct or indirect, and on what kinds of justification are available, is highly confused.⁶⁸ This problem has been discussed in more detail in Chapter 19 in the context of the free movement of goods.⁶⁹

(ii) *Reverse Discrimination and Wholly Internal Situations: When can Nationals Rely on Article 43 in their own Member State?*

We noted above that the wording of the first sentence of Article 43 refers to the situation of nationals of a Member State wishing to establish themselves 'in the territory of another Member State'. A first reading of this sentence suggests that nationals setting up in a self-employed capacity in their own Member State cannot complain under Article 43 about the domestic regulation of those activities. The situation is somewhat more complex, however.

In the first place, a Member State is clearly obliged under both Article 43 and Directive 2004/38 not to restrict its own nationals who wish to *leave* the territory in order to set up an establishment in another Member State.

Secondly, it is obvious that nationals who wish to establish themselves within their own Member State may be disadvantaged if the qualifications they have obtained in another Member State are not recognized by their own State. In *Knoors* where a Dutch national sought to practise as a plumber in the Netherlands, having obtained training and experience in Belgium, the Dutch government argued that a national could not rely on his own Member State under Article 43 to gain recognition for qualifications obtained since he might be seeking to evade the application of legitimate national provisions. The ECJ firmly rejected this argument.⁷⁰

20. In fact these liberties, which are fundamental in the Community system, could not be fully realized if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement and establishment and who have acquired, by

⁶⁷ Case 352/85 *Bond van Adverteerders v. Netherlands* [1988] ECR 2085, paras. 32–33. See also Cases C–17/92 *Federación de Distribuidores Cinematográficos v. Estado Español et Unión de Productores de Cine y Televisión* [1993] ECR I–2239, para. 16; Case C–484/93 *Svensson and Gustavsson v. Ministre du Logement et de l'Urbanisme* [1995] ECR I–3955, para. 15.

⁶⁸ See, e.g., Case C–204/90 *Bachmann v. Belgium* [1992] ECR I–249 in the context of free movement of workers, where the ECJ seemed to say that restrictions which appeared to be discriminatory could be justified without recourse to the specific Treaty exceptions. See also the range of justifications considered by the ECJ for the (arguably directly discriminatory) nationality restrictions in Case C–415/93 *Bosman*, n. 21 above. For a more general discussion of this confusion see J. Scott, 'Mandatory Requirements', in C. Barnard and J. Scott (eds.), *Law of the Single European Market* (Hart, 2002), ch. 10.

⁶⁹ See Ch. 19.

⁷⁰ Case 115/78 *Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399. See also Case 246/80 *Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311. Compare however the restrictive approach of the ECJ in the first *Auer* case, Case 136/78 *Ministère Public v. Auer* [1979] ECR 437, especially paras. 20–21, and see the later Case 271/82 *Auer*, n. 56 above.