

20

The Pursuit of an Occupation in Another Member State

CONTENTS

- | | |
|---|---|
| 1 Introduction | (v) Restrictions on grounds of abuse of free movement |
| 2 Taking Up and Pursuit of an Occupation in Another Member State | 4 Restrictions on the Pursuit of an Occupation |
| (i) Employment and self-employment | (i) Discrimination in labour markets |
| (ii) Performance of significant economic activity in another Member State | (ii) Discrimination in the pursuit of a business |
| (iii) The cross-border element | (iii) Equally applicable restrictions on the pursuit of an occupation |
| (iv) Towards an overarching right to pursue an occupation in another Member State | 5 The Free Movement of Companies |
| 3 Restrictions on the Taking Up of an Occupation | (i) Discrimination and foreign companies |
| (i) Discriminatory restrictions on the taking up of an activity | (ii) Relocation of company activity from one Member State to another |
| (ii) Restrictions on access to occupational activities and labour markets | 6 The Services Directive and Freedom of Establishment |
| (iii) Restrictions on secondary establishment | Further reading |
| (iv) Restrictions on the use of diplomas and qualifications | |

1 INTRODUCTION

This chapter is about the right to pursue an occupation in another Member State. It is organised as follows.

Section 2 outlines the scope of this right. Article 45 TFEU provides a right to work in other Member States, while Article 49 TFEU provides a right to self-employment in other

Member States. While these are separate Treaty provisions, the Court of Justice increasingly interprets them in parallel. Beneficiaries are EU citizens (and companies in the case of Article 49) who engage in a more than marginal economic activity with some cross-border element. If the subject lives in one state and works in another, this is sufficiently cross-border.

Section 3 considers national measures which restrict access to an occupation. In the past, certain professions were often restricted to nationals, but more recent cases tend to concern refusals to recognise foreign qualifications, or measures which make establishment of a business or professional practice subject to various requirements: these may be to do with the legal form of the business, the qualifications of the owner or shareholders, local economic need, or limits on the number of establishments which one person or company may run. The Court's approach, as ever, is to permit only those justified by the public interest and proportionate. However, because access restrictions have the effect of excluding some people from labour and business markets, the Court has been strict, and has been prepared to review even non-discriminatory national rules.

Section 4 analyses restrictions on the exercise of an occupation. Discrimination in pay and conditions, in union rights and in tax benefits, are all prohibited by case law and secondary legislation. The Court also examines measures critically for proportionality where they are equally applicable but tend to protect incumbents and disadvantage market entrants. However, it has been reluctant to engage with national measures whose only effect is to hinder economic effect generally, without any inequality in their impact.

Section 5 discusses the free movement of companies. Freedom of establishment enables companies to incorporate in one state while doing all their business in another. They can then avoid burdensome company laws in their state of business. Member States have argued that this is an abuse of free movement, but the Court disagrees. It is part of free movement that economic actors can choose to establish themselves in the jurisdiction most advantageous for them. This raises considerable risks of a company law 'race to the bottom'.

Section 6 is about the Services Directive, which also addresses establishment. Its Chapter on establishment addresses a limited number of national measures, but takes a similar approach to the case law; states may not discriminate, and measures restricting the business activities of established persons must be justified and proportionate. However, it appears that the Directive applies these principles not only where the measures impact on cross-border establishment, but generally, so that those starting a business in their own state will also benefit.

2 TAKING UP AND PURSUIT OF AN OCCUPATION IN ANOTHER MEMBER STATE

A central feature of any market is the possibility for individuals and companies to relocate to any part of its territory which offers them economic opportunities. Two economic freedoms in EU law are pivotal to the realisation of this. The first is free movement of workers, for which the central provision is Article 45 TFEU.

Article 45 TFEU

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

The second freedom is that of establishment. The central provision governing this is Article 49 TFEU.

Article 49 TFEU

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

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

An important difference between the Articles is that Article 45 only applies to natural persons, whereas Article 49 also applies to legal persons such as companies.

Regarding natural persons, the reason for treating the employed and self-employed separately is not obvious, and this chapter will suggest that the two groups are best considered in parallel. Their separateness in the Treaty is a historical artefact which does not fully correspond to the current state of the law or of society.

The origins of the distinction lie in the circumstances surrounding the original EEC Treaty. At a time of full employment, there were no concerns about the labour market and thus an assumption that free movement of labour was unproblematic. By contrast, there was concern that free movement might undermine professionals, such as lawyers, accountants and doctors, much of whose activity was carried out on a self-employed basis. Legislative harmonisation was thus seen as a precondition for free movement of the self-employed, and provision was

made in the EEC Treaty for the Commission to propose a General Programme for the Abolition of Restrictions on Freedom of Establishment,¹ and for legislation to be adopted allowing for mutual recognition of diplomas.²

However, in today's world the distinction appears anachronistic. People move interchangeably between employment and self-employment, each being economically substitutable for the other. In addition, companies have a range of contracts with individuals working for them, of which only some fit easily into the traditional model of the contract of employment.

Moreover, the legal distinctiveness of the two categories has been eroded by EU citizenship. Regulation 1612/68/EEC confers on workers certain advantages and restrictions, most notably in the field of social benefits, but does not extend these to the self-employed.³ These rights provided the most significant added value to the status of worker. However, both workers and the self-employed are EU citizens, and this fact has been used in recent years by both the Court of Justice and the EU legislator to assimilate their rights. In particular, the Citizenship Directive ensures that rights of entry, residence and expulsion, and rights to social benefits, are now the same for all categories of economically active migrant.⁴ The distinction between economically active and non-active is more important today than the distinction between employed and self-employed.

This constitutional and social convergence of the worker and the self-employed person may have influenced the Court. A central argument of this chapter is that Articles 45 and 49 are being interpreted in a similar manner, and using the same concepts and limits. In particular, both these provisions are being interpreted as being part of a more general right to pursue an occupation in another Member State.

Nevertheless, the free movement of persons, established or employed, cannot be understood in isolation from the free movement of services. The situations to which they are relevant often overlap: a measure which makes service provision from state X to other states harder will deter establishment in state X, and vice versa. Unsurprisingly, therefore, the Court has interpreted the law on services, establishment and workers largely in parallel. This chapter is therefore complemented by the chapter on free movement of services. In particular, the discussion of horizontal application of Article 56 is just as relevant to Articles 45 and 49,⁵ while the discussion of abuse later in this chapter is applicable to the law on services.⁶

(i) Employment and self-employment

Article 45 governs movement of the employed, whereas Article 49 performs the same function for the self-employed. The distinction between the two was explored in some depth in *Trojani*. *Trojani*, a French man, was given accommodation in a Salvation Army hostel in Brussels and some pocket money, in return for which he carried out approximately thirty hours of work each week for the hostel. This arrangement had a social purpose, as it was perceived to be

¹ Article 50 TFEU. The programme is contained in OJ Spec. edn, Second Series, IX, 7.

² Article 53 TFEU.

³ [1968] OJ Spec. edn L257/2, 475.

⁴ See p. 448.

⁵ See pp. 797–803.

⁶ See p. 852.

a rehabilitation programme. After two years, Trojani approached the Belgian authorities for social assistance. On refusal, he argued that he was a worker under Article 45 and therefore entitled to social assistance.

Case C-456/02 Trojani v Centre public d'aide sociale [2004] ECR I-7573

15. ... the concept of 'worker' within the meaning of Article [45 TFEU] has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration ...
16. Moreover, neither the *sui generis* nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law ...
17. With respect more particularly to establishing whether the condition of the pursuit of real and genuine activity for remuneration is satisfied, the national court must base its examination on objective criteria and make an overall assessment of all the circumstances of the case relating to the nature both of the activities concerned and of the employment relationship at issue ...
18. In this respect, the Court has held that activities cannot be regarded as a real and genuine economic activity if they constitute merely a means of rehabilitation or reintegration for the persons concerned ...
19. However, that conclusion can be explained only by the particular characteristics of the case in question,⁷ which concerned the situation of a person who, by reason of his addiction to drugs, had been recruited on the basis of a national law intended to provide work for persons who, for an indefinite period, are unable, by reason of circumstances related to their situation, to work under normal conditions ...
20. In the present case, as is apparent from the decision making the reference, Mr Trojani performs, for the Salvation Army and under its direction, various jobs for approximately 30 hours a week, as part of a personal reintegration programme, in return for which he receives benefits in kind and some pocket money.
21. Under the relevant provisions [the national law] the Salvation Army has the task of receiving, accommodating and providing psycho-social assistance appropriate to the recipients in order to promote their autonomy, physical well-being and reintegration in society. For that purpose it must agree with each person concerned a personal reintegration programme setting out the objectives to be attained and the means to be employed to attain them.
22. Having established that the benefits in kind and money provided by the Salvation Army to Mr Trojani constitute the consideration for the services performed by him for and under the direction of the hostel, the national court has thereby established the existence of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration.
23. For the claimant in the main proceedings to have the status of worker, however, the national court, in the assessment of the facts which is within its exclusive jurisdiction, would have to establish that the paid activity in question is real and genuine.

⁷ Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR I-1621.

24. The national court must in particular ascertain whether the services actually performed by Mr Trojani are capable of being regarded as forming part of the normal labour market.
For that purpose, account may be taken of the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services. ...
27. ... the freedom of establishment provided for in Articles [49 TFEU] to [54 TFEU] includes only the right to take up and pursue all types of self-employed activity, to set up and manage undertakings, and to set up agencies, branches or subsidiaries ... Paid activities are therefore excluded.

Trojani provides a useful and oft-cited summary of the preceding case law on the application of Article 45. The extract above should also be read alongside the following section.

The judgment makes clear that where a migrant works under the direction of another person in return for payment, she is regarded as an employee and falls under Article 45. The essence of a worker is that she has a boss and a wage. By contrast, if she earns her living independently through supplying goods or services to other persons, she is treated as self-employed and falls under Article 49.

(ii) Performance of significant economic activity in another Member State

To fall within either Articles 45 or 49, the migrant must be engaging in activity which is economic in nature. Economic activity involves her 'satisfying a request by the beneficiary in return for consideration'.⁸ In the case of employment, the migrant will be receiving consideration from the employer and providing services under the direction of the employer. In the case of the self-employed, the remuneration is usually received from the customer for whom the service is carried out.

The Court of Justice has enlarged this notion of economic activity in two ways. In *Steynmann*, a migrant lived in a Bhagwan community and received food and lodging and pocket money in return for doing tasks and duties within the community. The Court accepted that remuneration need not be financial, but could be in kind, so that Steynmann was a worker in the Treaty sense.⁹

Relationships involving an element of guardianship or social welfare may also constitute economic activity. Training will be considered economic activity if it is regarded as practical preparation directly related to the actual pursuit of an occupation, and the training period itself takes the form of economic activity.¹⁰ Similarly, jobs which would otherwise be unviable, sponsored with public funds to enable individuals to enter or re-enter working life, have been classified as economic activity.¹¹ Within such schemes, however, the person must have been chosen on the basis of their ability to perform a particular activity. In *Bettray*,¹² a Dutch

⁸ Case C-268/99 *Jany v Staatssecretaris van Justitie* [2001] ECR I-8615.

⁹ Case 196/87 *Steynmann v Staatssecretaris van Justitie* [1988] ECR 6159. See also Case C-456/02 *Trojani v Centre public d'aide sociale* [2004] ECR I-7573.

¹⁰ Case C-109/04 *Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-2421.

¹¹ Case C-1/97 *Birden v Stadtgemeinde Bremen* [1998] ECR I-7747.

¹² Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621.

drug rehabilitation scheme which offered individuals employment as part of the treatment of weaning them off drugs was not considered economic activity. It was regarded instead as a form of treatment because the jobs were adapted to the physical and mental capabilities of each person.

In *Raccanelli*, the Court found that a PhD student may or may not be a worker.¹³ It depends on whether the key elements of the worker relationship are present: remuneration and subordination. A grant may count as remuneration, but whether the researcher is under the direction of the faculty in question, or is independent in their activities, is a question of fact for the national court.

To fall within the provisions, the degree of economic activity must be more than minimal. In *Levin*, the Court ruled that to fall within Article 45 a migrant had to pursue 'effective and genuine activities, to the exclusion of activities on such a small scale as to be purely marginal and ancillary'.¹⁴ But this does not exclude work under a short-term contract,¹⁵ part-time work or low-paid work. In the same case the Court offered an interpretation of Article 45 in its broader context which still stands:

15. ... Since part-time employment, although it may provide an income lower than what is considered to be the minimum required for subsistence, constitutes for a large number of persons an effective means of improving their living conditions, the effectiveness of Community law would be jeopardized if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full-time employment and earning, as a result, a wage at least equivalent to the guaranteed minimum wage in the sector under consideration.

Following this, in *Kempf*,¹⁶ the Court held that a part-time music teacher who gave twelve hours of lessons a week was doing sufficient work to be covered by Article 45, even though she earned so little that she was forced to apply for benefits.

The minimum threshold for engaging Article 49 is a little more complex. In some cases the question may be whether an individual is established in a host state or providing services, and the intensity and scale of their economic activity will be relevant to this determination. This was discussed in Chapter 19.¹⁷ However, if an individual is resident in a host state, so that there is no question that this is the centre of her activities, then the question may arise, as with Article 45, whether those activities are of a sufficient scale to classify her as economically active. The only words of guidance that the Court has provided are in *Gebhard*, in which it said that:

25. The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons ...¹⁸

¹³ Case C-94/07 *Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften* [2008] ECR I-5939.

¹⁴ Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035.

¹⁵ Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187.

¹⁶ Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741.

¹⁷ See pp. 787–8.

¹⁸ Case C-55/94 *Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano* [1995] ECR I-4165.

This was intended to distinguish establishment from services, but may also indicate the minimum criteria for establishment per se. There must be some non-trivial stability and continuity in the activities: one job performed for one client is not enough. In substance, it is suggested that the minimum level of economic activity will be interpreted in the same way as for Article 45.

(iii) The cross-border element

In an analogous manner to the other freedoms, Articles 45 and 49 apply only to work or establishment with a cross-border aspect.¹⁹ The usual situation is where the individual physically relocates to another Member State. However, Article 45 also includes the situation where the worker works in their home state, but lives in another. In *Hartmann*, a German worker living and working in Germany moved house, but not job, to France. The Court found that this was enough to give him the status of migrant worker.²⁰ In similar fashion, the Court has stated that where the economic activity of a person or company based in one Member State is entirely or principally directed towards the territory of another Member State, they fall within Article 49.²¹

The cross-border economic activity need not already be underway to engage Articles 45 and 49. Measures which prevent it starting are also caught, provided their effect is not too hypothetical.²² These Articles therefore involve not merely the right to pursue an occupation in another Member State but also the right to *take up* that occupation. Article 45 therefore protects both workers and work-seekers.²³ In like vein, Article 49 covers restrictions on those who are self-employed as well as restrictions preventing EU citizens wishing to take up self-employment, but not yet self-employed. For example, in *Reyners*,²⁴ a Dutch national successfully challenged a Belgian measure permitting only Belgian nationals to practise as advocates in Belgium, which was preventing him practising as a lawyer in that state.

(iv) Towards an overarching right to pursue an occupation in another Member State

The common themes present in employment and self-employment, and the Court's clear inclination towards parallel development of the four freedoms,²⁵ suggest room for an explicit overarching right to take up and pursue an occupation in another Member State, which encompasses and structures both Articles 45 and 49. Such reasoning is present in the recent case of *Danish Company Cars*.²⁶ To avoid tax evasion, Denmark prohibited Danish residents

¹⁹ Case 175/78 *Saunders* [1979] ECR 1129; Case C-65/96 *Uecker and Jacquet* [1997] ECR I-3171; Case C-107/94 *Asscher* [1994] ECR I-1137. See also pp. 462–4, 755–6 and 788–90.

²⁰ Case C-212/05 *Hartmann v Freistaat Bayern* [2007] ECR I-6303; see also Case C-336/96 *Gilly v Directeur des services fiscaux du Bas-Rhin* [1998] ECR I-2793; Case C-213/03 *Geven v Land Nordrhein-Westfalen* [2007] ECR I-6347; A. Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46 *Common Market Law Review* 1591.

²¹ Case 205/84 *Commission v Germany (German insurance)* [1986] ECR 3755.

²² See pp. 839–44.

²³ Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035; Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

²⁴ Case 2/74 *Reyners v Belgium* [1974] ECR 631.

²⁵ See A. Tryfonidou, 'Further Steps on the Road to Convergence Among the Market Freedoms' (2010) 35 *ELRev.* 35.

²⁶ For similar reasoning in respect of Article 56 TFEU, see Case 143/87 *Stanton v INASTI* [1988] ECR 3877, paras. 13 and 14.

from using company cars registered abroad for private purposes in Denmark. The Commission considered this to penalise those working abroad and therefore to breach Article 45, as Danish residents could use company cars registered in Denmark for private purposes. The Danish government argued that the measure fell outside Article 45 as this article related solely to conditions of employment.

Case C-464/02 *Commission v Denmark (Danish Company Cars)* [2005] ECR I-7929

34. The provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State ...
35. Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned ...
36. However, in order to be capable of constituting such an obstacle, they must affect access of workers to the labour market ...
37. The manner in which an activity is pursued is liable also to affect access to that activity. Consequently, legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement within the meaning of that case law.
38. It follows that the Danish legislation at issue in this case is not excluded from the outset from the scope of Article [45 TFEU].

The case is, like *Alpine Investments*, *Rüffler*, *Bosman*²⁷ and the case law on Article 35, about a restriction on exit, imposed by the home state. These are legally interesting because they can rarely be seen in terms of nationality discrimination. As a result, the Court is often forced into innovative legal formulations, usually relying on the fact that a measure makes cross-border movement less attractive than staying at home.²⁸ Accordingly, in the extract above the central objection is that the measure discouraged Danes from going abroad to work, since a job abroad would be relatively less advantageous for them. In paragraph 34, the Court places this in a cross-category context. The extract implies a right to pursue an occupation abroad which encompasses both Articles 45 and 49, and extends beyond mere equal treatment.

As a matter of convenience, the right to pursue an occupation abroad can be considered to have two aspects: the right to *take up* economic activities and the right to *pursue* these activities. This distinction often occurs in the language of the Court,²⁹ and is useful in understanding the kinds of situations which may arise.

²⁷ Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141; Case C-544/07 *Rüffler*, Judgment of 23 April 2009; Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921.

²⁸ See pp. 460–2, 780–2 and 793.

²⁹ Case 197/84 *Steinhauser v City of Biarritz* [1985] ECR 1819; Case C-311/06 *Consiglio Nazionale degli Ingegneri v Ministero della Giustizia and Marco Cavallera*, Judgment of 29 January 2009; Case C-464/02 *Commission v Denmark (Danish Company Cars)* [2005] ECR I-7929.