

scope for deliberation and interest representation as possible, so that outcomes are considered in the context of both the wider EU environment and broad internal social needs.¹⁰¹

S. Deakin, 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation: A Law and Economics Approach to Centros' (1999) 2 *Cambridge Yearbook of European Legal Studies* 231, 245–6

Reflexive law, therefore, has a procedural orientation. What this means, in the context of economic regulation, is that the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation, rather than to intervene by imposing particular distributive outcomes. This type of approach finds a concrete manifestation in legislation which seeks, in various ways, to devolve or confer rule-making powers to self-regulatory processes. Examples are laws which allow collective bargaining by trade unions and employers to make qualified exceptions to limits on working time or similar standards ...

The purpose of harmonisation would not be to substitute for state-level regulation; hence the transnational standard would not operate to 'occupy the field' ... Rather, transnational standards would seek to promote diverse, local-level approaches to regulatory problems by creating a space for autonomous solutions to emerge when, because of market failure, they would not otherwise do so. This may involve what some regard as a restriction of competition, in the sense of ruling out certain options which could be associated with a 'race to the bottom' whilst leaving others open. This is now a familiar technique within the European Community ... Directives in the areas of labour law, consumer protection and environmental law are mostly interpreted as setting basic standards in the form of a 'floor of rights'. Although 'downwards' derogation is prohibited, Member States are allowed and implicitly encouraged to improve on the standards set centrally. Far from being a 'straitjacket', then, which restricts local autonomy, Community-level intervention may be the precondition for local-level experimentation.

6 THE SERVICES DIRECTIVE AND FREEDOM OF ESTABLISHMENT

Directive 2006/123/EC ('Services Directive') applies not only to cross-border service provision but also to those establishing in a Member State. They benefit from the Directive's Chapter on establishment, as well as from its rules on administrative simplification. These latter, and the material scope of the Services Directive, were discussed in Chapter 19.¹⁰²

The Chapter on freedom of establishment addresses three categories of national measures.¹⁰³ The first articles in this Chapter deal with authorisation schemes – rules which require that a person cannot establish or begin their activity without an authorisation. Such rules are fairly

¹⁰¹ Some are sceptical whether, even with such safeguards, such experimentation could take off, arguing that the broader context is still one in which local communities are being forced into quick decisions by the demands of multinational enterprises. W. Scheuerman, 'Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy' (2004) 17 *Canadian Journal of Law and Jurisprudence* 101; C. Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy' (2005) 30 *ELRev.* 461, 482.

¹⁰² See pp. 823–8.

¹⁰³ Directive 2006/123/EC on services in the internal market, articles 9–15.

common in some Member States. Article 9 provides that such schemes are only permitted where they are non-discriminatory, justified by a public interest objective, and the goal cannot be met by a less restrictive measure. As is evident, this is no more or less than the existing case law would suggest. However, articles 9 to 13 provide some detail on the operation of authorisation schemes, with procedural requirements aimed at ensuring that they function in an accessible, fair, transparent and non-discriminatory way.

Article 14 then lists certain kinds of measure concerning established persons which are prohibited. These include discriminatory requirements, requirements concerning the nationality of shareholders or company directors, restrictions on secondary establishment or requirements that the establishment in the state be the primary establishment and market-need based restrictions. The Court has tended to prohibit such restrictions anyway, but the absence of grounds for derogation may make the Directive stricter, although this has to be weighed against the many exclusions from the Directive's scope.

Finally, article 15 provides a list of 'requirements to be evaluated'. These include limits on employee numbers or tariffs, requirements to have a particular legal form, or 'quantitative or territorial restrictions'. Any such requirements are only permitted if they are non-discriminatory, justified and proportionate. Once again, the Directive follows the case law of the Court.

The establishment Chapter is apparently weaker than the services Chapter. It only applies to certain specifically listed national requirements, and, apart from article 14, it permits them to be justified by any good public interest objective. Its approach to the legality of national measures is essentially a summary of the case law.

This difference between the approach to service and establishment reflects their different roles in the wider structure of the internal market. Home state regulation, which is the philosophy of the cases and of the Directive, entails that requirements imposed on service providers by their host state should be the exception, and so are subject to strict limits. By contrast, the home state approach entails that the established person has in principle made a choice to subject herself to the rules of her state of new establishment, and EU intervention should confine itself to rooting out discrimination against her, or particularly obstructive and disproportionate rules.

However, the Chapter on establishment does add to the law in another way: it appears to apply to those establishing in their own state, as well as those coming from other states. Either might fall victim to many of the measures discussed (the authorisation requirements or rules on employee numbers or tariffs), and there is nothing in the Directive to suggest that only the cross-border person can rely on it. By contrast, that text appears to regulate the national measures in question in a general way. Thus, while the law on establishment is not made stricter by the Directive, it has been broadened. It is at least arguable that within the scope of the Directive's provisions on establishment, as is the case with the provisions on administrative simplification, wholly internal situations are no longer excluded. The defined group of national rules to which this Chapter applies is now subject to proportionality review at the request of any economic actor suffering disadvantage from them.

This is understandable. The alternative would be that the foreigner wishing to start his business would be exempted from all kinds of authorisation procedures and administrative requirements with which the national would still have to comply. This would create reverse discrimination. That may sometimes be an unavoidable side-effect of the case law, but it is bad

policy to entrench it in legislation.¹⁰⁴ Secondly, any such entrenched distinction would create a motivation for artificial cross-border constructions: the Frenchman wanting to start a business in France would be better first starting a nominal business abroad and then coming home, or looking for a foreign 'partner'. As is usually the case with harmonising legislation, the Directive tries to avoid such problems by creating a uniform structure of rights for all economic actors, albeit within a limited sphere.

FURTHER READING

- C. Costello, 'Market Access All Areas? The Treatment of Non-Discriminatory Barriers to the Free Movement of Workers' (2000) 27(3) *Legal Issues of Economic Integration* 267
- S. Deakin, 'Reflexive Governance and European Company Law' (2009) 15 *European Law Journal* 224
- A. Johnston and P. Syrpis, 'Regulatory Competition in European Company Law after *Cartesio*' (2009) 34 *European Law Review* 378
- A. Kranz, 'The *Bosman* Case: The Relationship Between European Union Law and the Transfer System in European Football' (1999) 5 *Cambridge Journal of European Law* 431
- G. Marengo, 'The Notion of Restriction on the Freedom of Establishment and Provision of Services in the Case-law of the Court' (1991) 11 *Yearbook of European Law* 111
- C. O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 *Common Market Law Review* 1107
- 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
- R. White, *Workers, Establishment, and Services in the European Union* (Oxford, Oxford University Press, 2005)

¹⁰⁴ See G. Davies, *Services, Citizenship and the Country of Origin Principle*, Mitchell Working Paper No. 2/07 (2007).