

Freedom of Establishment

Article 49 TFEU:

- 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** [...].
- Paragraph 1 requires **abolition of restrictions** on freedom of primary + secondary establishment.
- Paragraph 2 provides for the right to pursue self-employed activities on an **equal footing with the nationals of the MS of establishment**.

Differences: Services/Establishment:

- C-55/94 Gebhard v Milan Bar Council, [1995] ECR I-4186:
 - German national obtained law degree in Germany.
 - Authorised to practice in Germany + was admitted to the Stuttgart Bar.
 - He **does not have his own chambers in Germany**, instead working as an “independent collaborator”.
 - He then **resided in Italy**, where he worked, initially as a collaborator, later an associate member of a set of chambers of lawyers practicing in association in Milan.
 - Gebhard **opened his own chambers** in Milan where Italian avvocato + procuratori work in collaboration with him.
 - In 1991, **disciplinary proceedings** were initiated against Gebhard on the ground he had **practiced his profession in Italy on a permanent basis whilst using the title avvocato, thereby breaching Italian law**.
States authorised to participate lawyers in the Member State from which they come shall **be permitted to pursue lawyers’ professional activities on a temporary basis** in contentious and non-contentious matters in accordance with the detailed rules laid down in this title. For the purpose of the pursuit of the professional activities referred to in the preceding paragraph, the establishment on the territory of the Republic either of chambers or branch office is not permitted.
 - Services: Temporary – (27) 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**.
 - Establishment: (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.
 - Why present as temporary: circumvention of national regulations.

Establishment of Companies:

- Article 54 provides:
 - “Companies or firms **formed in accordance with the law of a Member State** and having their **registered office, central administration or principal place of business** within the Union shall, for the purposes of this Chapter, be **treated in the same way as natural persons who are nationals of Member States**”.
 - “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**”.
- Requires companies to be **treated the same way as nationals** this is **not strictly possible**, given difference between natural + legal persons.
- Despite many company law directives adopted, **considerable differences** between the way MS regulate companies + their activities remain.
- Definition of company is wide “legal persons governed by private or public law”.
- Excludes non-profit making companies.

When is a Company ‘Established’ in a MS? –

- So long as a **company is formed in accordance with the law of a MS** + has a **registered office** there + principle place of business somewhere in EU, it will be **established in the first MS**.
- ECJ made clear in **Segers C-79/85** this would **hold true** even if the company conducted **no business of any kind in that MS**, but instead conducted business through one of the various forms of **secondary establishment** e.g. subsidiary, branch or other agency of another MS [16].
- Affirmed in **Centros (C-212/97)** where ECJ ruled that a **company was lawfully established in the UK even though it has never traded there**.
- In the **Insurance Services Case** the Court held that **even an office managed for a company by an independent person on a permanent basis** would amount to establishment in that MS (**C-205/84**).
- This form of establishment would amount to a **secondary establishment**, since the registered office or seat of the company + its **principal place of business** would presumably be elsewhere in the EU.
- A company has a **right of secondary establishment** only if it already has its **principal place of business or central or register office within the EU**.

Court-Led Liberalisation in the Absence of EU Harmonisation:

- When **companies are not covered by Directive 2004/38**, the ECJR ruled in the **Daily Mail Case C-81/87** that companies enjoy **similar rights** under the Treaty.
- However, the **Daily Mail** judgment also declared that the Treaty provisions on freedom of establishment **did not give companies an unfettered right** to move their registered offices to another MS whilst retaining an establishment in the first MS.
- Court ruled that the MS from which the company wishes to move its register office to, is entitled to subject the **company to certain conditions**.

fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

- ECJ ruled that the **deliberate choice of a MS with lenient legislative requirements is simply an exercise of rights inherent** in the notion of freedom of establishment.
- Case has been described as 'opening the door to competition among national rules as an alternative approach to ensure the completion of the internal market' P Cabral + P Cunha.
- Centros was followed by **Uberseering C-208/00 + Inspire Art C-167/01** which confirmed + extended the Centros approach.

Uberseering:

- Company **incorporated in the Netherlands**, under Dutch law, where it had its registered office.
- Sought to **transfer its centre of administration to Germany + its entire share capital was bought by German shareholders**.
- Netherlands did **not seek to prevent the company** from transferring its administration or to deny the validity of its continued incorporation under Dutch law.
- German law, however, **would not recognise the legal capacity of a company incorporated in Netherlands, thus prohibiting it from appearing before the German courts**.
- German law followed '**the company seat principle**' rather than the 'incorporation principle' as the relevant factor of connection for a company + since Uberseering had moved its real seat from the Netherlands to Germany, German law **would not recognise the company's legal capacity unless it re-incorporated under German law**.
- Reasoning in Uberseering clearly moves away from the under-lying broad rationale in Daily Mail.
- Uberseering established that, **despite the lack of harmonisation of the laws** governing the connecting factors for incorporation, a **company which is legitimately incorporated in one MS - moves its centre of administration to another state cannot be denied recognition of its legal personality by the latter**.
- German rule was **disproportionate** despite attempting to pursue a legitimate aim.

Inspire Art:

- Addressed the question whether a **restriction on a company's secondary establishment which is less drastic** than outright denial of right of establishment might be compatible with Article 49.
- Dutch legislation sought to impose **regulatory requirements** concerning minimum share capital + directors liability on a company incorporated in the UK.
- ECJ **accepted that in principle** could be **justified in the interests of protecting creditors + investors** the rules at issue were **disproportionate + unnecessary**.
- Rulings did not overturn Daily Mail but seemed to **limits its impact + scope** – M Gelter.
- **Cartesio C-210/06**, company formed under Hungarian law wished to transfer its seat to Italy.
- Hungarian law **did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law**.
- National courts thought Daily Mail seemed to indicate that Article 49 + 54 TFEU did **not include the right for a company to transfer its central administration to another MS while retaining its legal personality + nationality of the origin**.
- Advocate General Maduro saw the **Hungarian legislation as unjustified negation** of the freedom of establishment, ECJ ruled that companies were **creatures of national law which existed by virtue of the national legislation which determined their incorporation + functioning**.
- Confirming the premise of Daily Mail, introducing a **mutual recognition principle**.
- MS must **recognise the legitimacy** of a company's incorporation under the law of another MS + should **not impose unnecessary restrictions** on the right of secondary establishment. (TXT: PG 815).