



EU Internal Market Law

Lecturers

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Lecture No 3

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The “internal” market is

Art 26.2 TFEU: an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the TFEU

i.e.

A common/single market embracing the territory of 27/28 MS in which

- goods, services, persons and capital freely move
- MS are prevented from hindering intra-EU free movement

EU Internal Market > intra-EU free movement

Four fundamental freedoms:

- 1) Free movement of goods (Art 28 et seq TFEU)
- 2) Free movement of workers (Art 45 et seq TFEU)
- 3) Right of establishment (Art 49 et seq TFEU) and Freedom to provide services (Art 56 et seq TFEU)
- 4) Free movement of capital (Art 63 et seq TFEU)

I only deal with free movement of goods and services and right of establishment, i.e.

Intra-Union free movement of

- 1) Products (goods, services)
- 2) Market participants (services providers/receivers, self-employed persons, companies)

Prof. A. Santini will deal with free movement of production factors (workers, capital)



FREE MOVEMENT OF GOODS

intra-Union imports and
exports of goods

Member States are prevented from creating obstacles on intra-EU imports and exports of goods resulting

- a) either from *fiscal* measures (customs duties and charges levied internally within a state)
- b) or from *non-fiscal* measures (quantitative restrictions & MEEs)

«Fiscal» or «tariff» barriers

1. Customs duties & Charges having equivalent effect (CEEs) on imports and exports between MSs -> **General and absolute** ban (Art 30 TFEU)
2. Internal taxation -> Prohibited if **discriminatory or protectionist** (Art 110 TFEU)

Customs duty

A charge, determined on the basis of a tariff, specifying the rate of duty to be paid

- a) By the importer to the host state
(customs duties on imports)
- b) By the exporter to the home state
(customs duties on exports)

Measures having equivalent effect to customs duties

«Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier...

even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product»: Case 24/68 *Commission v. Italy* (statistical levy case) [1969] ECR 193

Internal (indirect) taxation

(fiscal rules which apply internally within a MS)

MSs are free to determine their own taxation policy (Principle of fiscal autonomy), but internal taxation has to be completely neutral as regards competition between domestic and imported products

MSs are then prevented from taxing imported goods in a way

a) either discriminatory, directly or indirectly:

Art 110(1)

b) Or protectionist: Art 110(2)

- 
- With the completion of the internal market customs controls between MSs have been abolished



«Non-fiscal» or «non-tariff» barriers

QR & MEEs

Quantitative restrictions (QR)

&

all measures having equivalent effect (MEEs)

shall be prohibited

- a) on imports between Member States
(Art 34 TFEU)
- b) on exports between Member States
(Art 35 TFEU)

Customs Duties are totally banned from intra-EU trade on goods

Non-tariff barriers (QR & MEEs) are not

Although restrictive, national measures are compatible with EU law and may then apply if they serve an objective of general interest:

- a) Grounds of justifications under Art 36 TFEU
- b) Mandatory requirements (ECJ case law)

QR & MEEs

QR: «Measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit» - case 2/73 *Geddo v Ente nazionale risi* [1973] ECR 865, para. 7

The problematic issue: what are MEEs?

The *Dassonville* formula (case 8/74):

«all trading rules enacted by MSs which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade»

Justifications of QR & MEEs

Art 36 TFEU provides for an **exhaustive** list of grounds on which QR and MEEs on imports, exports or goods in transit may be justified (ex. public policy or public security; protection of health and life; protection of industrial and commercial property).

Such restrictive measures shall not constitute a means of arbitrary discrimination or a disguised restriction on intra-EU trade.



FREE MOVEMENT OF
SERVICES
&
FREEDOM OF
ESTABLISHMENT



A general prohibition on restrictions

Free movement of services (Art 56 TFEU)

Any restriction on the freedom to provide (and receive) services within the Union (cross-border intra-Union trade in services) shall be prohibited.

Right of establishment (Art 49 TFEU)

Any restriction on the freedom of establishment of nationals of a MS in the territory of another MS shall be prohibited.

This prohibition also applies «to restrictions on the setting-up of agencies, branches and subsidiaries»

Freedom of establishment includes «the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms»

Derogations

- 1) Neither freedom to provide services nor freedom of establishment apply to activities which in a Member State *«are connected, even occasionally, with the exercise of official authority»* (Arts 51(1) and 62 TFEU)
- 2) EU legislator may exclude certain activities from the scope of both freedoms (Art 51(2) TFEU)

Interpretation of Art 51(1) TFEU

Settled case-law (ex. case C-451/03 *Servizi Ausiliari Dottori Commercialisti*)

Being an exception to fundamental freedoms,

- It must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests it allows the MSs to protect
- It must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority

Activities excluded from Art 51(1) TFEU

- a) Those being auxiliary or preparatory to the exercise of official authority (case C-438/08 *Commission v Portugal*)
- b) Those whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact (case 2/74 *Reyners*)
- c) Those which do not involve the exercise of decision-making powers (*Commission v Portugal* cit.), powers of constraint (case C-114/97 *Commission v Spain*) or powers of coercion (case C-47/02 *Anker and Others*)

Justifications

- 1) National measures «providing for special treatment for foreign nationals» (discriminatory) are allowed only on grounds of public policy, public security or public health (Art 52 TFEU).
- 2) Non-discriminatory restrictions may also be justified by «imperative reasons of public interest» (ECJ case law)



A single approach to all
freedoms?

Common features

Obstacles on free trade on goods and services as well as on freedom of establishment are forbidden, but some derogations and justifications are allowed

- The Treaty provisions do not lay down an absolute prohibition
- The stricter the notion of «obstacle» to free movement is interpreted, the lesser a national measure is needed to be justified under EU law

Some preliminary remarks

- 1) EU freedoms vs EU secondary legislation
- 2) Means of enforcement of EU freedoms

EU primary rules vs EU secondary law

EU primary rules (prohibitions of restrictions) only come into play in the absence of EU secondary law (harmonisation measures):

“A national measure in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaties (fundamental freedoms)”: case C-322/01, *Deutscher Apothekerverband*, para. 64

How to enforce EU freedoms of movement?

General remark


National rules have to comply with EU freedoms of movement; if not,

- They must be abolished or amended by Member States and
- They cannot be applied by national courts (or they must be interpreted in accordance with EU freedoms)

How to enforce EU freedoms of movement?

What if a national rule is deemed to be incompatible with EU freedoms?

- a) «**Public**» enforcement: European Commission or a MS may bring an action for infringement of EU law before the ECJ (Arts 258-259 TFEU)
- b) «**Private**» enforcement: individuals may directly rely on EU freedoms before national courts (**Direct effect**)



«The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Arts 169 and 170 EEC (now Arts 258 and 259 TFEU) to the diligence of the Commission and of the Member States»

(case 26/62, Van Gend en Loos)

Private enforcement

It is founded upon 3 main pillars:

- 1) The direct effect of EU rules on free movement (*Van Gend & Loos*) which prevail on incompatible national rules (*Costa/ENEL*)
- 2) The right to an effective remedy before a national court (Art 47 Charter fundamental rights; Art 19.1 TEU)
- 3) The judicial cooperation between national courts and ECJ (preliminary rulings, Art 267 TFEU)

The Treaty bans as individual freedoms

individuals and companies enjoy a right

a) To buy/sell goods and provide/receive services

b) To move and reside in another MS in order to take up and pursue an economic activity

within the integrated market area (EU + EEA) without being impeded by unjustified national regulations