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ISSUE 1:  
THE SCOPE OF FREEDOMS  
OF MOVEMENT

What conditions are to be satisfied for the EU free movement provisions being applicable?

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2 criteria of applicability

a) The "**material**" criterion:  
which freedom applies, if any -> the movement of what is concerned (goods, workers, undertakings, capital...)

b) The "**spatial**" or "**territorial**" criterion:  
is "intra-Union" mobility concerned?

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a) The material scope of application  
which freedom applies, if any

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## Free movement of goods

What are "goods" in the Treaty meaning?

Goods are **products**

- which possess tangible physical characteristics ("**Tangible Goods**") and
- which "can be valued in money and which are capable, as such, of forming the subject of commercial transactions": case 7/68 *Commission v Italy (the art treasures case)*

Ex. works of art, animals, waste

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## Free movement of persons

(persons as "*market participants*")

Both natural and legal persons need to be **engaged in an "economic activity"** to fall within Arts 45, 49 and 56 TFEU, whether as employed or self-employed persons

**Non-economically active** individuals can enjoy rights to movement and residence as citizens of the Union (Art 21 TFEU): case C-413/99 *Baumbast*

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I) Which economically active person is moving?  
Self-employed vs employed person

(A) Right of establishment (Art 49), free movement of services (Art 56) apply to **companies**

**self-employed individuals**

**consumers** (passive market participants)

(B) Free movement of workers (Art 45) applies to **employed individuals**

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Self-employed persons vs workers  
→ subordination as distinguishing criterion

**Worker** ⇔ **relationship of subordination**  
Services are performed **for** and **under the control/direction** of the receiver (the employer): case 66/85 *Lawrie-Blum*

**Self-employed persons** ⇔ **no subordination**  
Self-employed do not perform their activity under the direction of the receiver, they bear the risk for the success or failure of their activity (and they are paid directly and in full): case C-268/99 *Jany*

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II) Freedom to provide services  
vs other freedoms

Free movement of services (Art 56), like right of establishment (Art 49), concern self-employed economic activity → Art 4(1) directive 2006/123/EC on services in the internal market: "service' means **any self-employed economic activity, normally provided for remuneration...**"

How to deal with borderline case?  
Art 57 → subordinated character of freedom to provide services

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The subordinated character of services

Art. 57 TFEU: "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons"

 Services provisions are subordinated to the other freedoms: they are supposed to apply to situations where no other freedom applies.

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Does case law lend support to this view?

1. Services vs goods  
"accessory follows the principal" rule  
*Schindler and Anomar cases*

2. Services vs workers  
Posting of workers by a cross-border services provider from a MS to the territory of another MS is treated under rules on services, not under those on free movement of workers  
*Rush Portuguesa, Vander Elst and Finalarte cases*

3. Services vs capital  
it would seem that the ECJ deals with free movement of services first:  
*Svensson & Gustavsson, Parodi and Ambry cases*

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III) Derogations from the scope of application of free movement of persons

- 1) Free movement of workers does not apply to "employment in the public service": Art 45(4)
- 2) Neither freedom of establishment nor free movement of services apply to activities which in a Member State "are connected, even occasionally, with the exercise of official authority": Arts 51(1) and 62
- 3) EU legislator may exclude certain activities from the scope of free movement of self-employed persons: Art 51(2)

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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

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**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*)

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**National property ownership regimes & fundamental freedoms**

Art 345 TFEU: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership" (Principle of Neutrality)

Treaties do not preclude either the nationalisation of undertakings or their privatisation → MSs may legitimately pursue an objective of establishing or maintaining the public ownership of certain undertakings

HOWEVER Art 345 TFEU does not mean that national rules governing the system of property ownership are not subject to the fundamental free movement rules: Joined Cases C-105/12 to C-107/12 *Netherlands v Essent NV & Ors*

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**b) The spatial or territorial scope of application**

only "intra-Union" flow (of goods, services and persons) is concerned

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**What is "intra-Union (EEA)" movement?**

For a situation falling under the scope of free movement provisions, two conditions have to be cumulatively met:

- 1) A link with the territory of the EU/EEA
- 2) A cross-border factor

As a result, both

- (i) Wholly internal (to one MS) situations and
  - (ii) Trade with third countries
- are excluded from the ambit of internal market rules

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**Intra-EU free movement of GOODS:**

a) link with the territory of the EU

import/export of goods

- (i) either "originating in a Member State"
- (ii) or "coming from third countries *which are in free circulation in Member States*" (Art 28.2 TFEU), i.e. which lawfully entered in the Single Market

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**Intra-EU free movement of GOODS:**

b) cross-border factor

Both fiscal (Arts 30 & 110 TFEU) and non-fiscal barriers (Arts 34 & 35 TFEU) are forbidden only on imports/exports of goods between Member States, i.e. from a MS to another MS

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Some examples: Who has right to freely trade on goods within the EU?

- 1) An Italian company selling in Milan clothes manufactured in Italy?
- 2) A Serbian citizen importing Peugeot cars from France to Italy?
- 3) An English branch of a German company selling in England shirts imported from India?

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Intra-EU Free movement of services & Right of establishment

In order for Arts 49 and 56 TFEU to apply two criteria are to be cumulatively satisfied:

- i) connection with the EU (**personal** scope of application)  
Persons must have the nationality of a Member State
- ii) cross-border factor (**territorial** scope of application)  
They must move within the EU from a Member State to another

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Personal scope: the formal link

The right to freely provide/receive services and to establish within the EEA is conferred upon

- A. Natural persons who are nationals of a Member State (Arts 56, 49 TFEU)
- B. "Companies or firms" who are "formed in accordance with the law of a MS" (Art 54 TFEU)

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## Freedom of establishment

- In order for Art. 49 TFEU to apply it suffices that the "formal" connections, as defined above, are met, i.e.
  - i) nationality (natural persons)
  - ii) incorporation (companies)

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## Free movement of services: genuine link

In order for Art 56 TFEU to apply an additional real connection with the EU is required:

- A. Natural persons must be established in a MS
- B. Companies must have "their registered office, central administration or principal place of business within the Union" (Art. 54 TFEU)

It is not necessary that the formal and the real connection are with the same MS: ex. Art 56 applies to a company incorporated under English law and having the real seat in Italy.

The Home State (country of origin) of the provider is normally identified according to the genuine link: see Art. 2(c) e-Commerce Directive.

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## What about the services receiver?

In the case of "active" person, i.e. who moves to another Member State in order to receive services, both the formal and the real connection are required.

Art. 4(3) Services Directive: "recipient" means any natural person who is a national of a MS or who benefits from rights conferred upon him by EU acts, or any legal person as referred to in Art 54 TFEU and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service".

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## Territorial scope: the cross-border factor

Economic activity pursued cross-border:

- > Individuals and companies must move from a Member State ("home" state) to another ("host" state)
- > Difference between cross-border provision of services under Art 56 and primary and secondary establishment in another State under Art 49

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## Cross-border provision of services

A) The parties **temporarily** move from a MS to another:

- i) The provider moves: Art 56
- ii) The recipient moves (the "active recipient or consumer"): *Luisi & Carbone* and *Cowan* cases
- iii) Both parties move: the *tourist guides* case

B) The service itself moves (ex. by telephone, fax, email, the internet): *Alpine Investments* case

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## Services vs establishment

The provider may pursue an economic activity in another MS (host State):

- (a) On a **permanent** basis: Art 49 TFEU
- (b) On a **temporary** basis: Art 56 TFEU

*Ratio*: Since in the first case the connection with the host State is closer than in the latter, a Member State may not make the provision of services in its territory subject to **compliance with all the conditions required for establishment** and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services" (*Säger* case, para. 13)

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### The ECJ case-law

- *German Insurance* case: any "permanent presence" in the host State automatically falls out Art 56
- *Gebhard* case: the "temporary nature" of the activities has to be determined in the light not only of the **duration** of the service provision but also of its **regularity, periodicity** or **continuity**; provider can still equip himself with some form of infrastructure in the host State

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### Trends in most recent case-law: a wider interpretation of services?

Case C-215/01, *Schnitzer* (2003): services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period (several years), to persons established in one or more other Member States are caught by Art 56 instead of Art 49

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### The secondary law

Directive 2005/36/EC on the recognition of professional qualifications, Art 5(2)

Provisions concerning free provision of services (title II of the directive) shall only apply where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, his profession. «The temporary and occasional nature of the provision of services shall be assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity»

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## Wholly internal situations

Opinion AG Wahl, Joined Cases  
C-159/12, C-160/12 and  
C-161/12, *Venturini & Ors*

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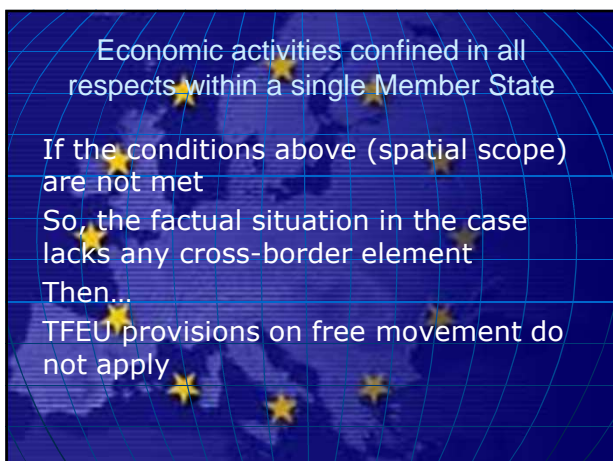
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Economic activities confined in all respects within a single Member State

If the conditions above (spatial scope) are not met

So, the factual situation in the case lacks any cross-border element

Then...

TFEU provisions on free movement do not apply

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From a 'private enforcement' perspective, 2 problems are to be distinguished

I) A **procedural** problem (for ECJ)  
Admissibility of requests for preliminary rulings (Art 267 TFEU)

II) A **substantial** problem (for national courts)  
Applicability of fundamental freedoms to the case

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### 1) Is a request for preliminary rulings admissible under Art 267 TFEU?

Main proceedings before a national court  
If such a court considers a decision on a question of EU law "necessary to enable it to give judgment", it may/must refer it to the ECJ for a preliminary ruling (concerning either the interpretation of EU rules or the validity of EU acts)

A decision is 'necessary' if the national court sees it as a step in its strategy for disposing of the case, i.e. if it has to apply that EU rule

If the decision is not necessary, ECJ has no jurisdiction to deliver interpretative rulings (the referred preliminary question is not admissible)

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### Reverse discrimination

National rules do not apply to cross-border situations because they are incompatible with EU freedoms

But they still apply to wholly internal situations

Domestic citizens are then discriminated

Such discriminations are not caught by TFEU rules on free movement

But they could be forbidden by national law (ex. Equality principle in national constitutions)

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