

EU Internal Market Law

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Part I. EU primary law on the single market: the 'fundamental' freedoms of movement

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The fundamental freedoms of movement

Relevant provisions in the Treaty on the Functioning of the European Union (TFEU):

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

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Free movement of goods

- Arts 34 and 35: Quantitative restrictions on imports /on exports and all measures having equivalent effect shall be prohibited between Member States
- Art 36: (The provisions above) shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of (...). Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States

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Right of establishment

- Art 49: (...) restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited (...)
- Art 52(1): The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of (...)

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Is a single approach to all fundamental freedoms possible?

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TFEU rules on free movement: Common features

1. Prohibitions (mainly) on Member States → obstacles on free movement are forbidden
2. Rights conferred on individuals
3. Only intra-EU trade is dealt with
4. With a few exceptions, obstacles on free movement are not totally banned, but some derogations and justifications are allowed
5. The stricter the notion of "obstacle" to free movement is interpreted, the lesser a national measure is needed to be justified under EU law

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The "three steps" approach

Applying EU fundamental freedoms entails

⇒ to address 3 different issues (the "steps")

⇒ in a logical order

1) The "**scope**" issue:

Does the case at hand fall within the scope of the freedoms, and which one?

2) The "**restriction**" issue:

If yes, does the national measure in question result in an obstacle to the relevant EU freedom?

3) The "**justification**" issue

If yes, can it however be allowed by EU law?

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Issue No 1: The scope of application 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

The case cannot fall within the scope of more than one freedom

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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 (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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Self-employed vs employed person

Which economically active person is moving?

- Right of establishment (Art 49), free movement of services (Art 56) apply to
 - companies**
 - self-employed individuals**
 - consumers** (passive market participants)
- 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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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

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

CJEU seems to deal with free movement of services first:

Svensson & Gustavsson, Parodi and Ambry cases

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Limits to the applicability of free movement of persons

- 1) Art 45(4) → Free movement of workers does not apply to "employment in the public service"
- 2) Arts 51(1) and 62 → Right of establishment and free movement of services do not apply to activities which in a Member State "are connected, even occasionally, with the exercise of official authority"
- 3) Art 51(2) → EU legislator may exclude certain activities from the scope of free movement of self-employed persons

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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,

- Its scope is limited to what is strictly necessary to safeguard the interests it allows the Member States to protect
- Only 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: When freedoms apply

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

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... As a result

- i. Wholly internal (to one Member State) situations and
 - ii. Trade with third countries
- are both 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

Prohibition on fiscal (Arts 30 & 110 TFEU) and non-fiscal barriers (Arts 34 & 35 TFEU) only as regards cross-border flow of goods, i.e. imports/exports of goods between Member States

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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**

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a) link with the territory of the EU

a) **Formal** link →

Natural persons: nationals of a MS (Arts 56, 49 TFEU)

"Companies or firms" "formed in accordance with the law of a MS" (Art 54 TFEU)

b) **Genuine** link →

Natural persons established in a MS

Companies having "their registered office, central administration or principal place of business within the Union" (Art. 54 TFEU)

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b) 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

- 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
- 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 CJEU 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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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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