

EU Internal Market Law

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Session No 4 “What is an “obstacle” to free movement according to the CJEU's case law?”

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I. PRELIMINARY REMARKS: GENERAL OVERVIEW OF THE TFEU PROVISIONS

The fundamental freedoms as general prohibitions on restrictions of free movement between Member States

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The EU fundamental freedoms

A few set of general provisions laid down by TFEU that prohibit any national measure which results in a restriction on

- Free movement of goods (Arts 30, 34-35, 110)
- Free movement of workers (Art 45)
- Freedom of establishment (Art 49)
- Free movement of services (Art 56)
- Free movement of capital (Art 63)

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Free movement of goods (intra-EU import/export)

Member States are prevented from creating obstacles resulting

- a) either from **fiscal** measures
- b) or from **non-fiscal** measures

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“Fiscal” or “tariff” barriers

- I) Customs duties & Charges having equivalent effect (CEEs) are **generally and totally banned** on intra-EEA trade on goods (Art 30 TFEU)
- II) Internal taxation on imported goods is **prohibited if discriminatory or protectionist** (Art 110 TFEU)

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“non-fiscal” or “non-tariff” barriers

Quantitative restrictions (QR)
&
measures having equivalent effect (MEE)

shall be prohibited

- i) on imports between Member States (Art 34)
- ii) on exports between Member States (Art 35)

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Free movement of workers

- 1) Art 45(2) → **abolition of any discrimination based on nationality** between workers of the MSs as regards conditions of work and employment (ex. employment, remuneration)
- 2) Art 45(3) → right, subject to justified limitations
 - i. to accept offers of employment actually made
 - ii. to move freely within the territory of MSs for this purpose
 - iii. to stay in a MS for the purpose of employment
 - iv. to remain in the territory of a MS after having been employed in that state

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Freedom of establishment

- Art 49 TFEU generally prohibits
 - i. **restrictions** on the freedom of establishment of nationals of a MS in the territory of another MS
 - ii. **restrictions** on the setting-up of agencies, branches or subsidiaries by nationals of any MS established in the territory of any MS
- Art 49 also provides for the **right**
 - I. to take up and pursue activities as self-employed persons and
 - II. to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected

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Free movement of services

Under Art 56 TFEU, any **restrictions** on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended

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Free movement of capital

General prohibition on all **restrictions**

1. **on the movement of capital**: Art 63(1) and
2. **on payments**: Art 63(2)
 - a) between Member States and
 - b) between Member States and third countries

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Common denominator

- 1) General **prohibition on restrictions** on intra-EU free flow of products, production factors and economic participants...
- 2) ...subject to a **possible justification** (with the sole exception of customs duties, that are totally banned)
 - even though restrictive, national measures are compatible with EU law if they serve an objective of general interest

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The paramount importance of the "restriction" issue

- The narrower the notion of "restriction" (obstacle to free movement) is interpreted
 - ⇒ the lesser a national measure is needed to be justified under EU law
 - ⇒ the lesser political choices made by national legislatures have to be scrutinised by the judiciary
- For the sake of legal certainty, clear and foreseeable criteria are needed

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II. THE DEFINITION OF THE CONCEPT OF RESTRICTION ON FREE MOVEMENT

What are the issues at stake?

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General remarks

- i. Treaties' provisions are of little or no help in interpreting the concept of restriction
- ii. Reference must essentially be made to the jurisprudence of the CJEU
- iii. The case-law is not without ambiguity and therefore lends itself to different and even conflicting interpretations
- iv. The case-law has evolved over the years: CJEU has clarified its previous decisions and, on some occasions, has changed its mind

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The evolution in the case-law

- From a "**pure discriminatory**" model to a "**restriction**" model?
 - i) Oldest and traditional approach → restriction = direct or indirect discrimination
 - ii) Most recent approach → a broader concept of "restriction" encompassing non-discriminatory measures → focus on the effect of a national rule in discouraging the exercise of fundamental freedoms
- Free movement of goods: pivotal role

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A "restriction" model?

- covering all national rules which
- a) In the field of goods → are **capable of hindering, directly or indirectly, actually or potentially, trade within the EU**: 'Dassonville formula' (Case 8/74)
 - b) In the field of persons → **prohibit, impede or render less attractive** the exercise of freedom of establishment and freedom to provide services: Case C-439/99 *Commission v. Italy*; cp., as to workers, Case C-19/92 *Kraus*

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Is that broad definition too vague for being useful?

Need for clear and effective criteria for assessing whether there is a restriction on free movement or not

The issues to be addressed

- i) What are those criteria?
- ii) Do similar criteria apply to all freedoms?
- iii) What is the very purpose of free movement?

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A possible conceptualisation of the judicial approach

- The *Trailers* case (in the field of goods) → the prohibition set out in Art 34 TFEU reflects the obligation to comply with 3 principles:
 - a) **non-discrimination**
 - b) **mutual recognition**
 - c) **free access to national markets**
- Do the same principle underpin the other freedoms too?

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The "market access" test

- Does it go beyond discrimination?
- Which role does it play?
 - a) A residual test
 - It applies to catch measures escaping the other two test
 - b) A far-reaching test
 - Any measure which impedes the access to the market of another MS is a restriction on free movement

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III. THE DISCRIMINATORY MODEL

The free movement law is about anti-discrimination and anti-protectionism

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What is a discrimination?

Unequal treatment without objective justification

- By the application of some distinguishing criteria, comparable situations are treated in a different way
- A discrimination arises where there is no objective difference to justify the difference in treatment
- The discriminatory measure has a different burden in law and in fact on the two situations, one situation being treated less favourably than the other

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From a broader perspective...

The **Principle of equal treatment**, as a general principle of EU law which includes the principle of non discrimination on grounds of nationality, requires that

- comparable situations must not be treated differently
- different situations must not be treated in the same way

unless such treatment is objectively justified

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Formal or direct discrimination

The discrimination arises from treating comparable situations differently on grounds of

- ✓ **Origin**/destination of products (goods, services) or
 - ✓ **nationality** (persons, undertakings)
- to the detriment of the cross-border situation

Prohibition of any discrimination on grounds of nationality "within the scope of application of the Treaties" is also a general principle of EU law: Art 18 TFEU; Art 21 (2) Charter

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Examples in the field of goods: Art 34 TFEU

- A rule of the importing MS fixing the minimum alcohol content for imported (but not domestic) vermouth
- A ban or other restriction on advertising foreign products, but not their domestic equivalents

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Examples in the field of persons

- Rules or practice, even adopted by a sporting organisation, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the MS in question
- A legislation permitting only nationals to access a particular trade or profession (ex. civil-law notary)
- Where a MS requires a national of another MS who brings proceedings before one of its courts to give security for costs

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Indirect or covert discrimination

The principle of non-discrimination also prohibits **all covert forms of discrimination** which,

- by the application of distinguishing criteria other than nationality,
- lead to the same result

(Joined Cases C-570/07, C-571/07 Blanco Pérez)

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A national rule is indirectly discriminatory, unless objectively justified and proportionate to its aim,

- i. if it is intrinsically liable to **affect the nationals of other MSs more** than the nationals of the State whose legislation is at issue and
- ii. if there is a **consequent risk** that it will **place the former at a particular disadvantage**

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Criteria of differentiation different from nationality or origin but leading in fact to the same result

- Domestic and cross-border situations comparable in objective terms
- Requirements which, while apparently nationality-neutral on their face (**same burden in law**), have a greater impact on nationals of other MSs (**different burden in fact**): while nationals almost always satisfy the condition, migrants do not

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Examples (in the field of persons)

- Requirements concerning permanent establishment (residence) in the State in question
- language
- rules requiring either a period of service or residence in the host state before enjoying a particular benefit

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Art 56 entails the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a MS other than the one in which the service is provided (Case C-288/89 *Gouda*)

A MS 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 TFEU provisions whose object is, precisely, to guarantee the freedom to provide services (Case C-76/90 *Säger*)

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Case 205/84 *Commission v. Germany*

Permanent establishment (residence, place of business) as a condition for carrying out an economic activity in the Host State is "*the very negation of the freedom to provide services*"

→ it makes it impossible for undertakings established in other MSs to provide services in that State

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Rationale

A cross-border service provider cannot be compared with a provider of equivalent services established in the Host State:

- Establishment connotes more permanence than cross-border provision of services
- The service provider already has a place of establishment – his Home State

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Discriminations against "Active" market actors

Examples

- To be a national of, and/or to be established in, the host state is required for carrying on a trade or profession in that State
- Foreign operators have to satisfy heavier requirements than national operators

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Case C-114/97 *Commission v Spain*

Conditions for being authorised to carry on private security activities in Spain →

- i. undertaking constituted in Spain
- ii. Its directors and managers residing in Spain and
- iii. security staff having Spanish nationality

Obstacle to free movement of persons? YES


Those requirements prevent undertakings established in other MSs from carrying on their activities in Spain through a branch or an agency and nationals of other MS from providing private security services in Spain

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Case C-451/03 Servizi Ausiliari Dottori Commercialisti

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The case

Italian law:

- i) The powers to provide taxpayers with certain tax advice and assistance services are exclusively conferred on Tax Advice Centres ('CAF')
- ii) The ability to set up CAF is limited to persons which are established in Italy

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The CJEU's rulings

- a) Obstacle to freedom to provide services → by reserving those activities to the CAF, Italian law completely prevents access to the market for those services by economic operators from other MSs
- b) Obstacle to freedom of establishment → by restricting the ability to form CAF to legal entities with their registered office in Italy, it is liable to make more difficult, or even completely prevent, the exercise by economic operators from other MSs of their right to establish themselves in Italy with the aim of providing the services in question

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