

GUIDE TO THE CASE LAW
of the European Court of Justice
on Articles 49 *et seq.* TFEU
(ex Articles 43 *et seq.* EC Treaty)

**FREEDOM OF
ESTABLISHMENT**

European Commission

PREFACE

The present guide forms part of a series of guides concerning the case-law of the European Court of Justice. To date this series includes publications concerning Article 49 TFEU et seq. (Freedom of Establishment) and Article 56 TFEU et seq. (Freedom to Provide Services).

The guides are produced and updated by the European Commission, Directorate-General Internal Market & Services, Unit B3.

This guide which concerns Article 49 TFEU aims to present the cases in a practical way by gathering together the essential passage of the cases, thus making it possible to find all the relevant parts of the judgement without having to consult the complete text of the case. The structure of the guide, following the recent case law, provides an approach to Article 43 intended to help not only academics, but also practitioners directly involved in detecting infringements and showing the possible need for harmonization.

*To highlight the essential passages, without ignoring their context, the reasoning of the Court is given without alteration, but the key words are shown in **bold and italics**. It must be pointed out that this method of presentation does not commit the Court, only the editors.*

Within each chapter, cases are cited in reverse chronological order starting with the most recent. The dynamic development of the interpretation by the Court of the concept of "restriction" on the freedom to provide services can thus be followed.

For further information concerning either the Guides to the Case Law please contact the following

Unit B3 Application of Single Market Law
+32 (0)2 29 63442
Markt-B3@ec.europa.eu

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Article 3	Article 3 paragraph 1	Repealed and replaced, in substance, by Articles 3 to 6 TFEU
Article 3	Article 3 paragraph 2	Replaced by Article 8 TFEU
Article 3 b)	Article 5	Article 5 TEU
Article 7	Article 6	Article 11 TFEU
Article 8 A	Article 17	Replaced, in substance, by Article 13 TFEU and Article 282 paragraph 1 TFEU
Article 52	Article 43	Article 49 TFEU
Article 54	Article 44	Article 50
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Article 64	Article 53	Article 60
Article 65	Article 54	Article 61
Article 73 b)	Article 56	Article 63
Article 73 c)	Article 57	Article 64
Article 73 f)	Article 59	Article 66
Article 90	Article 86 paragraph 1	Article 106
Article 164	Article 220	Repealed and replaced, in

		substance, by article 19 TEU
Article 165	Article 221 paragraph 1	Repealed and replaced, in substance, by Article 19 paragraph 2 first subparagraph TEU
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1 - FIELDS OF APPLICATION

1.1 NATURAL PERSONS

In order to assess the legislation at issue in the main proceedings from the point of view of fundamental freedoms, it must be noted that *the situation of a Community national who, since the transfer of his residence, has been living in one Member State and holding the majority of the shares in companies established in another Member State, has fallen within the scope of Article 43 EC* (see, to that effect, Case C-470/04 N [2006] ECR I-7409, paragraph 28).

Case C-464/05 Geurts v Belgische Staat [2007] ECR I-09325 §174

In that respect, and in accordance with well-established case-law, the concept of "establishment" within the meaning of the Treaty is 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 (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25). More particularly, *the Court has held that a 100% holding in the capital of a company having its seat in another Member State undoubtedly brings such a taxpayer within the scope of application of the Treaty provisions on the right of establishment* (Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 21).

Case C-470/04 N [2006] ECR I-0000 §26

As regards Article 52 of the Treaty, read in conjunction with Article 58 thereof (third question), it must be borne in mind that *the right of establishment* with which those provisions are concerned *is granted* both *to natural persons* who are nationals of a Member State of the Community and to legal persons within the meaning of Article 58. Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up (*Gebhard*, cited above, paragraph 23).

Case C-70/95 Sodemare [1997] ECR I-3395 §26

See also: Case C-55/94 Gebhard [1995] ECR I-4165 §23

As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, *this rule is, by its essence, capable of being directly invoked by nationals of all the other Member States*.

Case C-2/74 Revners [1974] ECR 631 §25

1.2 **LEGAL PERSONS AND COMPANIES**

1.2.1 **Legal Persons**

As the national court has referred to each of the provisions mentioned above in the question referred, it should be noted that *the creation and the outright ownership by a natural or legal person established in a Member State of a permanent establishment not having a separate legal personality situated in another Member State* falls within the scope of application *ratione materiae* of Article 43 EC.

Case C-414/06 Lidl Belgium [2008] ECR I-3601 §15

It follows that collective action such as that described in the first question referred by the national court [*collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement*] falls, in principle, within the scope of Article 43 EC.

Case C-438/05 Viking [2007] ECR I-10779 §37

As far as legal persons are concerned, it must also be noted that, as the Hellenic Republic has moreover acknowledged, their freedom of establishment is restricted by the conditions laid down in Article 27(4) of Law No 2646/98 and, in exercising that freedom, *legal persons are treated in the same way as natural persons under Article 48 EC*.

Case C-140/03 Commission v Greece [2005] ECR I-3177 §29

It follows from Article 48 EC that *the right to freedom of establishment is guaranteed* not only to Community nationals but also *to companies formed in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the Community* (see, to that effect, Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483; Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 18; and Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 56).

Case C-299/02 Commission v Netherlands [2004] ECR I-9761 §16

1.2.2 **Nationality of a company**

According to established case-law, *the freedom of establishment* which Article 52 grants to nationals of the Member States and which entails the right for them to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, *includes, pursuant to Article 58 of the Treaty, the right of companies or firms formed in accordance with the law of the Member State and having its registered office, central administration or principal place of business within the Community, to pursue their activities in the Member State concerned through a branch or agency. With regard to companies, it should be noted in this context that it is their corporate seat in the above sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons* (Case 270/83 *Commission v France* [1986] ECR 273, paragraph 18, and Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13).

Case C-264/96 ICI [1998] ECR I-0000 §20

As regards Article 52 of the Treaty, read in conjunction with Article 58 thereof (third question), it must be borne in mind that *the right of establishment* with which those provisions are concerned *is granted* both to natural persons who are nationals of a Member State of the Community and *to legal persons within the meaning of Article 58*. Subject to the exceptions and conditions laid down, *it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up* (Gebhard, cited above, paragraph 23).

Case C-70/95 Sodemare [1997] ECR I-3395 §26

See also: Case C-55/94 Gebhard [1995] ECR I-4165 §23

Such a condition may constitute a restriction, within the meaning of Article 52 of the Treaty, on the freedom of establishment of *a company or firm* which, in terms of Article 58 of the Treaty, *is to be treated in the same way as a natural person who is a national of a Member State, where that company or firm wishes to establish a branch in a Member State different from that in which it has its seat*.

Case C-250/95 Futura & Singer [1997] ECR I-2471 §24

In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52. Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. *A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State*, and in that regard Article 221 of the Treaty ensures that *it will receive the same treatment* as nationals of that Member State as regards participation in the capital of the new company.

Case C-81/87 Daily Mail [1988] ECR 5483 §17

1.2.3 Limits of application of the right of establishment

1.2.3.1 Variety in national legislation

Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether *Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article* – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – *is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law*. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

Case C-210/06 Cartesio [2008] ECR I-09641 §109

In order to answer that question, the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the ***abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy*** (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège*, paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others*, paragraph 120).

Case C-438/05 Viking [2007] ECR I-10779 §57

Consequently, the fact that an economic operator established in one Member State provides services in another Member State ***over an extended period*** is not in itself sufficient for that operator to be regarded as established in the latter Member State.

Case C-171/02 Commission v Portugal [2004] ECR I-5645 §27

In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, ***creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.***

Case C-81/87 Daily Mail [1988] ECR 5483 §19

The Treaty has taken account of that variety in national legislation. In defining, in Article 58, the companies which enjoy the right of establishment, ***the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company.*** Moreover, Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to another. No convention in this area has yet come into force.

Case C-81/87 Daily Mail [1988] ECR 5483 §21

It must therefore be held that ***the Treaty regards the differences in national legislation*** concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems ***which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.***

Case C-81/87 Daily Mail [1988] ECR 5483 §23

1.2.3.2 Transfer of the central office by a national company

As to freedom of establishment, the Court has already held that the fact that the ***company was established in a Member State for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse of that freedom*** (see, to that effect, *Centros*, paragraph 27, and Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 96).

Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-07995 § 36, 37

Accordingly, the answer to the first question must be that, *where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity* and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

Case C-208/00 Überseering BV [2002] ECR I-9919 § 94

Under those circumstances, *Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.*

Case C-81/87 Daily Mail [1988] ECR 5483 §24

The answer to the first part of the first question must therefore be that in the present state of Community law *Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.*

Case C-81/87 Daily Mail [1988] ECR 5483 §25

2 - DEFINITION OF “ESTABLISHMENT”

2.1 ECONOMIC ACTIVITY

The operation of roadside service stations falls within the concept of ‘establishment’ within the meaning of the Treaty. That is a very broad concept which allows EU nationals to participate, on a stable and continuous basis, in the economic life of a Member State other than their State of origin and to profit therefrom (see to that effect, in particular Case 2/74 *Reyners* [1974] ECR 631, paragraph 21; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25; and Case C 451/05 *ELISA* [2007] ECR I-8251, paragraph 63).

(...)The construction of roadside service stations by the legal persons referred to in Article 48 EC necessarily implies that they have access to the territory of the host Member State with a view to a stable and continuous participation in the economic life of that State, in particular by the setting up of agencies, branches or subsidiaries (see, by way of analogy, *Gebhard*, paragraphs 22 to 26, and Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraphs 24 and 25).

Case C-348/08 *Attanasio* [2010] ECR I-0000 §36, 39

Secondly, according to the settled case-law of the Court, the definition of establishment within the meaning of those articles of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period and *registration of a vessel cannot be separated from the exercise of the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes fixed establishment in the State of registration* (Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraphs 20 to 22).

Case C-438/05 *Viking* [2007] ECR I-10779 §70

In response to those arguments, it is to be remembered that, having regard to the objectives of the Community, *sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty* (see Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405, paragraph 4). This applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service (see Case 13/76 *Donà v Mantero* [1976] ECR 1333, paragraph 12).

Case C-415/93 *Bosman* [1995] ECR I-4353 §73

Case 13/76 *Donà* [1976] ECR 1333 §12

see also: Case 36/74 *Walrave* [1974] ECR 1405 §4

Consequently, *the registration of a vessel does not necessarily involve establishment* within the meaning of the Treaty, *in particular where the vessel is not used to pursue an economic activity* or where the application for registration is made by or on behalf of a person who is not established, and has no intention of becoming established, in the State concerned.

Case C-221/89 *Factortame* [1991] ECR I-3905 §21

It must be observed *in limine* that, in view of the objectives of the European Economic Community, ***participation in a community based on religion or another form of philosophy falls within the field of application of Community law only in so far as it can be regarded as an economic activity within the meaning of Article 2 of the Treaty.***

Case C-196/87 Stevmann [1988] ECR 6159 §9

In a case such as the one before the national court it is impossible to rule out *a priori* the possibility that work carried out by members of the community in question constitutes an economic activity within the meaning of Article 2 of the Treaty. ***In so far as the work, which aims to ensure a measure of self-sufficiency for the Bhagwan Community, constitutes an essential part of participation in that community, the services which the latter provides to its members may be regarded as being an indirect quid pro quo for their work.***

Case C-196/87 Stevmann [1988] ECR 6159 §12

However, it must be observed, as the Court held in its judgment of 23 March 1982 in Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, ***that the work must be genuine and effective and not such as to be regarded as purely marginal and ancillary.*** In this case the national court has held that the work was genuine and effective.

Case C-196/87 Stevmann [1988] ECR 6159 §13

Accordingly, the answer given to the first question must be that Article 2 of the EEC Treaty must be interpreted as meaning that ***activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work.***

Case C-196/87 Stevmann [1988] ECR 6159 §14

2.2 **PERMANENT ACTIVITY (OF A STABLE AND CONTINUOUS NATURE)**

*Since the Luxembourg company is involved on a stable and continuous basis in the economic life of Italy, that situation falls within the provisions of the chapter on freedom of establishment, namely Articles 52 to 58, and not those of the chapter concerning services (see, to that effect, Case 2/74 *Reyners v Belgian State* [1974] ECR 631, paragraph 21, and Case C-55/94 *Gebhard v Consiglio degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 25).*

Case C-70/95 *Sodemare* [1997] ECR I-3395 §24

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 (see, to this effect, Case 2/74 *Reyners v Belgium* [1974] ECR 631, paragraph 21).

Case C-55/94 *Gebhard* [1995] ECR I-4165 §25

As the Advocate General has pointed out, *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*. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.

Case C-55/94 *Gebhard* [1995] ECR I-4165 §27

However, that situation is to be distinguished from that of Mr Gebhard who, as a national of a Member State, pursues *a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base* to, amongst others, nationals of that State. *Such a national comes under the provisions of the chapter relating to the right of establishment* and not those of the chapter relating to services.

Case C-55/94 *Gebhard* [1995] ECR I-4165 §28

It must be observed in that regard that *the concept of establishment* within the meaning of Article 52 *et seq.* of the Treaty *involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period*.

Case C-221/89 *Factortame* [1991] ECR I-3905 §20

Consequently, *the registration of a vessel does not necessarily involve establishment* within the meaning of the Treaty, *in particular where the vessel is not used to pursue an economic activity* or where the application for registration is made by or on behalf of a person who is not established, and has no intention of becoming established, in the State concerned.

Case C-221/89 *Factortame* [1991] ECR I-3905 §21

However, where the vessel constitutes an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, ***the registration of that vessel cannot be dissociated from the exercise of the freedom of establishment.***

Case C-221/89 Factortame [1991] ECR I-3905 §22

In that connection, the Netherlands Government and the Commission rightly observed that Articles 59 and 60 of the Treaty do not apply in such a case. ***It is clear from the actual wording of Article 60 that an activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration does not fall within the Community provisions concerning the provision of services.*** On the other hand, such activities may fall within the scope of Articles 48 to 51 or Articles 52 to 58 of the Treaty, depending on the case.

Case C-196/87 Steymann [1988] ECR 6159 §16

In that respect, it must be acknowledged that an insurance undertaking of another Member State which maintains a ***permanent presence*** in the Member State in question ***comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency.*** In the light of the aforementioned definition contained in the first paragraph of Article 60, such an insurance undertaking cannot therefore avail itself of Articles 59 and 60 with regard to its activities in the Member State in question.

Case C-205/84 Commission v Germany [1986] ECR 3755 §21

That article further states what is to be understood by ***“pursuing” an activity, in particular by fixing minimum periods during which it must have been practised.***

Case C-115/78 Knoors [1979] ECR 399 §12

2.3 SELF-EMPLOYED ACTIVITIES

By its second question, the national court asks whether the rules of the Treaty relating to *freedom of establishment* and the free movement of capital preclude national legislation, such as that at issue in the main proceedings, which does not permit natural persons in receipt of income from employment in one Member State and assessable to tax on their total income there, to request that account be taken, for the purposes of determining the rate of taxation applicable to that income in that state, of rental income losses relating to their own use of a private dwelling in another Member State.

Case C-152/03 Ritter [2006] ECR I-1711 §18

With regard to *freedom of establishment*, it should be noted that, according to settled case-law, this *includes the right to take up and practice activities as a self-employed person* (C-9/02 De Lasteyrie du Saillant [2004] ECR I-2409, paragraph 40 and case-law cited therein).

Case C-152/03 Ritter [2006] ECR I-1711 §19

The dispute before the national court involves *natural persons employed as teachers* in a German state secondary school who claim that rental income losses relating to their private dwelling in France should be taken into account for the purposes of determining their income tax liability in Germany.

Case C-152/03 Ritter [2006] ECR I-1711 §20

It follows that an interpretation of the rules of the Treaty relating to freedom of establishment will be of no assistance in the resolution of the main dispute.

Case C-152/03 Ritter [2006] ECR I-1711 §21

In those circumstances, [...], the difficulties which the competent authorities of the host Member State may encounter when carrying out checks on Polish and Czech nationals wishing to become established in that State for the purpose of *engaging in the activity of prostitution* there *cannot permit* those authorities *to assume conclusively that all activity of that kind implies that the person concerned is in a disguised employment relationship and consequently to reject an application for establishment solely on the ground that the planned activity is generally exercised in an employed capacity.*

Case C-268/99 Aldona Malgorzata Janv and Others v Staatssecretaris van Justitie [2001] ECR I-8615 §67

Secondly, the argument of the Hellenic Government that its legislation is not an obstacle to the activities of nationals of other Member States is not relevant under the second paragraph of Article 52 of the Treaty. As the Court found in its judgment in *Factortame and Others*, cited above, at paragraph 25, *freedom of establishment includes, in the case of nationals of a Member State, 'the right to take-up and pursue activities as self-employed persons ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected ...'*.

Case C-62/96 Commission v Greece [1997] ECR I-6725 §23

As regards Article 52 of the Treaty, read in conjunction with Article 58 thereof (third question), it must be borne in mind that *the right of establishment* with which those provisions are concerned is granted both to natural persons who are nationals of a Member State of the Community and to legal persons within the meaning of Article 58. Subject to the exceptions and conditions laid down, it *allows all types of self-employed activity to be taken*

up and pursued on the territory of any other Member State, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up (Gebhard, cited above, paragraph 23).

Case C-70/95 Sodemare [1997] ECR I-3395 §26

See also: Case C-55/94 Gebhard [1995] ECR I-4165 §23

The provisions relating to the right of establishment *cover the taking-up and pursuit of activities* (see, in particular, the judgment in *Reyners*, paragraphs 46 and 47). *Membership of a professional body* may be a condition of taking up and pursuit of particular activities. It *cannot itself be constitutive of establishment*.

Case C-55/94 Gebhard [1995] ECR I-4165 §31

It follows that *the question whether it is possible for a national of a Member State to exercise his right of establishment and the conditions for exercise of that right must be determined in the light of the activities which he intends to pursue* on the territory of the host Member State.

Case C-55/94 Gebhard [1995] ECR I-4165 §32

Under the terms of the second paragraph of Article 52, freedom of establishment is to be exercised *under the conditions laid down for its own nationals by the law of the country where establishment is effected*.

Case C-55/94 Gebhard [1995] ECR I-4165 §33

In the event that the specific activities in question are not subject to any rules in the host State, so that a national of that Member State does not have to have any specific qualification in order to pursue them, *a national of any other Member State is entitled to establish himself on the territory of the first State and pursue those activities there*.

Case C-55/94 Gebhard [1995] ECR I-4165 §34

Next, the authorisation procedure must be easy of access to interested parties, and should not, in particular, be dependent on the payment of excessive administration fees.

Case C-19/92 Kraus [1993] ECR I-1663 §39

It should be emphasised that under the second paragraph of Article 52 freedom of establishment includes access to and the pursuit of the activities of self-employed persons *“under the conditions laid down for its own nationals by the law of the country where such establishment is effected.”* It follows from that provision and its context that in the absence of specific Community rules in the matter each Member State is free to regulate the exercise of the legal profession in its territory.

Case C-107/83 Klopp [1984] ECR 2971 §17

Under the provisions of Article 52 of the Treaty, *freedom of establishment shall include the right to take up activities as self-employed persons and to pursue them 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'*.

Case C-11/77 Patrick [1977] ECR 1199 §8

Case C-2/74 Reyners [1974] ECR 631 §18

In the general programme for the abolition of restrictions on freedom of establishment, adopted on 18 December 1961 pursuant to Article 54 of the Treaty, the Council proposed to eliminate not only overt discrimination, but also any form of disguised discrimination, by designating in Title III(b) as restrictions which are to be eliminated, 'any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, in respect of *the taking up or pursuit of an activity as a self-employed person* where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder *the taking up or pursuit of such activity by foreign nationals*' (OJ, English Special Edition, Second Series, ix, p.8).

Case C-71/76 Thieffry [1977] ECR 765 §13

2.4 **CROSS-BORDER CHARACTER**

According to settled case-law, *Articles 48, 52 and 59 of the Treaty cannot be applied to activities which are confined in all respects within a single Member State* (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37; Case C-332/90 *Steen* [1992] ECR I-341, paragraph 9; and Joined Cases C-29/94 to C-35/94 *Aubertin and Others* [1995] ECR I-301, paragraph 9).

Case C-134/95 USSL [1997] ECR I-195 §19

Although the provisions in the Treaty relating to freedom of movement for persons do not apply to situations which are purely internal to a Member State, the Court has already held that Article 52 of the Treaty *may not be interpreted in such a way as to exclude from the benefit of Community law the nationals of a given Member State when, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a vocational qualification which is recognised under Community law, they are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty* (see judgments in Case 115/78 *Knoors v Staatssecretaris voor Economische Zaken* [1979] ECR 399, paragraph 24, and in Case 61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 13).

Case C-19/92 Kraus [1993] ECR I-1663 §15

Case C-115/78 Knoors [1979] ECR 399 §24

The same reasoning must be followed as regards Article 48 of the Treaty. In its judgment in *Knoors*, cited above (paragraph 20), the Court held that *freedom of movement for workers and the right of establishment guaranteed by Article 48 and 52 of the Treaty were fundamental rights in the Community system, and would not be fully realised if the Member States were able to refuse to grant the benefit of the provisions of Community law to those of their nationals who had taken advantage of its provisions to acquire vocational qualifications in a Member State other than that of which they were nationals*.

Case C-19/92 Kraus [1993] ECR I-1663 §16

Case C-115/78 Knoors [1979] ECR 399 §20

As the Court stated in its judgment in Case 204/87 *Bekaert* [1988] ECR 2029, *the absence of any element going beyond a purely national setting in a given case means*, in matters of freedom of establishment, *that the provisions of Community law are not applicable* to such a situation.

Joined Cases C-54/88 Eleonora Nino & others [1990] ECR 3537 §11

In these circumstances, the answer to the question referred to the Court should be that when *a national of one Member State desirous of exercising a professional activity such as the profession of advocate in another Member State* has obtained a diploma in his country of origin which has been recognised as an equivalent qualification by the competent authority under the legislation of the country of establishment and which has thus enabled him to sit and pass the special qualifying examination for the profession in question, the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes, even in the absence of the directives provided for in Article 57, a restriction incompatible with the freedom of establishment guaranteed by Article 52 of the Treaty.

Case C-71/76 Thieffry [1977] ECR 765 §27

3 - TYPES OF ESTABLISHMENT

3.1 PRIMARY ESTABLISHMENT

3.1.1 Natural persons - Possibility of an employee in one Member State working in a self-employed capacity in another Member State

That is also true in respect of a person *who is employed in one Member State and wishes, in addition, to work in another Member State in a self-employed capacity.*

Case C-143/87 Stanton [1988] ECR 3877 §12

3.1.2 Legal persons - Transfer of central management and control of a company to another Member State

With regard to the first part of the question, the applicant claims essentially that Article 58 of the Treaty expressly confers on the companies to which it applies the same right of primary establishment in another Member State as is conferred on natural persons by Article 52. *The transfer of the central management and control of a company to another Member State amounts to the establishment of the company in that Member State because the company is locating its centre of decision-making there, which constitutes genuine and effective economic activity.*

Case C-81/87 Daily Mail [1988] ECR 5483 §12

3.2 SECONDARY ESTABLISHMENT (RIGHT TO MAINTAIN MORE THAN ONE PLACE OF WORK WITHIN THE EUROPEAN UNION)

3.2.1 Natural persons

Under that provision, freedom of establishment for nationals of one Member State on the territory of another Member State includes the *right to take up and pursue activities as self-employed persons and 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*. The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State (Case 270/83 *Commission v France* [1986] ECR 273, paragraph 13, and Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 22.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §13

As the Court has held (see in particular Case 107/83 *Ordre des Avocats du Barreau de Paris v Klopp* [1984] ECR 2971, paragraph 19), *freedom of establishment is not confined to the right to create a single establishment within the Community but includes freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the territory of the Member States*.

Case C-53/95 Inasti [1996] ECR I- 703 §10

See also: Case C-143/87 Stanton [1988] ECR I-3351 §11

Case C-107/83 Klopp [1984] ECR 2971 §19

It follows that a *person may be established*, within the meaning of the Treaty, *in more than one Member State* - in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries (Article 52) and, as the Court has held, *in the case of members of the professions, by establishing a second professional base* (see Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971, paragraph 19).

Case C-55/94 Gebhard [1995] ECR I-4165 §24

It follows *that the right of establishment precludes a Member State from requiring a person practising a profession to have no more than one place of business* within the Community.

Case C-106/91 Ramrath [1992] ECR I-3351 §21

Consequently, the answer to the first question must be that the Treaty provisions on the right of establishment *preclude a Member State from prohibiting a person from becoming established in its territory and practising as an auditor there on the grounds that that person is established and authorised to practise in another Member State*.

Case C-106/91 Ramrath [1992] ECR I-3351 §22

In that respect it must be pointed out that modern methods of transport and telecommunications facilitate proper contact with clients and the judicial authorities. Similarly, *the existence of a second set of chambers in another Member State does not prevent the application of the rules of ethics in the host Member State*.

Case C-107/83 Klopp [1984] ECR 2971 §21

3.2.2 Legal persons

Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question *whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article* – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – **is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law.** In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. ***That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.***

Case C-210/06 Cartesio [2008] ECR I-09641 §109-110

It should be noted at the outset that freedom of establishment entails for 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 European Community, ***the right to exercise their activity in other Member States through a subsidiary, branch or agency*** (see Case C-307/97 Saint Gobain ZN [1999] ECR I-6161, paragraph 35; Case C-141/99 AMID [2000] ECR I-11619, paragraph 20; and Case C-471/04 Keller Holding [2006] ECR I-2107, paragraph 29).

Case C-414/06 Lidl Belgium [2008] ECR I-0000 §18

The second sentence of the first paragraph of ***Article 52 expressly leaves traders free to choose the appropriate legal form*** in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions (*Commission v France*, paragraph 22).

Case C-253/03 CLT-UFA [2006] ECR I-1831 §14

Therefore, the ***freedom to choose the appropriate legal form*** in which to pursue activities in another Member State primarily serves to allow companies having their seat in a Member State to open a branch in another Member State in order to pursue their activities under the same conditions as those which apply to subsidiaries.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §15

In accordance with the second paragraph of Article 43 EC, read in conjunction with Article 48 EC, ***the freedom of establishment for companies*** referred to in that latter *article includes in particular the formation and management of those companies under the conditions defined by the legislation of the State of establishment for its own companies.*

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §17

As the Advocate General points out in point 30 of his Opinion, the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the *persons concerned* to participate in the economic life of the country effectively and under the same conditions as national operators.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §18

Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They *constitute particular methods of exercise of the freedom of establishment*, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §19

It must therefore be concluded that Articles 43 EC and 48 EC *preclude* national legislation such as the WFBV which *imposes* on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State *certain conditions provided for in domestic law in respect of company formation relating to minimum capital and directors' liability*. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where abuse is established on a case-by-case basis.

The answer to be given to the second question referred by the national court must therefore be that the *impediment to the freedom of establishment* guaranteed by the Treaty constituted by *provisions of national law, such as those at issue, relating to minimum capital and the personal joint and several liability of directors cannot be justified under Article 46 EC, or on grounds of protecting creditors, or combating improper recourse to freedom of establishment or safeguarding fairness in business dealings or the efficiency of tax inspections*.

Case C-167/01 Inspire Art Ltd [2003] ECR I-10155 §105, 142

According to established case-law, *the freedom of establishment* which Article 52 grants to nationals of the Member States and which entails the right for them to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, *includes, pursuant to Article 58 of the Treaty, the right of companies or firms formed in accordance with the law of the Member State and having its registered office, central administration or principal place of business within the Community, to pursue their activities in the Member State concerned through a branch or agency. With regard to companies, it should be noted in this context that it is their corporate seat in the above sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons* (Case 270/83 *Commission v France* [1986] ECR 273, paragraph 18, and Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13).

Case C-264/96 ICI [1998] ECR I-0000 §20

It is clear from those decisions that as regards vessels used for the pursuit of an economic activity, each Member State must, in exercising its powers for the purpose of defining the

conditions for the grant of its "nationality" to a ship, comply with the prohibition of discrimination against nationals of Member States on grounds of nationality and that a condition which stipulates that where a vessel is owned or chartered by natural persons they must be of a particular nationality and, in the case of a company, the shareholders and directors must be of that nationality is contrary to Article 52 of the Treaty. ***A condition relating to registration or management of a vessel in the case of a secondary establishment such as an agency, branch or subsidiary is contrary to Articles 52 and 58 of the Treaty*** (see, in particular, *Commission v Ireland*, cited above, paragraph 12).

Case C-62/96 Commission v Greece [1997] ECR I-6725 §18

As regards vessels used for the pursuit of an economic activity, the Court noted that, in exercising its powers for the purpose of defining the conditions for the grant of its "nationality" to a ship, each Member State must comply with the prohibition of discrimination against nationals of Member States on grounds of their nationality and that a condition which stipulates that where a vessel is owned or chartered by natural persons they must be of a particular nationality and where it is owned by a company the shareholders and directors must be of that nationality is contrary to Article 52 of the Treaty (*Commission v France*, paragraph 14, referring to *Factortame and Others*, paragraphs 29 and 30). Furthermore, Irish ***legislation is contrary to Articles 52 and 58 of the Treaty in so far as it requires legal persons owning vessels to be established under and subject to Irish law and to have their principal place of business in Ireland and, therefore, precludes registration or management of a vessel in the case of a secondary establishment such as an agency, branch or subsidiary*** (*Commission v France*, paragraph 19).

Case C-151/96 Commission v Ireland [1997] ECR I-3327 §12

See also: Case C-334/94 Commission v France [1996] ECR I-1307 §19

It follows that a ***person may be established***, within the meaning of the Treaty, ***in more than one Member State*** - in particular, ***in the case of companies, through the setting-up of agencies, branches or subsidiaries*** (Article 52) and, as the Court has held, in the case of members of the professions, by establishing a second professional base (see Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971, paragraph 19).

Case C-55/94 Gebhard [1995] ECR I-4165 §24

In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52. Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. ***A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State***, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company.

Case C-81/87 Daily Mail [1988] ECR 5483 §17

That freedom of establishment is not confined to the right to create a single establishment within the Community is confirmed by the very words of Article 52 of the Treaty, according to which ***the progressive abolition of the restrictions on freedom of establishment applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State***. that rule must be regarded as a specific statement of a general principle, applicable equally to the liberal professions, according to which the right of establishment includes freedom to set up and

maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community.

Case C-107/83 Klopp [1984] ECR 2971 §19

4 - COROLLARIES OF THE FREEDOM OF ESTABLISHMENT

4.1 ENTRY AND RESIDENCE

As regards vessels not used for the pursuit of an economic activity, the Court held in *Commission v Ireland*, cited above, paragraph 13, that, ***under Community law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity and to reside there after having pursued such an activity.*** Access to leisure activities available in that Member State is a corollary to freedom of movement.

Case C-62/96 Commission v Greece [1997] ECR I-6725 §19

See also: Case C-151/96 Commission v Ireland [1997] ECR I-3327 §13

Case C-334/94 Commission v France [1996] ECR I-1307 §21

His position might therefore come within the chapter of the Treaty on workers, more particularly Article 48, or ***within the chapters on the right of establishment and on services, in particular Articles 52, 56 and 59.***

Case C-106/91 Ramrath [1992] ECR I-3351 §16

Furthermore, ***a comparison of those different provisions shows that they are based on the same principles as regards both the entry into and residence in the territory of the Member States*** of persons covered by Community law and also the prohibition of all discrimination against them on grounds of nationality.

Case C-106/91 Ramrath [1992] ECR I-3351 §17

It should be pointed out that the Court has already held on several occasions that ***the right of residence is a right conferred directly by the Treaty subject only to the condition that the person concerned is carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the Treaty*** (see in particular the judgment in Case 48/75 Royer [1976] ECR 497, at paragraph 31).

Case C-363/89 Roux [1991] ECR I-273 §9

Accordingly the registration of a national of another Member State of the Community with a ***social security scheme established by the legislation of the host State cannot be imposed as a condition precedent to the exercise of the right of residence.***

Case C-363/89 Roux [1991] ECR I-273 §10

The questions put should therefore be answered in the sense that ***the right of nationals of one Member State to enter the territory of another Member State and to reside there is conferred directly, on any person falling within the scope of Community law, by the Treaty, especially Articles 48, 52 and 59 or, as the case may be, by its implementing provisions independently of any residence permit issued by the host State.***

Case C-48/75 Royer [1976] ECR 497 §50

4.2 **RIGHT TO RESIDE AFTER CEASING AN ACTIVITY**

As regards vessels not used for the pursuit of an economic activity, the Court held in *Commission v Ireland*, cited above, paragraph 13, that, under Community law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity *and to reside there after having pursued such an activity*. Access to leisure activities available in that Member State is a corollary to that freedom of movement.

Case C-62/96 Commission v Greece [1997] ECR I-6725 §19

See also: Case C-151/96 Commission v Ireland [1997] ECR I-3327 §13

and: Case C-334/94 Commission v France [1996] ECR I-1307 §21

4.3 OTHER RIGHTS OF THE FREEDOM OF ESTABLISHMENT

As regards vessels not used for the pursuit of an economic activity, the Court held in *Commission v Ireland*, cited above, paragraph 13, that, under Community law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity and to reside there after having pursued such an activity. ***Access to leisure activities available in that Member State is a corollary to freedom of movement.***

Case C-62/96 Commission v Greece [1997] ECR I-6725 §19

See also: Case C-151/96 Commission v Ireland [1997] ECR I-3327 §13

Case C-334/94 Commission v France [1996] ECR I-1307 §21

In paragraph 14 of that judgment, the Court concluded that ***registration by such a national of a pleasure craft in the host Member State falls within the scope of the Community provisions relating to freedom of movement for persons.***

Case C-62/96 Commission v Greece [1997] ECR I-6725 §20

See also: Case C-151/96 Commission v Ireland [1997] ECR I-3327 §14

Case C-334/94 Commission v France [1996] ECR I-1307 §22

As the Court has held on several occasions (see, most recently, the judgment of 14 January 1988 in Case 63/86 *Commission v Italy* [1988] ECR 29), ***the said prohibition is concerned not solely with the specific rules on the pursuit of an occupation but also with rules relating to various general facilities which are of assistance in the pursuit of that occupation.***

Case C-305/87 Commission v Greece [1989] ECR 1461 §21

In particular as is apparent from Article 54(3)(e) of the Treaty and the General programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (Official Journal, English Special Edition, Second Series IX, p.7), ***the right to acquire, use or dispose of immovable property on the territory of a Member State is the corollary of freedom of establishment.***

Case C-305/87 Commission v Greece [1989] ECR 1461 §22

That *reasoning* cannot be accepted. When Community law guarantees a natural person the freedom to go to another Member State ***the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement.*** It follows that the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and ***the right to obtain financial compensation provided for by national law when that risk materialises.*** The fact that the compensation at issue is financed by the Public Treasury cannot alter the rules regarding the protection of the rights guaranteed by the Treaty.

Case C-186/87 Cowan [1989] ECR 195 §17

As is apparent from the general programmes which were adopted by the Council on 18 December 1961 (Journal Officiel 1962, pp. 32 and 36) and which, as the Court has pointed out on numerous occasions, provide useful guidance with a view to the implementation of the provisions of the Treaty relating to the right of establishment and the freedom to provide services, the aforesaid prohibition is concerned not solely with the specific rules on the

pursuit of occupational activities *but also with the rules relating to the various general facilities which are of assistance in the pursuit of those activities. Among the examples mentioned in the two programmes are the right to purchase, exploit and transfer real and personal property and the right to obtain loans and in particular to have access to the various forms of credit.*

Case C-63/86 Commission v Italy [1988] ECR 29 §14

5 - DEFINITION OF RESTRICTIONS

5.1 GENERAL PRINCIPLES

It is settled case-law that *any national measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty constitutes a restriction within the meaning of Article 49 TFEU* (see, to that effect, Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761, paragraph 15, and Case C-140/03 *Commission v Greece* [2005] ECR I-3177, paragraph 27).

A national rule which makes the establishment of an undertaking from another Member State conditional upon the issue of prior authorisation falls within that category, since it is capable of hindering the exercise by that undertaking of freedom of establishment by preventing it from freely pursuing its activities through a fixed place of business. First, the undertaking may have to bear the additional administrative and financial costs which any such grant of authorisation entails. Secondly, the system of prior authorisation acts as a bar to self-employed activity for economic operators who do not satisfy predetermined requirements, compliance with which is a condition for the issue of that authorisation (see, to that effect, *Hartlauer*, paragraphs 34 and 35).

Moreover, national legislation constitutes a restriction where it makes the pursuit of an activity subject to a condition which is linked to the economic or social needs for that activity, since it tends to limit the number of service providers (see, to that effect, *Hartlauer*, paragraph 36).

Joined Cases C-570/07 and C-571/07 Blanco Perez [2010] ECR I-0000 §53, 54, 55

Legislation which makes the establishment in the host Member State of an economic operator from another Member State subject to the issue of a prior authorisation and allows self-employed activity to be pursued only by certain economic operators who satisfy predetermined requirements, compliance with which is a condition for the issue of that authorisation, *constitutes a restriction within the meaning of Article 43 EC*. Such legislation deters or even prevents economic operators from other Member States from pursuing their activities in the host Member State through a fixed place of business (see, to this effect, *Hartlauer*, paragraphs 34, 35 and 38).

Case C-531/06 Commission v Italy [2009] ECR I-0000 §44

According to settled case-law, *all measures which prohibit, impede or render less attractive [the freedom of establishment] must be regarded as obstacles* (see, Case C-55/94, Gebhard [1995] ECR I-4165, paragraph 37, and Case C-442/02, Caixabank France [2004] ECR I-8961, paragraph 11)

Case C-293/06 Deutsche Shell v Finanzamt Hamburg [2008] ECR I-1129 §28

It follows from all of the foregoing that, *by applying the transitional provisions or 'established rights', which permit psychotherapists to obtain authorisation or admission to practise independently of the applicable rules of the statutory sickness insurance scheme, solely to psychotherapists who have practised in a region of Germany under the German*

sickness insurance schemes and *by failing to take account of comparable or similar professional activity performed by psychotherapists in other Member States*, the Federal Republic of Germany has failed to fulfil its obligations under Article 43 EC.

Case C-456/05 Commission v Germany [2007] ECR I-10517 §76

A restriction on freedom of establishment is prohibited by Article 43 EC, *even if it is of limited scope or minor importance* (see, to that effect, Case 270/83 *Commission v France*, paragraph 21; Case C-34/98 *Commission v France* [2000] ECR I-995, paragraph 49; and Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 43).

Case C-170/05 Denkavit Internationaal [2006] ECR I-11949 §50

Such a condition [*requiring the economic operator to have a minimum share capital*] cannot be justified on the ground of protection of creditors, in so far as there are means of attaining that objective which restrict the freedom to provide services and freedom of establishment to a lesser degree, such as setting up a guarantee or taking out an insurance contract.

Case C-171/02 Commission v Portugal [2004] ECR I-5645 §42, 55

According to settled case-law, although direct taxation falls within the competence of the *Member States*, the latter *must none the less exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination on grounds of nationality* (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 21 and 26; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; and Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 36).

Case C-250/95 Futura & Singer [1997] ECR I-2471 §19

Such a system, which is in conformity with the fiscal principle of territoriality, cannot be regarded as entailing any discrimination, overt or covert prohibited by the Treaty.

Case C-250/95 Futura & Singer [1997] ECR I-2471 §22

As far as Article 52 is concerned, suffice it to state that, as has been found above, the legislation in question is applicable to all traders exercising their activity on national territory; that its purpose is not to regulate the conditions concerning the establishment of the undertakings concerned; *and that any restrictive effects which it might have on freedom of establishment are too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom.*

Case C-418/93 Semeraro [1996] ECR I-2975 §32

On that point, it must however be stressed that *Community law sets limits to the exercise of those powers by the Member States in so far as provisions of national law adopted in that connection must not constitute an obstacle to the effective exercise of the fundamental freedoms guaranteed by Articles 48 and 52 of the Treaty* (see, to that effect, the judgment in Case 222/86 *UNECTEF v Heylens and Others* [1987] ECR 4097, paragraph 11).

Case C-19/92 Kraus [1993] ECR I-1663 §28

It follows that *the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment* within the meaning of Article 52 *et seq.* of the Treaty.

Case C-221/89 Factortame [1991] ECR I-3905 §23

However, it may be seen from the provisions of Articles 54 and 57 of the Treaty that *freedom of establishment is not completely ensured by the mere application of the rule of national treatment*, as such application retains all obstacles other than those resulting from the non-possession of the nationality of the host State and, in particular, those resulting from the disparity of the conditions laid down by the different national laws for the acquisition of an appropriate professional qualification.

Case C-136/78 Auer [1979] ECR 437 §21

Thus *a Member State cannot, after 1 January 1973, make the exercise of the right to free establishment by a national of a new Member State subject to an exceptional authorisation in so far as he fulfils the conditions laid down by the legislation of the country of establishment for its own nationals.*

Case C-11/77 Patrick [1977] ECR 1199 §15

5.2 **DISCRIMINATORY MEASURES**

In this connection, it should be borne in mind that *the principle of non-discrimination prohibits not only direct or overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result* (see Case C-212/99 *Commission v Italy* [2001] ECR I-4923, paragraph 24, and Case C-224/00 *Commission v Italy* [2002] ECR I-2965, paragraph 15).

Thus, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as *indirectly discriminatory if it is intrinsically liable to affect the nationals of other Member States more than the nationals of the State whose legislation is at issue and if there is a consequent risk that it will place the former at a particular disadvantage* (Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 30).

Joined Cases C-570/07 and C-571/07 *Blanco Perez* [2010] ECR I-0000 §80

[...] Article 43 EC prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals (Case 270/83 *Commission v France* [1986] ECR 273, paragraph 24).

In the present case, the national legislation at issue *infringes that very prohibition by requiring only nationals of the eight new Member States to prove that they will not be working as employees by presenting the certificate* provided for in Paragraph 2(4) of the AuslBG or a work permit exemption certificate as referred to in Paragraph 15(1) of that law.

Thus, first, access by those Community nationals to an economic activity as a member of a partnership or of a limited liability company in which they have a holding of less than 25% of the capital is subject to additional conditions and formalities compared to those applied to Austrian nationals. Second, if the certification procedure provided for in Paragraph 2(4) of the AuslBG is applied, the economic activity carried out by the nationals of the eight new Member States is itself suspended for the duration of that procedure, namely for a maximum of three months.

The national legislation at issue therefore enshrines a difference in treatment on the ground of nationality which is prohibited, in principle, by Article 43 EC.

Case C-161/07 *Commission v Austria* [2008] ECR I-10671 §28-31

More particularly, since such a *concession* is of a certain cross-border interest, *its award, in the absence of any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession but which are located in other Member States* (see, to that effect, Case C-507/03 *Commission v Ireland* [2007] ECR I-0000, paragraph 30).

Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC (*Commission v Ireland*, cited above, paragraph 31).

Case C-347/06 ASM Brescia [2008] ECR I-05641 §59-60

In the light of that judgment, the condition *requiring practice as a psychotherapist in a region of Germany* under the German statutory sickness insurance scheme, which *requires* the psychotherapist *to be established in a region of Germany*, amounts to a restriction on the freedom of establishment of psychotherapists established in another Member State.

Case C-456/05 Commission v Germany [2007] ECR I-10517 §57

In those circumstances, legislation of a Member State, [...], which lays down *minimum tax bases only for non-resident taxpayers* constitutes indirect *discrimination on grounds of nationality* within the meaning of Article 52 of the Treaty. In fact, even if such legislation provides for a distinction on the basis of residence, in that it denies non-residents certain tax benefits which are, conversely, granted to persons residing within the national territory, it is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see, by analogy, *Schumacker*, paragraph 28).

Case C-383/05 Talotta [2007] ECR I-2555 §25, 32

It is true that the Court has already held that, in tax law, *the taxpayers' residence may constitute a factor that might justify national rules involving different treatment for resident and non-resident taxpayers*. (*Marks & Spencer*, paragraph 37).

Different treatment of resident and non-resident taxpayers cannot therefore in itself be categorised as *discrimination* within the meaning of the EC Treaty (see, to that effect, *Wielockx*, paragraph 19).

However, *a difference in treatment between those two categories of taxpayer must be categorised as discrimination* within the meaning of the Treaty *where there is no objective difference such as to justify that difference in treatment* (see, to that effect, *Schumacker*, paragraphs 36 to 38, and *Royal Bank of Scotland*, paragraph 27).

Such a difference in the tax treatment of dividends between parent companies, based on the location of their registered office, constitutes a restriction on freedom of establishment, which is, in principle, prohibited by Article 43 EC and Article 48 EC.

Case C-170/05 Denavit International [2006] ECR I-11949 §23, 24, 25, 29

It is for the concession-granting public authority to evaluate, subject to review by the competent courts, the appropriateness of the detailed arrangements of the call for competition to the particularities of the public service concession in question. However, *a complete lack of any call for competition in the case of the award of a public service concession* such as that at issue in the main proceedings *does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency*.

Case 458/03 Parking Brixen [2005] ECR I-8585 §50

In this case, Article 5 of the Bermuda II Agreement permits the United States of America, inter alia, *to revoke, suspend or limit the operating authorisations or technical permissions of an airline designated by the United Kingdom* but of which *a substantial part of the ownership and effective control is not vested in that Member State or its nationals*.

There can be no doubt that *airlines established in the United Kingdom of which a substantial part of the ownership and effective control is vested either in a Member State other than the United Kingdom or in nationals of such a Member State ('Community airlines')* are capable of being affected by that clause.

Case C-466/98 Commission v UK and Northern Ireland [2002] ECR I-09427 §47, 48

It must be observed first of all that *the nationality condition* imposed on undertakings by Article 7 of the Law *prevents undertakings established in other Member States from carrying on their activities in Spain through a branch or an agency*. Secondly *Article 10* of the Law *precludes nationals of other Member States from carrying on permanently private security activities in Spain as employed persons or self-employed persons*. Finally, *those provisions prevent nationals of other Member States from providing private security services* in Spain.

Case C-114/97 Commission v Spain [1998] ECR I-0000 §31

The rule according to which directors and managers of all security undertakings must reside in Spain constitutes an obstacle to freedom of establishment (see, in this regard, Case C-221/89 *Factortame* [1991] ECR I-3905, paragraph 32) and to the freedom to provide services.

Case C-114/97 Commission v Spain [1998] ECR I-0000 §44

It is clear from those decisions that as regards vessels used for the pursuit of an economic activity, *each Member State must*, in exercising its powers for the purpose of defining the conditions for the grant of its "nationality" to a ship, *comply with the prohibition of discrimination against nationals of Member States on grounds of nationality and that a condition which stipulates that where a vessel is owned or chartered by natural persons they must be of a particular nationality and, in the case of a company, the shareholders and directors must be of that nationality is contrary to Article 52* of the Treaty. A condition relating to registration or management of a vessel in the case of a secondary establishment such as an agency, branch or subsidiary is contrary to Articles 52 and 58 of the Treaty (see, in particular, *Commission v Ireland*, cited above, paragraph 12).

Case C-62/96 Commission v Greece [1997] ECR I-6725 §18

Case C-151/96 Commission v Ireland [1997] ECR I-3327 §12

See also: Case C-334/94 Commission v France [1996] ECR I-1307 §14

Accordingly, *that law treats nationals who have not exercised their right to free movement and migrant workers differently, to the detriment of the latter*, since it is primarily the latter's children who do not reside in the territory of the Member State granting the benefit in question.

Joined Cases C-4/95 and C-5/95 Stöber and Piosa Pereira [1997] ECR I-511 §38

In so far as the case-files contain no material capable of providing objective justification for that difference in treatment, *it must be regarded as discriminatory* and hence incompatible with Article 52 of the Treaty.

Joined Cases C-4/95 and C-5/95 Stöber and Piosa Pereira [1997] ECR I-511 §39

Further, the Court has held (see Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017, paragraph 14) that ***the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.***

Case C-1/93 Halliburton [1994] ECR I-1137 §15

See also Case C-330/91 Commerzbank [1993] ECR I-4017 §14

Although the ***difference in treatment has only an indirect effect on the position of companies constituted under the law of other Member States, it constitutes discrimination on grounds of nationality*** which is prohibited by Article 52 of the Treaty.

Case C-1/93 Halliburton [1994] ECR I-1137 §20

As for the requirement for the owners, charterers, managers and operators of the vessel and, in the case of a company, the shareholders and directors to be resident and domiciled in the Member State in which the vessel is to be registered, it must be held that such a requirement, which is not justified by the rights and obligations created by the grant of a national flag to a vessel, ***results in discrimination on grounds of nationality. The great majority of nationals of the Member State in question are resident and domiciled in that State and therefore meet that requirement automatically, whereas nationals of other Member States would, in most cases, have to move their residence and domicile to that State in order to comply with the requirements of its legislation.*** It follows that such a requirement is contrary to Article 52.

Case C-221/89 Factortame [1991] ECR I-3905 §32

Article 52 is thus intended to ensure that all nationals of Member States who establish themselves in another Member State, even if that establishment is only secondary, for the purpose of pursuing activities there as a self-employed persons receive the same treatment as nationals of that State and it ***prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality resulting from the legislation of the Member State.***

Case C-270/83 Commission v France [1986] ECR 273 §14

Notwithstanding the French government's argument to the contrary, the difference in treatment also cannot be justified by any advantages which branches and agencies may enjoy *vis-a-vis* companies and which, according to the French government, balance out the disadvantages resulting from the failure to grant the benefit of shareholders' tax credits. Even if such advantages actually exist, they cannot justify a breach of the obligation laid down in Article 52 to accord foreign companies the same treatment in regard to shareholders' tax credits as is accorded to French companies. ***It is also not necessary in this context to assess the extent of the disadvantages*** which branches and agencies of foreign insurance companies suffer as a result of the failure to grant them the benefit of shareholders' tax credits and to consider whether those disadvantages could have any effect on their tariffs, ***since Article 52 prohibits all discrimination, even if only of a limited nature.***

Case C-270/83 Commission v France [1986] ECR 273 §21

It must first be noted that the fact that the laws of the Member States on corporation tax have not been harmonised cannot justify the difference of treatment in this case. Although it is true that in the absence of such harmonisation, a company's tax position depends on the national law applied to it, ***Article 52 of the EEC Treaty prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right***

of establishment which differ from those laid down for its own nationals.

Case C-270/83 Commission v France [1986] ECR 273 §24

The answer to the question referred to the Court must therefore be that, with effect from 1 January 1973, a national of a new Member State who holds a qualification recognised by the competent authorities of the Member State of establishment as equivalent to the certificate issued and required in that State enjoys the right to be admitted to the profession of architect and to practise it *under the same conditions as nationals of the Member State of establishment without being required to satisfy any additional conditions.*

Case C-11/77 Patrick [1977] ECR 1199 §18

The Commission, in spite of doubts which it experiences on the subject of the direct effect of the provision to be interpreted - both in view of the reference by the Treaty to the 'general programme' and to the implementing directives and by reason of the tenor of certain liberalising directives already taken, which do not attain in every respect perfect equality of treatment - considers, however, that *Article 52 has at least a partial direct effect in so far as it specifically prohibits discrimination on grounds of nationality.*

Case C-2/74 Revners [1974] ECR 631 §14

5.3 **NON-DISCRIMINATORY MEASURES**

It must therefore be held that, *by prohibiting biologists from holding shares in more than two companies formed in order to operate jointly one or more biomedical analysis laboratories*, the French Republic has *failed* to fulfil its obligations under *Article 43 EC*.

Case C-89/09 *Commission v France* [2010] ECR I-0000 §103

As regards the compatibility with Article 49 EC of the national scheme at issue, it has consistently been held that *Article 49 EC requires* not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also *the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States*, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (see, in particular, Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraph 78 and the case-law cited).

It follows unequivocally from the case-law cited above that the scheme established by Decree-Law No 12/2004 – under which even *undertakings which are already legally established in another Member State must, before being able to provide temporary construction services in Portugal, be authorised by the Portuguese authorities* to provide the type of services which they wish to carry out – constitutes a *restriction* of the freedom to provide services.

Case C-458/08 *Commission v Portugal* [2010] ECR I-0000 §83, 86

It is settled case-law that restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective (*Hartlauer*, paragraph 44, and *Apothekerkammer des Saarlandes and Others*, paragraph 25).

Joined Cases C-570/07 and C-571/07 *Blanco Perez* [2010] ECR I-0000 §61

Accordingly, a *rule* such as that at issue in the main proceedings, *which makes the opening of new roadside service stations subject to the compliance with minimum distances between service stations, constitutes a restriction within the meaning of Article 43 EC*. Such a rule, which applies only to new service stations and not to service stations already in existence before the entry into force of the rule, makes access to the activity of fuel distribution subject to conditions and, by being more advantageous to operators who are already present on the Italian market, is liable to deter, or even prevent, access to the Italian market by operators from other Member States (also see, by way of analogy, *CaixaBank France*, paragraphs 11 to 14, and Case C-518/06 *Commission v Italy* [2009] ECR I-0000, paragraphs 62 to 64, 70 and 71).

Case C-348/08 *Attanasio* [2010] ECR I-0000 §45

In this case, the question arises of the conformity with Article 43 EC of national *legislation imposing certain conditions for obtaining authorisation to carry on the activity of vehicle inspection, in particular, by making the grant of administrative authorisations subject to the criterion of the public interest*, the requirement that undertakings wishing to establish

themselves on that market should hold a *minimum share capital* of EUR 100 000, the *limiting of those undertakings' company objects* and the imposition of *incompatibility rules on members, managers and directors*.

It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions of that freedom (see, inter alia, Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 26; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; and Case C-157/07 *KrankenheimRuhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-0000, paragraph 30).

Even though those rules apply in exactly the same way to operators established in Portugal and to those originating in other Member States, *they could lead to the prevention of operators not satisfying the criteria defined there from establishing in Portugal for the purpose of carrying on the activity of vehicle inspection*. In particular, as the Commission claims, the public interest criterion, to which the grant of the administrative authorisation concerned is subject, may open the way for an arbitrary use of the discretion on the part of the competent authorities, permitting them to refuse that authorisation to certain interested operators, although they fulfil the other conditions laid down by the legislation.

Consequently, the conditions concerned for access to the activity of vehicle roadworthiness tests imposed by the Portuguese legislation constitutes a restriction on freedom of establishment.

Case C-438/08 Commission v Portugal [2009] ECR I-0000 §28-31

The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That *obligation of transparency* which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service *concession to be opened up to competition and the impartiality of procurement procedures to be reviewed* (see, to that effect, *Telaustria and Telefonadress*, paragraphs 61 and 62, and *Parking Brixen*, paragraph 49).

Theoretically, a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency (*Parking Brixen*, paragraph 50).

Case C-410/04 ANAV [2006] ECR I-3303 § 21, 22

As the Advocate General has pointed out in point 47 of his Opinion, *a merger* such as that at issue in the main proceedings *constitutes an effective means of transforming companies* in that it makes it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, thereby reducing the complications, times and costs associated with other forms of company consolidation such as those which entail, for example, the dissolution of a company with liquidation of assets and the subsequent formation of a new company with the transfer of assets to the latter.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §21

In so far as, under national rules, recourse to such a means of company transformation is not possible where one of the companies is established in a Member State other than the Federal

Republic of Germany, German law establishes *a difference in treatment between companies* according to the internal or cross-border nature of the merger, which is likely to deter the exercise of the freedom of establishment laid down by the Treaty.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §22

Such a difference in treatment constitutes a restriction within the meaning of Articles 43 EC and 48 EC, which is contrary to the right of establishment and can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application must be appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it (see Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 49; Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 49).

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §22

According to settled case-law, *Article 43 EC precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of the freedom of establishment* that is guaranteed by the Treaty (see, in particular, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-299/02 *Commission v Netherlands* [2004] ECR I-0000, paragraph 15).

Case C-140/03 Commission v Greece [2005] ECR I-3177 §27

In this case, it should be noted that the measure prohibiting qualified opticians from operating more than one optician's shop effectively amounts to a restriction on the freedom of establishment of natural persons within the meaning of Article 43 EC, notwithstanding the alleged absence of discrimination on grounds of the nationality of the professionals concerned.

Case C-140/03 Commission v Greece [2005] ECR I-3177 §28

It is settled case-law that *Article 43 EC precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals of the freedom of establishment* guaranteed by the Treaty (see, to that effect, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32).

Case C-299/02 Commission v Netherlands [2004] ECR I-9761 §15

Further, the Court has held (see Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017, paragraph 14) that *the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.*

Case C-1/93 Halliburton [1994] ECR I-1137 §15

See also: Case C-330/91 Commerzbank [1993] ECR I-4017 §14

Although it applies independently of a company's seat, *the use of the criterion of fiscal residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having, their seat in other Member States.* Indeed, it is most often those companies which are resident for tax purposes outside the territory of the Member State in question.

Case C-330/91 Commerzbank [1993] ECR I-4017 §15

On that point, it must however be stressed that *Community law sets limits to the exercise of those powers by the Member States* in so far as provisions of national law adopted in that connection must not constitute an obstacle to the effective exercise of the fundamental freedoms guaranteed by Articles 48 and 52 of the Treaty (see, to that effect, the judgment in Case 222/86 *UNECTEF v Heylens and Others* [1987] ECR 4097, paragraph 11).

Case C-19/92 Kraus [1993] ECR I-1663 §28

Consequently, Articles 48 and 52 preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, *where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty*. The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest (see to that effect, judgment in Case 71/76 *Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris* [1977] ECR 765, paragraphs 12 and 15). It would however also be necessary in such a case for application of the national rules in question to be appropriate for ensuring attainment of the objective they pursue and not to go beyond what is necessary for that purpose (see judgment in Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351, paragraphs 29 and 30).

Case C-19/92 Kraus [1993] ECR I-1663 §32

In answering that question, it must first be borne in mind that, as the Court has stated on numerous occasions, Article 52 of the Treaty constitutes one of the fundamental legal provisions of the Community. *By prohibiting any discrimination on grounds of nationality resulting from national laws, regulations or practices, that article seeks to ensure that, as regards the right of establishment, a Member State accords to nationals of other Member States the same treatment as it accords to its own nationals* (judgment in Case 197/84 *Steinhauser v City of Biarritz* [1985] ECR 1819, paragraph 14).

Case C-168/91 Konstantinidis [1993] ECR I-1191 §12

It must therefore be determined whether national rules relating to the transcription in Roman characters of the name of a Greek national in the registers of civil status of the Member State in which he is established are capable of placing him at *a disadvantage in law or in fact, in comparison with the way in which a national of that Member State would be treated in the same circumstances*.

Case C-168/91 Konstantinidis [1993] ECR I-1191 §13

Rules of that kind are to be regarded as incompatible with Article 52 of the Treaty only in so far as their application causes a Greek national *such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment* enshrined in that article.

Case C-168/91 Konstantinidis [1993] ECR I-1191 §15

It should therefore be stated in reply to the national court that Article 52 of the Treaty must be interpreted as meaning that it is contrary to that provision for a Greek national to be obliged, under the applicable national legislation, to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation is modified and *the resulting distortion exposes him to the risk that potential clients may confuse him with other persons*.

Case C-168/91 Konstantinidis [1993] ECR I-1191 §17

It must be stated in this regard that, even if applied without any discrimination on the basis of nationality, *national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment* guaranteed to them by Article 52 of the EEC Treaty. That could be the case if the national rules in question took *no account of the knowledge and qualifications already acquired by the person concerned in another Member State*.

Case C-340/89 Vlassopoulou [1991] ECR I-2357 §15

According to the Court's case-law *the principle of equal treatment*, of which Articles 52 and 59 of the Treaty embody specific instances, *prohibits* not only overt discrimination by reason of nationality but also *all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result* (see, in particular, the judgment of 29 October 1980 in Case 22/80 *Boussac v Gerstenmeier* ((1980)) ECR 3427).

Case C-3/88 Commission v Italy [1989] ECR 4035 §8

The legislation of a Member State which exempts persons whose principal occupation is employment in that Member State from the obligation to pay contributions to the scheme for self-employed persons but withholds such exemption from persons whose principal occupation is employment in another Member State *has the effect of placing at a disadvantage the pursuit of occupational activities outside the territory of that Member State*. Articles 48 and 52 of the Treaty therefore preclude such legislation.

Case C-143/87 Stanton [1988] ECR 3877 §14

In these circumstances, the answer to the question referred to the Court should be that when a national of one Member State desirous of exercising a professional activity such as the profession of advocate in another Member State has obtained a *diploma in his country of origin which has been recognised as an equivalent qualification by the competent authority under the legislation of the country of establishment* and which has thus enabled him to sit and pass the special qualifying examination for the profession in question, *the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes*, even in the absence of the directives provided for in Article 57, *a restriction incompatible with the freedom of establishment* guaranteed by Article 52 of the Treaty.

Case C-71/76 Thieffry [1977] ECR 765 §27

5.4 **ORIGIN OF RESTRICTIONS**

5.4.1 **Restrictions emanating from the state of destination**

In so far as *the exercise of the powers of opposition* also concern holdings conferring on their holders the power to influence in a definite manner the managements of the companies concerned and to determine their activities and may therefore restrict freedom of establishment, it must be considered that, for the same reasons as those set out above in the examination of the compatibility of the criteria in Article 1(2) of the Decree of 2004 with Article 56 EC, those criteria give the Italian authorities disproportionate discretion in the exercise of their powers of opposition.

Case C-326/07 Commission v Italy [2009] ECR I-02291 §56

It follows that the disputed *obligation to swear that oath, imposed on the employees of private security undertakings*, constitutes an obstacle to the freedom of establishment and to the freedom to provide services for operators not established in Italy.

Indeed, measures less restrictive than those [*territorial limitation of the licence*] imposed by the Italian Republic –[...]– could, in tandem with the requirement of a territorially unlimited prior authorisation, ensure a similar outcome and guarantee the supervision of private security activities.

As regards the grounds relied upon by the Italian Republic in justification of that impediment to the freedoms guaranteed by Articles 43 EC and 49 EC, it must be stated that *the obligation for each change in the functioning of the undertaking to be subject to prefectorial authorisation* cannot be regarded as prima facie inappropriate for attaining the objective entrusted to the Prefetto of effective supervision of the activities concerned (see, to that effect, Case C-134/05 *Commission v Italy*, paragraph 59).

However, the Italian Republic has not shown to the requisite legal standard that supervision of the fixing of staffing levels, as required by the legislation in force, is necessary to attain the objective sought.

The Court has already ruled that, in the private security sector, *the obligation to lodge a guarantee with a deposits and loans office* is likely to hinder or make less attractive the exercise of freedom of establishment and freedom to provide services within the meaning of Articles 43 EC and 49 EC, in so far as it makes the provision of services or the formation of a subsidiary or secondary establishment more onerous for private security undertakings established in other Member States than for those established in the Member State of destination (see Case C-514/03 *Commission v Spain*, paragraph 41).

Case C-465/05 Commission v Italy [2007] ECR I-0000 §48, 77, 103, 104, 109

Having regard to all the foregoing considerations, the reply to the question referred for a preliminary ruling must be that *it is contrary* to Article 43 EC for the domestic legislation of one Member State, such as the legislation at issue in the cases in the main proceedings, *to require a self-employed worker residing in that Member State to register there a company vehicle made available to him by the company for which he works, established in another Member State, when it is not intended that that vehicle should be used essentially in the first Member State on a permanent basis and it is not, in fact, used in that manner.*

Cases C-151/04 and 152/04 Nadin [2005] I-11203 § 55

Legislation of a Member State which requires contributions to be made to the scheme for self-employed persons by persons already working as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social security scheme inhibits the pursuit of occupational activities outside the territory of that Member State. Article 52 of the Treaty therefore precludes legislation of that kind unless it is duly justified.

Case C-53/95 Inasti [1996] ECR I-703 §12

Consequently, Articles 48 and 52 *preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty.* The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest (see to that effect, judgment in Case 71/76 *Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris* [1977] ECR 765, paragraphs 12 and 15). It would however also be necessary in such a case for application of the national rules in question to be appropriate for ensuring attainment of the objective they pursue and not to go beyond what is necessary for that purpose (see judgment in Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351, paragraphs 29 and 30).

Case C-19/92 Kraus [1993] ECR I-1663 §32

It should therefore be stated in reply to the national court that Article 52 of the Treaty must be interpreted as meaning that *it is contrary to that provision for a Greek national to be obliged, under the applicable national legislation, to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons.*

Case C-168/91 Konstantinidis [1993] ECR I-1191 §17

It must be stated in this regard that, even if applied without any discrimination on the basis of nationality, *national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment* guaranteed to them by Article 52 of the EEC Treaty. *That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.*

Case C-340/89 Vlassopoulou [1991] ECR I-2357 §15

It is established that entitlement to reimbursement of sickness costs pertains to a person and not to a company. However, the requirement that a company formed in accordance with the law of another member state must be accorded the same treatment as national companies means that the employees of that company must have the right to be affiliated to a specific social security scheme. ***Discrimination against employees in connection with social security protection indirectly restricts the freedom of companies of another member state to establish themselves through an agency, branch or subsidiary in the member state concerned.*** That proposition is supported by the fact that according to the council's general programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (Official journal, English special edition, second series ix, p. 7), which provides useful guidance for the implementation of the relevant provisions of the treaty (see judgments of 28 April 1977, case 71/76 Thieffry (1977) ECR 765 and of 18 June 1985 in case 197/84 Steinhauser (1985) ECR 1819), all provisions and administrative practices which "deny or restrict the right to participate in social security schemes, in particular sickness insurance schemes" are to be regarded as restrictions on the freedom of establishment.

Case C-79/85 Segers [1986] ECR 2375 §15

The question must therefore be answered to the effect that even in the absence of any directive co-ordinating national provisions governing access to and the exercise of the legal profession, ***Article 52 and seq. of the EEC Treaty prevent the competent authorities of a Member State from denying, on the basis of the national legislation and the rules of professional conduct which are in force in that State, to a national of another Member State the right to enter and to exercise the legal profession solely on the ground that he maintains chambers simultaneously in another Member State.***

Case C-107/83 Klopp [1983] ECR 2971 §22

Thus a Member State cannot, after 1 January 1973, make the exercise of the right to free establishment by a national of a new Member State subject to an exceptional authorisation in so far as he fulfils the conditions laid down by the legislation of the country of establishment for its own nationals.

Case C-11/77 Patrick [1977] ECR 1199 §15

The answer to the question referred to the Court must therefore be that, with effect from 1 January 1973, ***a national of a new Member State who holds a qualification recognised by the competent authorities of the Member State of establishment as equivalent to the certificate issued and required in that State enjoys the right to be admitted to the profession of architect and to practise it under the same conditions as nationals of the Member State of establishment without being required to satisfy any additional conditions.***

Case C-11/77 Patrick [1977] ECR 1199 §18

In these circumstances, the answer to the question referred to the Court should be that when a national of one Member State desirous of exercising a professional activity such as the profession of advocate in another Member State *has obtained a diploma in his country of origin which has been recognised as an equivalent qualification by the competent authority under the legislation of the country of establishment* and which has thus enabled him to sit and pass the special qualifying examination for the profession in question, *the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes*, even in the absence of the directives provided for in Article 57, *a restriction incompatible with the freedom of establishment* guaranteed by Article 52 of the Treaty.

Case C-71/76 Thieffry [1977] ECR 765 §27

5.4.2 Restrictions emanating from the state of origin

Even though, according to their wording, the provisions of the EC Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also *prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation* (see, inter alia, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 21, and Case C-298/05 *Columbus Container Services* [2007] ECR I-0000, paragraph 33).

Those considerations also apply where a company established in a Member State carries on business in another Member State through a permanent establishment.

Case C-414/06 Lidl Belgium [2008] ECR I-0000 §19, 20

According to equally well established case-law of the Court, even though, according to their wording, the provisions of the Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also *prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation* (see Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 31, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 42).

Case C-157/05 Holböck [2007] ECR I-4051 § 27

The same also applies to the rules concerning freedom of establishment. According to the case-law, even if, according to their wording, those rules are intended to ensure that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, *they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation* (Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 42, and Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 30).

It must therefore be held that, by adopting and maintaining in force tax rules, such as those in Chapter 47 of the IL, ***which make entitlement to deferral of taxation on capital gains arising from the sale of a private residential property or of a right to reside in a private cooperative building conditional on the newly-acquired residence also being on Swedish territory***, the Kingdom of Sweden has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC and under Articles 28 and 31 of the EEA Agreement.

Case C-104/06 Commission v Sweden [2007] ECR I-671 §20, 35

It should be pointed out that, even though, according to their wording, ***the provisions concerning freedom of establishment*** are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they ***also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation*** which comes within the definition contained in Article 58 (Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 16).

Case C-264/96 ICI [1998] ECR I-0000 §21

The provisions of the Treaty relating to the free movement of persons are thus intended to facilitate the pursuit of occupational activities throughout the Community, and ***preclude national legislation which might inhibit the extension of such activities beyond the territory of a single Member State*** (*Stanton*, paragraph 13).

Case C-53/95 Inasti [1996] ECR I-703 §11

The provisions of the Treaty relating to the free movement of persons are thus intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and ***preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State***.

Case C-143/87 Stanton [1988] ECR 3877 §13

See also §§14-16

The Court has also stated, in Case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc* [1988] ECR 5483, paragraph 16, that even though the Treaty provisions relating to freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, ***they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58. The rights guaranteed by Article 52 et seq. of the Treaty would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State***. The same considerations apply, in relation to Article 48 of the Treaty, with regard to rules which impede the freedom of movement of nationals of one Member State wishing to engage in gainful employment in another Member State.

Case C-415/93 Bosman [1995] ECR I-4353 §97

see also: Case C-379/92 Peralta [1994] ECR I-3453 §31

and: Case C-81/87 Daily Mail [1988] ECR 5483 §16

In fact, these liberties, which are fundamental in the Community system, could not be fully

realised *if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement and establishment* and who have acquired, by virtue of such facilities, the trade qualifications referred to by the directive in a Member State other than that whose nationality they possess.

Case C-115/78 Knoors [1979] ECR 399 §20

Although it is true that the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State, the position nevertheless remains that the reference in Article 52 to “nationals of a Member State” who wish to establish themselves “in the territory of another Member state” *cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State’s own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognised by the provisions of Community law, are, with regard to their state of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty.*

Case C-115/78 Knoors [1979] ECR 399 §24

5.4.3 Restrictions emanating from associations or organisations not governed by public law

Once the objections concerning the application of Article 48 of the Treaty to sporting activities such as those of professional footballers are out of the way, it is to be remembered that, as the Court held in paragraph 17 of its judgment in *Walrave*, cited above, *Article 48 not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.*

Case C-415/93 Bosman [1995] ECR I-4353 §82

Case C-36/74 Walrave [1974] ECR 1405 §17

The Court has held that *the abolition* as between Member States *of obstacles* to freedom of movement for persons and *to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law* (see *Walrave*, cited above, paragraph 18).

Case C-415/93 Bosman [1995] ECR I-4353 §83

Case C-36/74 Walrave [1974] ECR 1405 §18

6 - JUSTIFICATION OF RESTRICTIONS

6.1 DISCRIMINATORY MEASURES

6.1.1 Participation in the exercise of official authority (Article 52 TFEU)

For the rest, the Court has already held that *merely making a contribution to the maintenance of public security, which any individual may be called upon to do, does not constitute exercise of official authority* (see Case C-114/97 *Commission v Spain*, paragraph 37).

Case C-465/05 *Commission v Italy* [2007] ECR I-11091 §38

However, in the field of public service concessions, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, *is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority* (*Parking Brixen*, paragraph 62).

In fact, *the participation, even as a minority, of a private undertaking in the capital of a company in which the concession-granting public authority is also a participant excludes in any event the possibility of that public authority exercising over such a company a control similar to that which it exercises over its own departments* (see, to that effect, *Stadt Halle and RPL Lochau*, paragraph 49).

Case C-410/04 *ANAV* [2006] ECR I-3303 §24, 31

Freedom of establishment may, however, in the absence of Community harmonisation measures, be limited by national regulations justified by the reasons stated in Article 46(1) EC or by pressing reasons of general interest (see, to that effect, Case 71/76 *Thieffry* [1977] ECR 765, paragraphs 12 and 15, and *Kraus*, cited above, paragraph 32).

Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761 §17

In that context, *it is for the Member States to decide on the level at which they intend to ensure the protection of the objectives set out in Article 46(1) EC* and of the general interest and also on the way in which that level must be attained. However, they can do so only within the limits set by the Treaty and, in particular, they must observe the principle of proportionality, which requires that the measures adopted be appropriate for ensuring attainment of the objective which they pursue and do not go beyond what is necessary for that purpose (see, to that effect, Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 29 and 30, and *Kraus*, paragraph 32).

Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761 §18

As regards the exception provided for in the first paragraph of Article 55 combined, where appropriate with Article 66 of the Treaty, it must be remembered that, *as a derogation from the fundamental rule of freedom of establishment, it must be interpreted in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect* (Case 147/86 *Commission v Greece* [1988]

ECR 1637, paragraph 7).

Case C-114/97 Commission v Spain [1998] ECR I-0000 §34

According to established case-law, *the derogation* for which it provides *must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority* (Case 2/74 *Reyners* [1974] ECR 631, paragraph 45, and Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8).

Case C-114/97 Commission v Spain [1998] ECR I-0000 §35

In the present case, it is clear from the evidence before the Court that *the activity of security undertakings and security staff is to carry out surveillance and protection tasks on the basis of relations governed by private law*.

Case C-114/97 Commission v Spain [1998] ECR I-0000 §36

However, the exercise of that activity does not mean that security undertakings and security staff are vested with powers of constraint. *Merely making a contribution to the maintenance of public security*, which any individual may be called upon to do, *does not constitute exercise of official authority*.

Case C-114/97 Commission v Spain [1998] ECR I-0000 §37

As a preliminary matter, it should be recalled that *the first paragraph of Article 55 of the Treaty excludes from the application of the provisions on freedom of establishment activities which in a Member State are connected, even occasionally, with the exercise of official authority*. Nevertheless, as the Court ruled in *Reyners* (cited above, at paragraph 45), *the derogation provided for in Article 55 must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority*.

Case C-42/92 Thijssen [1993] ECR I-4047 §8

As the Belgian Government emphasised in its submissions, *the activities of an internal auditor or "ordinary commissioner", as the Government describes it, are not connected with the exercise of official authority*. The duties of an ordinary commissioner consist in fact in auditing the finances and the annual accounts of the company and presenting to the general meeting a report on the audits so carried out on the basis of the documents and information which he is entitled to obtain from the responsible officers of the undertaking.

Case C-42/92 Thijssen [1993] ECR I-4047 §18

Under the terms of the first paragraph of *Article 55* the provisions of the chapter on the right of establishment *shall not apply* 'so far as any given Member State is concerned, *to activities which in that state are connected, even occasionally, with the exercise of official authority*'.

Case C-2/74 Reyners [1974] ECR 631 §42

Having regard to the fundamental character of freedom of establishment and the rule on equal treatment with nationals in the system of the Treaty, *the exceptions allowed by the first paragraph of Article 55 cannot be given a scope which would exceed the objective for which this exemption clause was inserted*.

Case C-2/74 Reyners [1974] ECR 631 §43

The first paragraph of Article 55 must enable Member States to exclude non-nationals from taking up functions *involving the exercise of official authority which are connected with one of the activities of self-employed persons provided for in Article 52.*

Case C-2/74 Revners [1974] ECR 631 §44

This need is fully satisfied when *the exclusion of nationals is limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority.*

Case C-2/74 Revners [1974] ECR 631 §45

An extension of the exception allowed by Article 55 to a whole profession would be possible only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.

Case C-2/74 Revners [1974] ECR 631 §46

This extension is on the other hand not possible when, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole.

Case C-2/74 Revners [1974] ECR 631 §47

Professional activities involving contacts, even regular and organic, with the courts, including even compulsory co-operation in their functioning, do not constitute, as such, connection with the exercise of official authority.

Case C-2/74 Revners [1974] ECR 631 §51

The most typical activities of the profession of avocat, in particular, such as consultation and legal assistance and also representation and the defence of parties in court, even when the intervention or assistance of the avocat is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority.

Case C-2/74 Revners [1974] ECR 631 §52

It is therefore right to reply to the question raised that the exception to freedom of establishment provided for by the first paragraph of Article 55 must be *restricted* to those of the activities referred to in Article 52 which in themselves *involve a direct and specific connection with the exercise of official authority.*

Case C-2/74 Revners [1974] ECR 631 §54

In any case it is not possible to give this description, in the context of a profession such as that of avocat, to activities such as consultation and legal assistance or the representation and defence of parties in court, even if the performance of these activities is compulsory or there is a legal monopoly in respect of it.

Case C-2/74 Revners [1974] ECR 631 §55

6.1.2 **Public policy, public security and public health (Article 52 TFEU)**

Second, the protection of public health is one of the overriding reasons in the general interest which can justify restrictions on the freedoms of movement guaranteed by the Treaty such as the freedom of establishment (see, inter alia, *Hartlauer*, paragraph 46) and the free movement of capital.

More specifically, *restrictions on those freedoms of movement may be justified by the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality* (see, to this effect, *Deutscher Apothekerverband*, paragraph 106, and Case C-141/07 *Commission v Germany*, paragraph 47).

Case C-531/06 *Commission v Italy* [2009] ECR I-4103 §51, 52

Second, the *protection of public health is one of the overriding reasons in the general interest which can justify restrictions on the freedoms of movement guaranteed by the Treaty such as the freedom of establishment* (see, inter alia, *Hartlauer*, paragraph 46).

Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes/Hartlauer* [2009] ECR I-0000 §27

As the Court has pointed out on numerous occasions, the concept of public policy, first, comes into play where a genuine and sufficiently *serious threat affects one of the fundamental interests of society and, second, must, as a justification for a derogation from a fundamental principle of the Treaty, be narrowly construed* (see to that effect, in particular, Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 28; Case C-465/05 *Commission v Italy* [2007] ECR I-11091, paragraph 49; and Case C-319/06 *Commission v Luxembourg* [2008] ECR I-0000, paragraph 50).

It is also clear from the case-law that the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom of establishment *must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that Member State*, and by precise evidence enabling its arguments to be substantiated (see, by analogy, *Commission v Luxembourg*, paragraph 51 and the case-law cited).

Case C-161/07 *Commission v Austria* [2008] ECR I-10671 §35-36

The Court has defined further the distinction between activities of private bodies constituting simple preparatory tasks and those constituting a direct and specific connection with the exercise of official authority by finding that, even where private bodies exercise the powers of a public authority, drawing the conclusions from the inspections which they carry out, Article 45 EC cannot be relied on where the applicable legislation lays down that those private bodies are to be supervised by the public authority (see, to that effect, *Commission v Austria*, paragraph 41, and *Commission v Germany*, paragraph 43). *The Court has found that private bodies carrying out their activities under the active supervision of the competent public authority, responsible, ultimately, for inspections and decisions of those bodies, cannot be considered to be 'connected directly and specifically with the exercise of official authority' within the meaning of Article 45 EC* (*Commission v Austria*, paragraph 42, and *Commission v Germany*, paragraph 44).

In that regard, it should, none the less, be pointed out that the decision whether or not to certify roadworthiness, which essentially only records the results of the roadworthiness test, on the one hand, lacks the decision-making independence inherent in the exercise of public authority powers and, on the other hand, is taken in the context of direct State supervision.

Consequently, the activities of the private vehicle roadworthiness testing bodies concerned in this case do not fall within the exception provided for in Article 45 EC.

Case C-438/08 Commission v Portugal [2009] ECR I-0000 §37, 41, 45

The Court has in particular accepted, with regard to bodies operating in the oil, telecommunications and electricity sectors, that the object of ensuring a secure supply of such services in the case of a crisis in the territory of the Member State concerned may constitute a reason of public security and, therefore, justify a restriction of a fundamental freedom (Commission v Spain, paragraph 71).

The Court has, nevertheless, ruled that if the Member States remain, in essential respects, free to fix, in keeping with their domestic needs, the requirements of public policy and public security, as grounds for derogating from a fundamental freedom, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally without any control by the institutions of the European Community. So, **public policy and public security may not be invoked unless there is a genuine and sufficiently serious threat to a fundamental interest of society** (see, inter alia, Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 28; Case C-54/99 *Eglise de scientologie* [2000] ECR I-1335, paragraph 17; and *Commission v Spain*, paragraph 47).

The Court has applied that analysis to an opposition system in force in Belgium in the energy sector, which covered certain decisions concerning the strategic assets of national companies, in particular energy supply networks, and specific management decisions relating to those companies, State intervention being possible only when there was a threat that the objectives of the energy policy might be compromised. The Court considered that that system was based on objective criteria amenable to judicial review and that the Commission had not shown that less restrictive measures could have been taken to attain the objective pursued (Case C-503/99 *Commission v Belgium* [2000] ECR I-4809, paragraphs 50 to 53).

Case C-326/07 Commission v Italy [2009] ECR I-02291 §69-71

The rule according to which directors and managers of all security undertakings must reside in Spain constitutes an obstacle to freedom of establishment (see, in this regard, Case C-221/89 *Factortame* [1991] ECR I-3905, paragraph 35) and to the freedom to provide services.

Case C-114/97 Commission v Spain [1998] ECR I-0000 §44

This condition is not necessary in order to ensure public security in the Member State concerned and *is not therefore covered by the derogation provided by Article 56(1)* combined, where appropriate, with Article 66 of the Treaty.

Case C-114/97 Commission v Spain [1998] ECR I-0000 §45

Recourse to this justification presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society (see, as far as public policy is concerned, *Bouchereau*, cited above, paragraph 35).

Case C-114/97 Commission v Spain [1998] ECR I-0000 §46

In answer to the argument that revenue lost through the granting of tax relief on losses incurred by resident subsidiaries cannot be offset by taxing profits of non-resident subsidiaries, it must be pointed out that ***diminution of tax revenue occurring in this way is not one of the grounds listed in Article 56*** of the Treaty and cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article 52 of the Treaty.

Case C-264/96 ICI [1998] ECR I-0000 §28

As the Court of Justice held in Joined Cases 115/181 [*sic*] and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, paragraph 7, ***the reservations contained in Articles 48 and 56*** of the EC Treaty ***permit Member States to adopt***, with respect to the nationals of other Member States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, ***measures which they cannot apply to their own nationals***, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto.

Joined Cases C-65/95 and C-111/95 Shingara & Radiom [1997] ECR I-3343 §28

As stated in paragraph 12 above, the rule in question entails discrimination based on the place of establishment. ***Such discrimination can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty***, to which Article 66 refers, and which do not include economic aims (see in particular Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11).

Case C-484/93 Svensson [1995] ECR I-3955 §15

As the Court held in its judgment in Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, at paragraphs 32 and 33, ***national rules which are not applicable to services without discrimination*** as regards their origin ***are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article 56*** of the Treaty. It also appears from that judgment (paragraph 34) that economic aims cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty.

Case C-288/89 Mediawet I [1991] ECR I-4007 §11

It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects unless those rules fall within the derogating provision contained in Article 56 of the Treaty to which Article 66 refers. ***It follows from Article 56, which must be interpreted strictly***, that discriminatory rules may be justified on grounds of public policy, public security or public health.

Case C-260/89 ERT [1991] ECR I-2925 §24

6.2 **NON-DISCRIMINATORY MEASURES**

6.2.1 **Measures justified by an imperative requirement in the general interest**

In addition, the Court's case-law has identified a number of overriding reasons in the public interest capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty. ***Reasons already recognised by the Court include the objectives of road safety*** (see, inter alia, Case C-55/93 *van Schaik* [1994] ECR I-4837, paragraph 19, and Case C-54/05 *Commission v Finland* [2007] ECR I-2473, paragraph 40 and the case-law cited), ***environmental protection*** (see, inter alia, Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 9, and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 75) ***and consumer protection*** (see, inter alia, Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20; *CaixaBank France*, paragraph 21, and Case C-393/05 *Commission v Austria* [2007] ECR I-10195, paragraph 52 and the case-law cited).

Case C-348/08 Attanasio [2010] ECR I-0000 §50

That difference in treatment can, however, be justified by objective circumstances, such as ***the necessity of complying with the principle of legal certainty***. [...] In those circumstances, and without it being necessary to consider the principle of the protection of legitimate expectations, the principle of legal certainty ***not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view***.

It is for the referring court to determine whether, in particular, the extension of the length of the transitional period, brought about by legislation such as that at issue in the main proceedings, can be regarded as being necessary to comply with the principle of legal certainty.

Case C-347/06 ASM Brescia [2008] ECR I-05641 §64-71

As far as concerns the argument based on the ***coherence of the tax system***, it must be recalled that the Court has acknowledged that the need to preserve such coherence ***may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty*** (see Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28; Case C-300/90 *Commission v Belgium* [1992] ECR I-305, paragraph 21; *Keller Holding*, paragraph 40; and Case C-379/05 *Amurta* [2007] ECR I-0000, paragraph 46).

However, for such an argument to succeed, the Court has held that ***a direct link must be established*** between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-955, paragraph 18; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 52; *Keller Holding*, paragraph 40, and Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraphs 54 to 56).

Furthermore, the direct nature of the link must be established, in light of the objective pursued by the tax rules concerned, in relation to the relevant tax payers by a strict correlation between the deductible element and the taxable element (see, to that effect, Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 24).

Case C-293/06 *Deutsche Shell v Finanzamt Hamburg* [2008] ECR I-1129 §37, 38, 39

In that regard, the Court has already held that *the protection of fundamental rights is a legitimate interest* which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

In that regard, it must be observed that the right to *take collective action for the protection of workers is a legitimate interest* which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, *Schmidberger*, paragraph 74) and that the protection of workers is one of the overriding reasons of public interest recognised by the Court (see, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33).

Case C-438/05 *Viking* [2007] ECR I-10779 §45, 77

The protection of an established right, namely, the retention of patients following several years of professional activity, constitutes an overriding ground of public interest. A Member State may consider it necessary in such a case to protect a practice and, by the same token, the professional activity of the persons concerned by means of the adoption of appropriate measures.

Case C-456/05 *Commission v Germany* [2007] ECR I-10548 §63

The need to prevent the reduction of tax revenue is not one of the grounds listed in Article 46(1) EC or a matter of overriding general interest which would justify a restriction on a freedom introduced by the Treaty (see, to that effect, Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56, and *Skandia and Ramstedt*, paragraph 53).

Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-07995 § 49

The argument based on road safety does indeed constitute an overriding reason in the public interest capable of justifying a hindrance to freedom of movement for persons (*Cura Anlagen*, paragraph 59).

Cases C-151/04 and 152/04 *Nadin* [2005] ECR I-11203 §49

Case C-297/05 *Commission v Netherlands* [2007] ECR I-07467 §77 and Case C-110/05 *Commission v Italy* [2009] ECR I-0000, §60, Case C-438/08 *Commission v Portugal* [2009] ECR I-0000 §48

Such a *difference in treatment* constitutes a restriction within the meaning of Articles 43 EC and 48 EC, which is contrary to the right of establishment and *can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest*. It is further necessary, in such a case, that its application must be appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it (see Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 49; Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 49).

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §22

In that respect, it is not possible to exclude the possibility that *imperative reasons in the public interest such as protection of the interests of creditors, minority shareholders and employees* (see Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 92), and the *preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions* (see Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 132), may, in certain circumstances and under certain conditions, *justify a measure restricting the freedom of establishment*.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §28

A *national measure* which, even though it is applicable *without discrimination on grounds of nationality*, is liable to hinder or render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty *may be justified by overriding reasons of general interest*, provided that the measure in question is appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for that purpose (see, in particular, *Kraus*, cited above, paragraph 32).

Case C-140/03 Commission v Greece [2005] ECR I-3177 §34

Such a condition [*requiring the economic operator to be constituted as a legal person*] *cannot be justified on the ground of protection of creditors*. Since there are means of attaining that objective which restrict freedom to provide services and freedom of establishment to a lesser degree, such as setting up a guarantee or taking out an insurance contract, that condition must be regarded as disproportionate.

Case C-171/02 Commission v Portugal [2004] ECR I-5645 § 43

Freedom of establishment may, however, in the absence of Community harmonisation measures, *be limited* by national regulations justified by the reasons stated in Article 46(1) EC or *by pressing reasons of general interest* (see, to that effect, Case 71/76 *Thieffry* [1977] ECR 765, paragraphs 12 and 15, and *Kraus*, cited above, paragraph 32).

Case C-299/02 Commission v Netherlands [2004] ECR I-9761 §17

In that context, it is for the *Member States to decide on the level at which they intend to ensure* the protection of the objectives set out in Article 46(1) EC and of *the general interest and also on the way in which that level must be attained*. However, they can do so only within the limits set by the Treaty and, in particular, they must observe the principle of proportionality, which requires that the measures adopted be appropriate for ensuring attainment of the objective which they pursue and do not go beyond what is necessary for that purpose (see, to that effect, Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 29 and 30, and *Kraus*, paragraph 32).

Case C-299/02 Commission v Netherlands [2004] ECR I-9761 §18

In answer to the argument that revenue lost through the granting of tax relief on losses

incurred by resident subsidiaries cannot be offset by taxing profits of non-resident subsidiaries, it must be pointed out that *diminution of tax revenue occurring in this way* is not one of the grounds listed in Article 56 of the Treaty and *cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment* that is, in principle, incompatible with Article 52 of the Treaty.

Case C-264/96 ICI [1998] ECR I-0000 §28

It is true that in the past the Court has accepted that the need to maintain *the cohesion of the tax systems could*, in certain circumstances, *provide sufficient justification for maintaining rules restricting fundamental freedoms* (see, to this effect, Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission v Belgium* [1992] ECR I-305). Nevertheless, in the cases cited, there was a direct link between the deductibility of contributions from taxable income and the taxation of sums payable by insurers under old-age and life assurance policies, and that link had to be maintained in order to preserve the cohesion of the tax system in question. In the present case, there is no such direct link between the consortium relief granted for losses incurred by a resident subsidiary and the taxation of profits made by non-resident subsidiaries.

Case C-264/96 ICI [1998] ECR I-0000 §29

Consequently, the imposition of such a condition, which specifically affects companies or firms having their seat in another Member State, is in principle prohibited by Article 52 of the Treaty. *It could only be otherwise if the measure pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest*. Even if that were so, it would have to be of such a nature as to ensure achievement of the aim in question and not go beyond what was necessary for that purpose (see, to this effect, the judgments in Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; and in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 104).

Case C-250/95 Futura & Singer [1997] ECR I-2471 §26

The Court has repeatedly held that *the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction* on the exercise of fundamental freedoms guaranteed by the Treaty (see, for example, the judgment in Case 120/78 *REWE-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 8). A Member State may therefore apply measures which enable the amount of both the income taxable in that State and of the losses which can be carried forward there to be ascertained clearly and precisely.

Case C-250/95 Futura & Singer [1997] ECR I-2471 §31

Legislation of the kind at issue in the main proceedings affords no additional social protection to the persons concerned. Therefore, *the impediment to the pursuit of occupational activities in more than one Member State may not in any event be justified on that basis*.

Case C- 53/95 - Inasti [1996] ECR 703 §13

It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a ***non-discriminatory manner***; they must be ***justified by imperative requirements in the general interest***; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, paragraph 32).

Case C-55/94 Gebhard [1995] ECR I-4165 §37

Consequently, Articles 48 and 52 preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty. ***The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest*** (see to that effect, judgment in Case 71/76 *Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris* [1977] ECR 765, paragraphs 12 and 15). It would however also be necessary in such a case for application of the national rules in question to be appropriate for ensuring attainment of the objective they pursue and not to go beyond what is necessary for that purpose (see judgment in Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351, paragraphs 29 and 30).

Case C-19/92 Kraus [1993] ECR I-1663 §32

However, ***in so far as those rules have the effect of restricting*** freedom of movement for workers, ***the right of establishment*** and the freedom to provide services within the Community, ***they are compatible with the Treaty only if the restrictions which they entail are actually justified in view of the general obligations inherent in the proper practice of the professions in question*** and apply to nationals and foreigners alike. That is not the case where the restrictions are such as to create discrimination against practitioners established in other member states or raise obstacles to access to the profession which go beyond what is necessary in order to achieve the intended goals.

Case C-96/85 Commission v France [1986] ECR 1485 §11

Furthermore, ***the risk of tax avoidance*** cannot be relied upon in this context. ***Article 52 of the EEC Treaty does not permit any derogation from the fundamental principle of freedom of establishment on such a ground.***

Case C-270/83 Commission v France [1986] ECR 273 §25

That Article is therefore directed towards reconciling freedom of establishment with the application of national professional rules justified by the general good, in particular rules relating to organisation, qualifications, professional ethics, supervision and liability, ***provided that such application is effected without discrimination.***

Case C-71/76 Thieffry [1977] ECR 765 §12

It follows from ***the provisions cited taken as a whole that freedom of establishment, subject to observance of professional rules justified by the general good, is one of the objectives of the Treaty.***

Case C-71/76 Thieffry [1977] ECR 765 §15

6.2.2 Measures suitable for securing the attainment of the objective pursued and not going beyond what is necessary (proportionality)

As to those submissions, it is apparent from the Court's case-law that national legislation is appropriate for securing attainment of the objective relied upon only *if it genuinely reflects a concern to attain that objective in a consistent and systematic manner* (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 53 and 58; Case C-500/06 *Corporación Dermoestética* [2008] ECR I-0000, paragraphs 39 and 40; and *Hartlauer*, paragraph 55).

Case C-531/06 Commission v Italy [2009] ECR I-4103 §66

On this point, it must be recalled *that a restriction of freedom of establishment, applicable without discrimination on grounds of nationality, may be justified by overriding reasons in the general interest, provided that it is appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for attaining that objective* (*Commission v Greece*, paragraph 34 and the case-law cited).

Case C-169/07 Hartlauer [2009] ECR I-1721 §44

First, it must be recalled that national legislation *is appropriate* for ensuring attainment of the objective pursued only *if it genuinely reflects a concern to attain it in a consistent and systematic manner* (see, to that effect, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 53 and 58, and Case C-500/06 *Corporación Dermoestética* [2008] ECR I-0000, paragraphs 39 and 40).

Case C-169/07 Hartlauer [2009] ECR I-1721 §55

Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes [2009] ECR I-0000 §44

Second, it follows from settled case-law that a prior administrative authorisation scheme cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings. Therefore, if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, *it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion* (see, to that effect, inter alia, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraphs 37 and 38, and *Müller-Fauré and van Riet*, paragraphs 84 and 85).

Case C-169/07 Hartlauer [2009] ECR-1721 §64

[...] measures less restrictive than those introduced by the national legislation at issue (*requires nationals of the eight new Member States who wish to register a partnership or company to obtain a certificate determining that they are self-employed, or a work permit exemption certificate*), for example the putting in place of regular administrative checks possibly coupled with obligations concerning the communication of information on the part of the economic operators potentially affected, could achieve a similar result by enabling it to be ascertained whether certain economic activities are actually carried out on a self-employed basis, or in the context of an employment relationship.

Case C-161/07 Commission v Austria [2008] ECR I-10671 §39

However, it should be borne in mind that, according to settled case-law, irrespective of the existence of a legitimate objective under EU law, a restriction on the fundamental freedoms enshrined in the Treaty may be justified only if the relevant measure is appropriate to ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective (see, to that effect, Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 43; Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 81; Joined Cases C-155/08 and C-157/08 *X and Passenheim-van Schoot* [2009] ECR I-0000, paragraph 47; and Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-0000, paragraph 42). Furthermore, national legislation is appropriate to ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (see, in particular, *Hartlauer*, paragraph 55, and *Presidente del Consiglio dei Ministri*, paragraph 42).

(...) In circumstances such as those in the main proceedings, ***that restriction [mandatory minimum distances between roadside service stations] does not appear to be justified by the objectives of road safety, protection of health and the environment, or the rationalisation of the service provided to users, these being matters for the national court to verify.***

Case C-348/08 *Attanasio* [2010] ECR I-0000 §57

As regards the appropriateness of the action taken by FSU for attaining the objectives pursued in the case in the main proceedings, it should be borne in mind that it is common ground that ***collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members*** (European Court of Human Rights, *Syndicat national de la police belge v Belgium*, of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others v United Kingdom* of 2 July 2002, 2002-V, § 44).

Case C-438/05 *Viking* [2007] ECR I-10779 §86

Consequently, it was disproportionate ***not to take account of all psychotherapists who had practised outside the German statutory sickness insurance scheme during the reference period.***

Case C-456/05 *Commission v Germany* [2007] ECR I-10517 §73

So far as the argument that reliable identification is essential is concerned, the fact is that ***to require the registration of company vehicles belonging to companies established in another Member State in order to guarantee the reliable identification of the owners of such vehicles*** goes beyond what is necessary in order to attain that object. As a matter of fact, all Member States having a system of vehicle registration, it appears possible to identify the owner of a vehicle whatever the Member State in which it is registered.

Cases C-151/04 and 152/04 *Nadin* [2005] ECR I-11203 § 48

Such a difference in treatment constitutes a restriction within the meaning of Articles 43 EC and 48 EC, which is contrary to the right of establishment and can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application must be ***appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it*** (see Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 49; Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 49).

Case C-411/03 *SEVIC Systems* [2005] ECR I-10805 §22

In that respect, it is not possible to exclude the possibility that imperative reasons in the public interest such as protection of the interests of creditors, minority shareholders and employees (see Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 92), and the ***preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions*** (see Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 132), may, in certain circumstances and under certain conditions, justify a measure restricting the freedom of establishment.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §28

But such a restrictive measure would also have to be ***appropriate for ensuring the attainment of the objectives pursued and not go beyond what is necessary*** to attain them.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §29

To refuse generally, in a Member State, to register in the commercial register a merger between a company established in that State and one established in another Member State has the result of ***preventing the realisation of cross-border mergers even if the interests mentioned in paragraph 28 of this judgment are not threatened***. In any event, such a rule ***goes beyond what is necessary to protect those interests***.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §30

In those circumstances, the answer to the question referred must be that ***Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State***.

Case C-411/03 SEVIC Systems [2005] ECR I-10805 §31

A national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty ***may be justified by overriding reasons of general interest, provided that the measure in question is appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for that purpose*** (see, in particular, *Kraus*, cited above, paragraph 32).

Case C-140/03 Commission v Greece [2005] ECR I-3177 §34

In this case, it is sufficient to note that ***the objective of protecting public health*** upon which the Hellenic Republic relies ***may be achieved by measures which are less restrictive*** of the freedom of establishment both for natural and legal persons, for example by requiring the presence of qualified, salaried opticians or associates in each optician's shop, rules concerning civil liability for the actions of others, and rules requiring professional indemnity insurance.

Case C-140/03 Commission v Greece [2005] ECR I-3177 §35

It is thus clear that the disputed restrictions go beyond what is required in order to achieve the objective pursued. There is therefore no justification for them.

Case C-140/03 Commission v Greece [2005] ECR I-3177 §36

That being the case, it should be declared that,

- by enacting and maintaining in force Law No 971/79, which does not permit a qualified optician as a natural person to operate more than one optician's shop, the Hellenic Republic has failed to fulfil its obligations under Article 43 EC, and that,
- by enacting and maintaining in force Law No 971/79 and Law No 2646/98, under which the establishment by a legal person of an optician's shop in Greece is subject to the following conditions:
 - authorisation for the establishment and operation of the optician's shop must have been granted to a recognised optician who is a natural person, the person holding the authorisation to operate the shop must hold at least 50% of the company's share capital and must participate at least to that extent in the profits and losses of the company, and the company must be in the form of a collective or limited partnership, and
 - the optician in question may participate at most in one other company owning an optician's shop, subject to the condition that the authorisation for the establishment and operation of that shop is in the name of another authorised optician,

the Hellenic Republic has failed to fulfil its obligations under Articles 43 EC and 48 EC.

Case C-140/03 Commission v Greece [2005] ECR I-3177 §38

In that context, it is for the Member States to decide on the level at which they intend to ensure the protection of the objectives set out in Article 46(1) EC and of the general interest and also on the way in which that level must be attained. However, they can do so only within the limits set by the Treaty and, in particular, they must observe the *principle of proportionality*, which *requires that the measures adopted be appropriate for ensuring attainment of the objective which they pursue and do not go beyond what is necessary for that purpose* (see, to that effect, Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 29 and 30, and *Kraus*, paragraph 32).

Case C-299/02 Commission v Netherlands [2004] ECR I-9761 §18

Consequently, the imposition of such a condition, which specifically affects companies or firms having their seat in another Member State, is in principle prohibited by Article 52 of the Treaty. It could only be otherwise if the measure pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. Even if that were so, *it would have to be of such a nature as to ensure achievement of the aim in question and not go beyond what was necessary for that purpose* (see, to this effect, the judgments in Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; and in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 104).

Case C-250/95 Futura & Singer [1997] ECR I-2471 §26

See also: Case C-415/93 Bosman [1995] ECR I-4921 §104

In response to those arguments it must be recalled that the Court has held that, *in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objectives and whether they do not go beyond what is necessary to achieve it* (see, in particular, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 57).

Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405 §54

It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; ***they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it*** (see Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, paragraph 32).

Case C-55/94 Gebhard [1995] ECR I-4165 §37

Consequently, Articles 48 and 52 preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty. The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest (see to that effect, judgment in Case 71/76 *Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris* [1977] ECR 765, paragraphs 12 and 15). ***It would however also be necessary in such a case for application of the national rules in question to be appropriate for ensuring attainment of the objective they pursue and not to go beyond what is necessary for that purpose*** (see judgment in Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351, paragraphs 29 and 30).

Case C-19/92 Kraus [1993] ECR I-1663 §32

It follows that the fact that a Member State establishes a procedure for the issue ***of administrative authorisations***, to be obtained prior to using postgraduate academic titles awarded in another State, and prescribes ***criminal penalties*** for non-compliance with that procedure is not, in itself, ***incompatible*** with the requirements of Community law.

Case C-19/92 Kraus [1993] ECR I-1663 §36

However, in order to satisfy the requirements laid down by Community law ***with respect to the observance of the principle of proportionality***, national rules of that kind must fulfil certain conditions.

Case C-19/92 Kraus [1993] ECR I-1663 §37

It follows that the answer to the question put by the national court must be that Articles 48 and 52 of the Treaty must be interpreted as meaning that they do not preclude a Member State from prohibiting one of its own nationals, who holds a postgraduate academic title awarded in another Member State, from using that title on its territory ***without having obtained an administrative authorisation for that purpose, provided that the authorisation procedure is intended solely to verify whether the postgraduate academic title was properly awarded, that the procedure is easily accessible and does not call for the payment of excessive administrative fees, that any refusal of authorisation is capable of being subject to proceedings, that the person concerned is able to ascertain the reasons for the decision and that the penalties prescribed for non-compliance with the authorisation procedure are not disproportionate to the gravity of the offence.***

Case C-19/92 Kraus [1993] ECR I-1663 §42

In that regard it must be stated that the Italian Government had sufficient legal powers at its disposal to be able to adapt the performance of contracts to meet future and unforeseeable

circumstances and to ensure compliance with the general interest, and that *in order to protect the confidential nature of the data in question the Government could have adopted measures less restrictive of freedom of establishment* and freedom to provide services than those in issue, in particular by imposing a duty of secrecy on the staff of the companies concerned, breach of which might give rise to criminal proceedings. There is nothing in the documents before the Court to suggest that the staff of companies none of whose share capital is in Italian public ownership could not comply just as effectively with such a duty.

Case C-3/88 Commission v Italy [1989] ECR 4035 §11

6.3 MEASURES AIMING TO PROHIBIT THE CIRCUMVENTION OF NATIONAL RULES

As to freedom of establishment, *the Court has already held that the fact that the company was established in a Member State for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse of that freedom* (see, to that effect, *Centros*, paragraph 27, and Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 96).

It is also apparent from case-law that *the mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion* and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, to that effect, *ICI*, paragraph 26; Case C-478/98 *Commission v Belgium* [2000] ECR I-7587, paragraph 45; *X and Y*, paragraph 62; and Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 27).

Case C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-07995 § 37, 51

As regards the *justification based on the risk of tax avoidance*, suffice it to note that *the legislation* at issue in the main proceedings *does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation*, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment.

Case C-264/96 ICI [1998] ECR I-0000 §26

Furthermore, *the risk of charges being transferred*, which the legislation at issue is designed to prevent, *is entirely independent of whether or not the majority of subsidiaries are resident in the United Kingdom*. The existence of only one non-resident subsidiary is enough to create the risk invoked by the United Kingdom Government.

Case C-264/96 ICI [1998] ECR I-0000 §27

Community law does not preclude a Member State from adopting, in the absence of harmonisation, *measures designed to prevent the opportunities created under the Treaty from being abused in a manner contrary to the legitimate interests of the State* (see the judgment in *Knoors*, cited above, paragraph 25).

Case C-19/92 Kraus [1993] ECR I-1663 §34

The need to protect a public which will not necessarily be alerted to abuse of academic titles which have not been awarded according to the rules laid down in the country in which the holder of the title intends to make use of it *constitutes a legitimate interest such as to justify a restriction*, by the Member State in question, of the fundamental freedoms guaranteed by the Treaty.

Case C-19/92 Kraus [1993] ECR I-1663 §35

Similarly, as the Court held in its judgment of 3 December 1974 (Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* (1974) ECR 1299) ***a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State.*** Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.

Case C-205/84 Commission v Germany [1986] ECR 3755 §22

However, ***it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting wrongly to evade the application of their national legislation*** as regards training for a trade.

Case C-115/78 Knoors [1979] ECR 399 §25

7 - LEGAL CONSIDERATIONS - NOT UPDATED

7.1 INTERPRETATION OF ARTICLE 49 TFEU AS A “FUNDAMENTAL” PRINCIPLE OF EUROPEAN UNION LAW

In order to answer that question, the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège*, paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others*, paragraph 120).

Moreover, the Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively (see, to that effect, Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 31 and 39).

Case C-438/05 Viking [2007] ECR I-10779 §57, 58

It must be remembered that Article 52 of the Treaty constitutes one of the *fundamental provisions* of Community law and has been directly applicable in the Member States (see, in particular, Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 34).

Case C-253/03 CLT-UFA [2006] ECR I-1831 §12

As regards Article 52 of the Treaty, read in conjunction with Article 58 thereof (third question), it must be borne in mind that *the right of establishment* with which those provisions are concerned *is granted both to natural persons* who are nationals of a Member State of the Community *and to legal persons* within the meaning of Article 58. Subject to the exceptions and conditions laid down, *it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up* (*Gebhard*, cited above, paragraph 23).

Case C-70/95 Sodemare [1997] ECR I-3395 §26

See also: Case C-55/94 Gebhard [1995] ECR I-4165 §23

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 (see, to this effect, Case 2/74 *Reyners v Belgium* [1974] ECR 631, paragraph 21).

Case C-55/94 Gebhard [1995] ECR I-4165 §25

On that point, it must however be stressed that Community law sets limits to the exercise of

those powers by the Member States in so far as provisions of national law adopted in that connection must not constitute an obstacle to the *effective exercise of the fundamental freedoms guaranteed by Articles 48 and 52 of the Treaty* (see, to that effect, the judgment in Case 222/86 *UNECTEF v Heylens and Others* [1987] ECR 4097, paragraph 11).

Case C-19/92 Kraus [1993] ECR I-1663 §28

The Court has confirmed that Articles 48 and 52 of the Treaty implement the fundamental principle contained in Article 3c of the Treaty in which it is stated that, for the purposes set out in Article 2, the activities of the Community are to include the abolition, as between Member States, of obstacles to freedom of movement for persons (see, in particular, judgments in Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16; in *Heylens*, cited above, paragraph 8 and in Case C-370/90 *The Queen, ex parte Secretary of State for the Home Department v Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265).

Case C-19/92 Kraus [1993] ECR I-1663 §29

In stating that freedom of movement for workers and freedom of establishment are to be secured by the end of the transitional period, Articles 48 and 52 lay down a precise obligation of result. The performance of that obligation was to be facilitated by but not to be made dependent upon the implementation of Community measures. *The fact that such measures have not yet been adopted does not authorise a Member State to deny to a person subject to Community law the practical benefit of the freedoms guaranteed by the Treaty.*

Case C-19/92 Kraus [1993] ECR I-1663 §30

Furthermore, *Member States are required*, in conformity with Article 5 of the Treaty, *to take all appropriate measures*, whether general or particular, *to ensure fulfilment of the obligations arising out of the Treaty* and *to abstain from any measures which could jeopardise the attainment of the objectives of the Treaty.*

Case C-19/92 Kraus [1993] ECR I-1663 §31

In that respect, it must be acknowledged that an insurance undertaking of another Member State which maintains *a permanent presence* in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, *even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency.* In the light of the aforementioned definition contained in the first paragraph of Article 60, such an insurance undertaking cannot therefore avail itself of Articles 59 and 60 with regard to its activities in the Member State in question.

Case C-205/84 Commission v Germany [1986] ECR 3755 §21

It must be stated firstly that *Article 52 of the EEC Treaty embodies one of the fundamental principles of the Community* and has been directly applicable in the Member States since the end of the transitional period. By virtue of that provision, freedom of establishment for nationals of one Member State on the territory of another includes the right to take up and pursue activities as self-employed persons and 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. The abolition of restrictions on freedom of establishment also applies 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.

Case C-270/83 Commission v France [1986] ECR 273 §13

Furthermore, the fact that insurance companies whose registered office is situated in another Member State are at liberty to establish themselves by setting up a subsidiary in order to have the benefit of the tax credit cannot justify different treatment. *The second sentence of the first paragraph of Article 52 expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions.*

Case C-270/83 Commission v France [1986] ECR 273 §22

The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community.

Case C-2/74 Revners [1974] ECR 631 §24

Having regard to *the fundamental character of freedom of establishment* and the rule on equal treatment with nationals in the system of the Treaty, the exceptions allowed by the first paragraph of Article 55 cannot be given a scope which would exceed the objective for which this exemption clause was inserted.

Case C-2/74 Revners [1974] ECR 631 §43

7.2 **DIRECT APPLICABILITY OF ARTICLE 49 TFEU**

It must be remembered that Article 52 of the Treaty constitutes one of the fundamental provisions of Community law and has been *directly applicable in the Member States* (see, in particular, Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 34).

Case C-253/03 CLT-UFA [2006] ECR I-1831 §12

In that regard, it should be noted that, *whilst those provisions, which have direct effect, prohibit imposing unjustified restrictions on the freedoms concerned, they are not sufficient in themselves to ensure elimination of all obstacles to free movement* of persons, services and capital, and that the directives provided for by the Treaty in this matter preserve an important scope in the field of measures intended to make easier the effective exercise of the rights arising out of those provisions (see, *as far as freedom of establishment is concerned, Case 2/74 Reyners* [1974] ECR 631, paragraphs 29, 30 and 31).

Case C-57/95 France v Commission [1997] ECR I-1627 §20

That article requires the abolition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. *It is settled case-law that that is a directly applicable rule of Community law.* Member States were therefore under the obligation to observe that rule even though, in the absence of Community legislation on social security for self-employed persons, they retained competence to legislate in this field (*Stanton*, paragraph 10).

Case C-53/95 Inasti [1996] ECR I-703 §9

See also: Case C-143/87 Stanton [1988] ECR 3877 §10

In stating that freedom of movement for workers and *freedom of establishment* are to be secured by the end of the transitional period, Articles 48 and 52 lay down a precise obligation of result. *The performance of that obligation was to be facilitated by but not to be made dependent upon the implementation of Community measures.* The fact that such measures have not yet been adopted does not authorise a Member State to deny to a person subject to Community law the practical benefit of the freedoms guaranteed by the Treaty.

Case C-19/92 Kraus [1993] ECR I-1663 §30

However, in laying down that freedom of establishment is to be attained by the end of the transitional period, *Article 52 of the Treaty thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures* (see the judgment in Case 11/77 *Patrick v Ministre des Affaires Culturelles* [1977] ECR 1199, paragraph 10).

Case C-340/89 Vlassopoulou [1991] ECR I-2357 §13

Case C-107/83 Klopp [1984] ECR 2971 §10

Case C-11/77 Patrick [1977] ECR 1199 §10

Case C-2/74 Reyners [1974] ECR 631 §26

It must be stated firstly that *Article 52 of the EEC Treaty* embodies one of the fundamental principles of the Community and *has been directly applicable in the Member States since the end of the transitional period.* *By virtue of that provision,* freedom of establishment for nationals of one Member State on the territory of another includes the right to take up and pursue activities as self-employed persons and 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. The abolition of restrictions on freedom of establishment also applies 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.

Case C-270/83 Commission v France [1986] ECR 273 §13

Finally, the French government is wrong to contend that the difference of treatment in question is due to the double-taxation agreements. Those agreements do not deal with the cases here at issue as defined above. Moreover, *the rights conferred by Article 52 of the Treaty are unconditional and a Member State cannot make respect for them subject to the contents of an agreement concluded with another Member State*. In particular, that Article does not permit those rights to be made subject to a condition of reciprocity imposed for the purpose of obtaining corresponding advantages in other Member States.

Case C-270/83 Commission v France [1986] ECR 273 §26

After the expiry of the transitional period *the directives provided for by the chapter on the right of establishment have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect*.

Case C-11/77 Patrick [1977] ECR 1199 §13

Case C-2/74 Revners [1974] ECR 631 §30

In this respect, *Article 52 is a clear and complete provision, capable of producing a direct effect*.

Case C-2/74 Revners [1974] ECR 631 §10

At the end of the transitional period, the Member States no longer have the possibility of maintaining restrictions on the freedom of establishment, since *Article 52 has, as from this period, the character of a provision which is complete in itself and legally perfect*.

Case C-2/74 Revners [1974] ECR 631 §12

In these circumstances the 'general programme' and the directives provided for by Article 54 were of significance only during the transitional period, since the freedom of establishment was fully attained at the end of it.

Case C-2/74 Revners [1974] ECR 631 §13

As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, *this rule is, by its essence, capable of being directly invoked by nationals of all the other Member States*.

Case C-2/74 Revners [1974] ECR 631 §25

It is right therefore to reply to the question raised that, since the end of the transitional period, *Article 52 of the Treaty is a directly applicable provision despite the absence in a particular sphere, of the directives prescribed by Articles 54(2) and 57(1) of the Treaty*.

Case C-2/74 Revners [1974] ECR 631 §32

(...) *It is therefore legally complete in itself and is consequently capable of producing direct effects on the relations between Member States and individuals*. (...)

Case C-6/64 Costa [1964] ECR 585 p.596

7.3 **OBLIGATION OF MEMBER STATES TO MODIFY LAWS INCOMPATIBLE WITH THE RIGHT OF ESTABLISHMENT**

Even if, in practice, the authorities of a Member State *do not apply a national provision which is at variance with Community law, the principle of legal certainty nevertheless requires that that provision be amended* (see, to that effect, Case C-358/98 *Commission v Italy* [2000] ECR I-1255, paragraphs 16 and 17, and Case C-160/99 *Commission v France* [2000] ECR I-6137, paragraph 22).

Case C-522/04 *Commission v Belgium* [2007] ECR I-05701 § 70

Accordingly, when deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or disapply that legislation. *Where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules.*

Case C-264/96 *ICI* [1998] ECR I-0000 §34

With regard to the first branch of the application, therefore, *it must be held that by retaining in force laws, regulations and administrative provisions restricting the right to register a vessel* in the national register and to fly the national flag to vessels more than half the shares in which are owned by natural persons of French nationality or which are owned by legal persons having a seat in France or legal persons a certain proportion of whose directors, administrators or managers must be French nationals or, in the case of a private limited company, limited partnership, or general commercial or non-commercial partnership, more than half of whose capital must be held by French citizens or all of whose capital must be held by French persons who fulfil certain conditions, *the French Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the Treaty*, Article 7 of Regulation No 1251/70 and Article 7 of Council Directive 75/34.

Case C-334/94 *Commission v France* [1996] ECR I-1307 §24

It has *consistently* been held that *the incompatibility of national legislation with provisions of the Treaty, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended*. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, *cannot be regarded as constituting the proper fulfilment of obligations under the Treaty* (Case 168/85 *Commission v Italy* [1986] ECR 2945, paragraph 13).

Case C-334/94 *Commission v France* [1996] ECR I-1307 §30

Case C-168/85 *Commission v Italy* [1986] ECR 2945 §13

It must be observed in that regard that *directly applicable provisions of the Treaty are binding on all the authorities of the Member States and they must therefore comply with them without its being necessary to adopt national implementing provisions*. However, as the Court held in its judgment of 20 March 1986 in Case 72/85 (*Commission v Netherlands* (1986) ECR 1219), *the right of individuals to rely on directly applicable provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty*.

It is clear from previous judgments of the Court, in particular its judgment of 25 October 1979, cited above, that if a provision of national law that is incompatible with a provision of the Treaty, even one directly applicable in the legal order of the Member States, is retained unchanged, this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law and that maintaining such a provision in force therefore amounts to a failure by the state in question to comply with its obligations under the Treaty.

Case C-168/85 Commission v Italy [1986] ECR 2945 §11

Consequently, the Italian republic cannot escape from its obligation to amend its national law in accordance with the requirements of the Treaty by relying on the direct applicability of the provisions of the Treaty, on *the introduction of certain administrative practices or on the fact that Community citizens have, in its view, an increased awareness of their rights*. Indeed, *in this case, Community citizens remain in a state of uncertainty* not only because national provisions contrary to the Treaty have been maintained in force but also because new provisions, also contrary to the Treaty, were introduced in the field of tourism in 1983.

Case C-168/85 Commission v Italy [1986] ECR 2945 §14

7.4 RIGHT TO REDRESS IN THE CASE OF DAMAGE ATTRIBUTABLE TO A MEMBER STATE

7.4.1 Principle of the right to reparation (corollary of direct effect)

First of all, it should be noted that, as the Court has repeatedly held, *the principle that the State is liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty* (judgments in *Frankovich and Others*, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie de Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-392/93 *the Queen v HM Treasury ex parte British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20).

Case C-66/95 Sutton [1997] ECR I-2163 §31

See also: Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §31

The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (see, in particular, Case 168/85 *Commission v Italy* [1986] ECR 2945, paragraph 11, Case C-120/88 *Commission v Italy* [1991] ECR I-621, paragraph 10, and C-119/89 *Commission v Spain* [1991] ECR I-641, paragraph 9). The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State.

As appears from paragraph 33 of the judgment in Francovich and Others, the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §20

It is all the more so *in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts*. In that event, *the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.*

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §22

In this case, it is undisputed that the Community provisions at issue, namely Article 30 of the Treaty in Case C-46/93 and *Article 52* in Case C-48/93, *have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. Breach of such provisions may give rise to reparation.*

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §23

7.4.2 The three pre-conditions for the right to redress (according to European Union law)

According to the abovementioned case-law, *a Member State's obligation to make reparation for the loss and damage so caused is subject to three conditions: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties Treaty* (judgments in *Brasserie de Pêcheur and Factortame*, paragraph 51; *British Telecommunications*, paragraph 39; *Hedley Lomas*, paragraph 25; *Dillenkofer and Others*, paragraph 21). *Those conditions are to be applied to each type of situation* (judgment in *Dillenkofer and Others*, paragraph 24).

Case C-66/95 Sutton [1997] ECR I-2163 §32

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §51

In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied (see, in particular, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Suederdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 26), *the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.*

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §33

Firstly, those conditions satisfy the requirements of *the full effectiveness of the rules of Community law* and of *the effective protection of the rights which those rules confer.*

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §52

Secondly, *those conditions correspond in substance to those defined by the Court in relation to Article 215* in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §53

The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §66

The obligation to make reparation for loss or damage caused to individuals *cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law.* Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §79

7.4.2.1 First condition: attribution of rights to individuals by the rule infringed

The first condition is manifestly satisfied in the case of Article 30 of the Treaty, the relevant provision in Case C-46/93, and *in the case of Article 52, the relevant provision in Case C-48/93*. Whilst Article 30 imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect (Case 74/76 *Iannelli & Volpi v Meroni* [1977] ECR 557, paragraph 13). Likewise, *the essence of Article 52 is to confer rights on individuals* (Case 2/74 *Reyners* [1974] ECR 631, paragraph 25).

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §54

7.4.2.2 Second condition: breach sufficiently serious

As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, *the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion*.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §55

The *factors* which the competent court may take into consideration include the *clarity and precision of the rule breached*, the *measure of discretion* left by that rule to the national or Community authorities, whether the infringement and the damage caused was *intentional or involuntary*, whether any error of law was *excusable or inexcusable*, the fact that the *position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law*.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §56

On any view, *a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement*.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §57

The decision of the United Kingdom legislature to introduce in the Merchant Shipping Act 1988 provisions relating to the conditions for the registration of fishing vessels *has to be assessed differently* in the case of the provisions making registration subject to a nationality condition, which constitute direct discrimination manifestly contrary to Community law, and in the case of the provisions laying down residence and domicile conditions for vessel owners and operators.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §61

The latter conditions are *prima facie* incompatible with Article 52 of the Treaty in particular, but the United Kingdom sought to justify them in terms of the objectives of the common fisheries policy. In the judgment in Factortame II, cited above, the Court rejected that justification.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §62

In order to determine whether the breach of Article 52 thus committed by the United Kingdom was sufficiently serious, the national court might take into account, *inter alia*, the legal disputes relating to particular features of the common fisheries policy, the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the state of certainty of Community law made by the national courts in the interim proceedings brought by individuals affected by the Merchant Shipping Act.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §63

7.4.2.3 Third condition: direct causal link between the breach of the obligation borne by the state and the damage sustained by the injured parties

As for the third condition, it is for the national courts to determine whether there is *a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties*.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §65

7.4.3 Implementation of redress (according to national law)

Finally, since the judgment in *Frankovich and Others*, it has been settled case law that, while the right to reparation is founded directly on Community law *where the three conditions set out above are fulfilled, the national law on liability provides the framework within which the State must make reparation for the consequences of the loss and damage caused, provided always that the conditions laid down by national law relating to reparation of loss and damage must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation* (paragraphs 41 to 43).

Case C-66/95 Sutton [1997] ECR I-2163 §33

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §67

In the absence of relevant Community provisions, *it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation*. However, those *criteria must not be less favourable* than those applying to similar claims based *on domestic law* and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §83

Accordingly, the reply to the national court's question must be that the *obligation for Member States* to make good loss or damage caused to individuals by breaches of Community law attributable to the State *cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question*.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §96

8 - PROCEDURAL GUARANTIES IN CONNECTION WITH RESTRICTIONS

8.1 OBLIGATION TO VERIFY AND COMPARE ON THE PART OF THE STATE OF DESTINATION

Likewise, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State (see Case C-340/89 *Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg* [1991] ECR I-2357, paragraph 15). Consequently, they must take account of the equivalence of diplomas (see the judgment in *Thieffry*, paragraphs 19 and 27) and, if necessary, *proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned* (see the judgment in *Vlassopoulou*, paragraph 16).

Case C-55/94 Gebhard [1995] ECR I-4165 §38

Thus, *the authorisation procedure must in the first place be intended solely to verify whether the postgraduate academic title obtained in another Member State was properly awarded*, following a course of studies which was actually completed, in an establishment of higher education which was competent to award it.

Case C-19/92 Kraus [1993] ECR I-1663 §38

Consequently, *a Member State* which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification *must take into consideration the diplomas*, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State *by making a comparison between the specialised knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules*.

Case C-340/89 Vlassopoulou [1991] ECR I-2357 §16

That examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. That assessment of the *equivalence* of the foreign diploma must be carried out *exclusively in the light of the level of knowledge and qualifications* which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates (see the judgment in Case 222/86 *UNECTEF v Heylens*, cited above, paragraph 13).

Case C-340/89 Vlassopoulou [1991] ECR I-2357 §17

8.2 **OTHER PROCEDURAL GUARANTIES: REASON FOR REFUSAL, RIGHT TO LEGAL PROCEEDINGS, PENALTIES**

In the absence of Community rules governing the matter, the Member States remain competent to impose penalties for breach of such an obligation. However, it follows from settled case-law concerning non-compliance with formalities for establishing the right of residence of an individual enjoying the protection of Community law that *Member States may not impose a penalty so disproportionate to the gravity of the infringement that this becomes an obstacle to the free movement of persons; this would be especially so if the penalty consisted of imprisonment* (see, in particular, Case C-265/88 *Messner* [1989] ECR 4209, paragraph 14). In view of the effect which the right to drive a motor vehicle has on the actual exercise of the rights relating to the free movement of persons, the same considerations must apply with regard to breach of the obligation to exchange driving licences.

Case C-193/94 Skanavi [1996] ECR I-929 §36

Moreover, *verification of the academic title*, referred to in paragraph 38 of this judgment, *must be carried out by the national authorities in accordance with a procedure which is in conformity with the requirements of Community law as regards the effective protection of the fundamental rights conferred by the Treaty on Community nationals*. It follows that any *refusal of authorisation by the competent national authority must be capable of being subject to judicial proceedings* in which its legality under Community law can be reviewed and that *the person concerned must be able to ascertain the reasons for the decision taken with respect to him* (see judgment in *Heylens*, cited above, paragraphs 14 to 17, and judgment in Case 340/89 *Vlassopoulou v Ministerium für Justiz, Bundes-und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357, paragraph 22).

Case C-19/92 Kraus [1993] ECR I-1663 §40

It follows that the answer to the question put by the national court must be that Articles 48 and 52 of the Treaty must be interpreted as meaning that they do not preclude a Member State from prohibiting one of its own nationals, who holds a postgraduate academic title awarded in another Member State, from using that title on its territory without having obtained an administrative authorisation for that purpose, provided that the authorisation procedure is intended solely to verify whether the postgraduate academic title was properly awarded, *that the procedure is easily accessible and does not call for the payment of excessive administrative fees, that any refusal of authorisation is capable of being subject to proceedings, that the person concerned is able to ascertain the reasons for the decision and that the penalties prescribed for non-compliance with the authorisation procedure are not disproportionate to the gravity of the offence*.

Case C-19/92 Kraus [1993] ECR I-1663 §42

9 - SPECIFIC QUESTIONS

9.1 **RELATION TO OTHER PRIMARY LAW**

9.1.1 **Article 3 TEU (formerly Article 2 EC¹)**

In response to those arguments, it is to be remembered that, having regard to the objectives of the Community, *sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty* (see Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405, paragraph 4). This applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service (see Case 13/76 *Donà v Mantero* [1976] ECR 1333, paragraph 12).

Case C-415/93 Bosman [1995] ECR I-4353 §73

It must be observed *in limine* that, in view of the objectives of the European Economic Community, *participation in a community based on religion or another form of philosophy* falls within the field of application of Community law only *in so far as it can be regarded as an economic activity* within the meaning of Article 2 of the Treaty.

Case C-196/87 Stevmann [1988] ECR 6159 §9

Having regard to the objectives of the Community, *the practice of sport is subject to Community law only in so far as it constitutes an economic activity* within the meaning of Article 2 of the Treaty. This applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service.

Case C-13/76 Donà [1976] ECR 1333 §12

Having regard to the objectives of the Community, *the practice of sport is subject to Community law only in so far as it constitutes an economic activity* within the meaning of Article 2 of the Treaty.

Case C-36/74 Walrave [1974] ECR 1405 §4

9.1.2 **Article 3 EC²**

The Court has confirmed that Articles 48 and 52 of the Treaty implement the fundamental principle contained in Article 3c of the Treaty in which it is stated that, for the purposes set out in Article 2, *the activities of the Community are to include the abolition, as between Member States, of obstacles to freedom of movement for persons* (see, in particular, judgments in Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16; in *Heylens*, cited above, paragraph 8 and in Case C-370/90 *The Queen, ex parte Secretary of State for the Home Department v Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265).

Case C-19/92 Kraus [1993] ECR I-1663 §29

¹ Repealed and replaced in substance by Article 3 TEU

² Article 3 paragraph 1 EC repealed and replaced in substance by Articles 3 to 6 TFEU
Article 3 paragraph 2 EC replaced by Article 8 TFEU

Under Article 3 of the Treaty, the activities of the Community include, *inter alia*, **the abolition of obstacles** to freedom of movement for persons and services.

Case C-71/76 Thieffry [1977] ECR 765 §7

With a view to attaining this objective, the first paragraph of Article 52 provides that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished **by progressive stages in the course of the transitional period**.

Case C-71/76 Thieffry [1977] ECR 765 §8

9.1.3 Article 5 TEU (formerly Article 5 EC)

It must be emphasised that **the difference of treatment applied according to whether or not the business of the holding company belonging to the consortium consists wholly or mainly in holding shares in subsidiaries having their seat in non-member countries lies outside the scope of Community law**.

Case C-264/96 ICI [1998] ECR I-0000 §32

Consequently, **Articles 52 and 58 of the Treaty do not preclude domestic legislation under which tax relief is not granted to a resident consortium member where the business of the holding company owned by that consortium consists wholly or mainly in holding shares in subsidiaries which have their seat in non-member countries. Nor does Article 5 apply**.

Case C-264/96 ICI [1998] ECR I-0000 §33

Consequently, in circumstances such as those in point in the main proceedings, **Article 5 of the Treaty does not require the national court to interpret its legislation in conformity with Community law or to disapply the legislation in a situation falling outside the scope of Community law**.

Case C-264/96 ICI [1998] ECR I-0000 §35

Furthermore, **Member States are required**, in conformity with Article 5 of the Treaty, **to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to abstain from any measures which could jeopardise the attainment of the objectives of the Treaty**.

Case C-19/92 Kraus [1993] ECR I-1663 §31

Moreover, it is also clear from the judgment in Case 71/76 Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris [1977] ECR 765, at paragraph 16, that, in so far as Community law makes no special provision, the objectives of the Treaty, and in particular freedom of establishment, may be achieved by measures enacted by the Member States, which, under **Article 5 of the Treaty, must take "all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty** or resulting from action taken by the institutions of the Community" and abstain from "any measure which could jeopardize the attainment of the objectives of this Treaty".

Case C-340/89 Vlassopoulou [1991] ECR 2357 §14

Case C-71/76 Thieffry [1977] ECR 765 §16

9.1.4 Article 11 TFEU (formerly Article 6 EC)

The Court has held that **the general prohibition of discrimination on grounds of nationality**

laid down in Article 7 of the EEC Treaty has been implemented by Article 52 of that Treaty in the specific domain which it governs and that, consequently, any rules incompatible with the latter provision are also incompatible with Article 7 of the Treaty (Commission v *United Kingdom*, paragraph 18). Article 7 of the EEC Treaty has become Article 6 of the EC Treaty.

Case C-334/94 Commission v France [1996] ECR I-1307 §13

The Court has consistently held that *Article 6* of the Treaty, which lays down the general principle of the prohibition of discrimination on grounds of nationality, *applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific prohibition of discrimination* (see, in particular, Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, paragraph 19).

Case C-193/94 Skanavi [1996] ECR I- 929 §20

The principle of non-discrimination was implemented and specifically laid down, in relation to the right of establishment, by Article 52 of the Treaty.

Case C-193/94 Skanavi [1996] ECR I- 929 §21

Under Article 7 of the Treaty the prohibition of discrimination applies "within the scope of application of this Treaty" and "without prejudice to any special provisions contained therein". This latter expression refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given concrete form in respect of specific situations. *Examples of that are the provisions concerning* free movement of workers, *the right of establishment* and the freedom to provide services.

Case C-186/87 Cowan [1989] ECR 195 §14

Article 7 of the Treaty, which forms part of the ‘principle’ of the Community, provides that within the scope of application of the Treaty and *without prejudice to any special provisions contained therein*, ‘*any discrimination on grounds of nationality shall be prohibited*’.

Case C-2/74 Revners [1974] ECR 631 §15

Article 52 provides for the implementation of this general provision in the special sphere of the right of establishment.

Case C-2/74 Revners [1974] ECR 631 §16

9.1.5 Article 8A EC³

Article 8a of the Treaty, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, *finds specific expression in Article 52 of the Treaty*. Since the facts with which the main proceedings are concerned fall within the scope of the latter provision, it is not necessary to rule on the interpretation of Article 8a.

Case C-193/94 Skanavi [1996] ECR I- 929 §22

9.1.6 Article 54 TFEU (formerly Article 48 EC)

As the Court of Justice held in Joined Cases 115/181 [*sic*] and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, paragraph 7, *the reservations contained in Articles 48 and*

³ Replaced, in substance, by Article 13 TEU and Article 282, paragraph 1, TFEU.

56 of the EC Treaty *permit Member States to adopt*, with respect to the nationals of other Member States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, *measures which they cannot apply to their own nationals*, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto.

Joined Cases C-65/95 and C-111/95 Shingara & Radiom [1997] ECR I-3343 §28

Furthermore, according to the order for reference, *Mr Kemmler is not an employed person but a self-employed person with professional establishments in both Frankfurt and Brussels. His situation is not therefore covered by Articles 48 and 51 of the Treaty*, which concern the free movement of workers, or by Article 59, which concerns the freedom to provide services. *Since Mr Kemmler has a stable and permanent establishment in both the Member States concerned, only Article 52, concerning the right of establishment, is relevant to the decision in the case.*

Case C-53/95 Inasti [1996] ECR I-703 §8

The same reasoning must be followed as regards Article 48 of the Treaty. In its judgment in *Knoors*, cited above (paragraph 20), the Court held that freedom of movement for workers and the right of establishment guaranteed by *Article 48 and 52 of the Treaty were fundamental rights in the Community system*, and would not be fully realised if the Member States were able to refuse to grant the benefit of the provisions of Community law to those of their nationals who had taken advantage of its provisions to acquire vocational qualifications in a Member State other than that of which they were nationals.

Case C-19/92 Kraus [1993] ECR I-1663 §16

His position might therefore come within the chapter of the Treaty on workers, more particularly Article 48, *or* within the chapters on the right of establishment and on services, in particular Articles 52, 56 and 59.

Case C-106/91 Ramrath [1992] ECR I-3351 §16

Furthermore, *a comparison of those different provisions shows that they are based on the same principles* as regards both the entry into and residence in the territory of the Member States of persons covered by Community law and also the prohibition of all discrimination against them on grounds of nationality.

Case C-106/91 Ramrath [1992] ECR I-3351 §17

On that point it should be observed that *Articles 48 and 52 of the EEC Treaty afford the same legal protection* and that therefore the classification of an economic activity is without significance.

Case C-363/89 Roux [1991] ECR 273 §23

It is clear from the actual wording of Article 60 that *an activity carried out on a permanent basis* or, in any event, without a foreseeable limit to its duration does not fall within the Community provisions concerning the provision of services. On the other hand, such activities *may fall within the scope of Articles 48 to 51 or Articles 52 to 58 of the Treaty, depending on the case.*

Case C-196/87 Stevemann [1988] ECR 6159 §16

9.1.7 Article 60 TFEU (formerly Article 53 EC)

Article 53 emphasises the *irreversible nature of the liberalisation achieved in this regard at any given time*, by providing that *Member States shall not introduce any new restrictions* on the right of establishment in their territories of nationals of other Member States.

Case C-71/76 Thieffry [1977] ECR 765 §10

9.1.8 Article 61 TFEU (formerly Article 54 EC)

It must be pointed out that *Article 54(3)(g) must be read in the light not only of Article 52 and 54 of the EC Treaty*, which clearly show that the *coordination of systems of company law forms part of the general programme for the abolition of restrictions on freedom of establishment, but also of Article 3(h) of that Treaty* which provides that the *activities of the Community are to include the approximation of national laws to the extent required for the functioning of the common market*.

Case C-97/96 Daihatsu [1997] ECR I-6843 §18

Furthermore the very wording of Article 54(3)(g) of the Treaty refers to *the need to protect the interests of 'others' generally*, without distinguishing or excluding any categories falling within the ambit of that term.

Case C-97/96 Daihatsu [1997] ECR I-6843 §19

Consequently *the term 'others'*, as contemplated in Article 54(3)(g) of the Treaty *cannot be limited merely to creditors* of the company.

Case C-97/96 Daihatsu [1997] ECR I-6843 §20

Moreover, *the objective of abolishing restrictions on freedom of establishment*, which is assigned in very broad terms to the Council and the Commission by Article 54(1) and (2) of the Treaty, *cannot be circumscribed by the provisions of Article 54(3). Article 54(3) merely sets out a non-exhaustive list of measures to be taken in order to attain that objective*, as is borne out by the use in that provision of the words 'in particular'.

Case C-97/96 Daihatsu [1997] ECR I-6843 §21

It is not possible to invoke against the direct effect of the rule on equal treatment with nationals contained in Article 52 the fact that the Council has failed to issue the directives provided for by Articles 54 and 57 or the fact that certain of the directives actually issued have not fully attained the objectives of non-discrimination required by Article 52.

Case C-11/77 Patrick [1977] ECR 1199 §12

In these circumstances *the 'general programme' and the directives provided for by Article 54 were of significance only during the transitional period*, since the freedom of establishment was fully attained at the end of it.

Case C-2/74 Revners [1974] ECR 631 §13

For the purpose of achieving this objective by progressive stages during the transitional period *Article 54 provides for the drawing up by the Council of a 'general programme' and, for the implementation of this programme, directives intended to attain freedom of establishment* in respect of the various activities in question.

Case C-2/74 Revners [1974] ECR 631 §19

It is right therefore to reply to the question raised that, *since the end of the transitional period, Article 52 of the Treaty is a directly applicable provision despite the absence in a particular sphere, of the directives prescribed by Articles 54(2) and 57(1) of the Treaty.*

Case C-2/74 Revners [1974] ECR 631 §32

9.1.9 Article 63 TFEU (formerly Article 56 EC)

It must consequently be declared that, by maintaining in PT special rights, such as those provided for in its articles of association for the State and other public sector bodies, allocated in connection with the *State's golden shares* in PT, the Portuguese Republic has *failed to fulfil its obligations under Article 56 EC.*

In that regard, it is sufficient to note that, in accordance with settled case-law, *in so far as the national measures at issue entail restrictions on freedom of establishment*, such restrictions are *a direct consequence of the obstacles to the free movement of capital* considered above, to which they are *inextricably linked*. Consequently, since an infringement of Article 56(1) EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment (see, inter alia, *Commission v Netherlands*, paragraph 43).

Case C-171/08 Commission v Portugal [2010] ECR I-0000 § 78, 80

Case C-543/08 Commission v Portugal [2010] ECR I-0000 § 97, 99

Furthermore, even if the legislation at issue in the main proceedings [mandatory minimum distances between roadside service stations] were to have restrictive effects on free movement of capital, it follows from the case-law that *those effects would be the unavoidable consequence of an obstacle to freedom of establishment and would not therefore justify an independent examination of that legislation from the point of view of Article 56 EC* (see, by way of analogy, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 33; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 24; and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 74).

Case C-384/08 Attanasio [2010] ECR I-0000 §40

As regards the question whether *national legislation falls within the ambit of one or other of those freedoms* [freedom of establishment/free movement of capital], it is clear from well-established case-law that *the purpose of the legislation concerned must be taken into consideration* (see, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22, and case-law cited).

Provisions of national law which apply to *the possession by nationals of one Member State of holdings in the capital of a company established in another Member State allowing them to exert a definite influence on the company's decisions and to determine its activities fall within the ambit ratione materiae of the provisions of the EC Treaty on freedom of establishment* (see, to that effect, in particular, Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22, and Case C-112/05 *Commission v Germany* [2007] ECR I-8995, paragraph 13).

Direct investments, that is to say, investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity fall within the ambit of Article 56 EC on the free movement of capital. That object presupposes that the shares held by the shareholder enable him to

participate effectively in the management of that company or in its control (*Commission v Germany*, paragraph 18, and case-law cited).

National legislation not intended to apply only to those shareholdings which enable the **holder to have a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the ambit of both Article 43 EC and Article 56 EC** (see, to that effect, *Holböck*, paragraphs 23 and 24). Contrary to what the Italian Republic maintains, *Cadbury Schweppes and Cadbury Schweppes Overseas* does not support the conclusion that in such a case only Article 43 EC is of relevance. That judgment, as its paragraph 32 makes clear, concerns only a situation in which a company holds shareholdings giving it control of other companies (see Case C-207/07 *Commission v Spain* [2008] ECR I-0000, paragraph 36).

In this case, a distinction must be drawn, depending on whether the criteria are applied to the State's powers to oppose the acquisition of shareholdings and the conclusion of contracts by shareholders representing a certain proportion of voting rights or are applied to the power to veto certain company resolutions.

Case C-326/07 *Commission v Italy* [2009] I-02291 §33-37

Even if it were to be accepted that the tax regime at issue in the main proceedings [*not allowing a resident company to deduct losses incurred in another Member State by a permanent establishment belonging to it*] has restrictive effects on the free movement of capital, **such effects would have to be seen as an unavoidable consequence of any restriction on freedom of establishment and they do not justify an examination of that regime in the light of Article 56 EC** (see, to that effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 33; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraphs 48 and 49; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 34).

Case C-414/06 *Lidl Belgium* [2008] ECR I-0000 §169.1.9 Article 64 TFEU (formerly Article 57 EC)

It must be observed, first, that *the Directive*, which is based on Articles 49, 57(1) and 66 of the Treaty, **aims to facilitate freedom of movement of persons and services by allowing nationals of the Member States to pursue a profession, on a self-employed or employed basis, in a Member State other than that in which they have obtained their professional qualification.**

Joined Cases C-225/95, C-226/95 and C-227/95 *Kapasalakis* [1998] ECR I-0000 §18

Consequently, the Member States may in certain circumstances, adopt or maintain measures constituting an obstacle to free movement. **Article 57(2) of the Treaty authorizes the Community to eliminate obstacles of that kind in particular by coordinating the provisions laid down by law, regulation, or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.** Since coordinating measures are concerned, the Community is to have regard to the public interest aims of various Member States and to adopt a level of protection for that interest which seems acceptable in the Community.

Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405 §17

It is not possible to invoke against the direct effect of the rule on equal treatment with nationals contained in Article 52 ***the fact that the Council has failed to issue the directives provided for by Articles 54 and 57 or the fact that certain of the directives actually issued***

have not fully attained the objectives of non-discrimination required by Article 52.

Case C-11/77 Patrick [1977] ECR 1199 §12

With a view to making it easier for persons to take up and pursue activities as self-employed persons, Article 57 assigns to the Council the duty of issuing directives concerning, first, the mutual recognition of diplomas, and secondly, the co-ordination of the provisions laid down by law or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons.

Case C-71/76 Thieffry [1977] ECR 765 §11

That Article is therefore directed towards *reconciling freedom of establishment with the application of national professional rules justified by the general good*, in particular rules relating to organisation, qualifications, professional ethics, supervision and liability, provided that such application is effected without discrimination.

Case C-71/76 Thieffry [1977] ECR 765 §12

Consequently, if the freedom of establishment provided for by Article 52 can be ensured in a Member State either under the provisions of the laws and regulations in force, or by virtue of the practices of the public service or of professional bodies, *a person subject to Community law cannot be denied the practical benefit of that freedom solely by virtue of the fact that, for a particular profession, the directives provided for by Article 57 of the Treaty have not yet been adopted.*

Case C-71/76 Thieffry [1977] ECR 765 §17

Besides these liberalising measures, *Article 57 provides for directives intended to ensure mutual recognition of diplomas, certificates and other evidence of formal qualifications and in a general way for the co-ordination of laws with regard to establishment and the pursuit of activities as self-employed persons.*

Case C-2/74 Revners [1974] ECR 631 §20

It appears from the above that in the system of the chapter on the right of establishment the 'general programme' and the directives provided for by the Treaty are intended to accomplish two functions, the first being *to eliminate obstacles* in the way of attaining freedom of establishment during the transitional period, the second being *to introduce into the law of Member States a set of provisions intended to facilitate the effective exercise of this freedom* for the purpose of assisting economic and social interpenetration within the Community in the sphere of activities as self-employed persons.

Case C-2/74 Revners [1974] ECR 631 §21

9.1.10 Article 65 TFEU (formerly Article 58 EC)

It is *contrary to [Article 52] in conjunction with [Article 58] of the Treaty* for a Member State, when determining the national basis of assessment, *to exclude a currency loss suffered by a company with a registered office in that State upon repatriation of start-up capital granted to its permanent establishment in another Member State.*

Case C-293/06 Deutsche Shell v Finanzamt Hamburg [2008] ECR I-1129 §28, 29, 41, 43, 45

As regards Article 58 of the Treaty, taken in isolation (second question), it must be borne in mind that *the effect of that provision is to assimilate*, for the purpose of giving effect to the chapter relating to the right of establishment, *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 Community, *to natural persons* who are nationals of one of the Member States, although non-profit making companies are excluded from the benefit of that chapter (see Case 182/83 *Fearon v Irish Land Commission* [1984] ECR 3677, paragraph 8). *Since that provision does no more than define the class of persons to whom the provisions on the right of establishment apply*, it cannot preclude, as such, national rules of the kind at issue in the main proceedings.

Case C-70/95 Sodemare [1997] ECR I-3395 §25

As regards Article 52 of the Treaty, read in conjunction with Article 58 thereof (third question), it must be borne in mind that *the right of establishment* with which those provisions are concerned *is granted both to natural persons* who are nationals of a Member State of the Community *and to legal persons* within the meaning of Article 58. Subject to the exceptions and conditions laid down, *it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up* (*Gebhard*, cited above, paragraph 23).

Case C-70/95 Sodemare [1997] ECR I-3395 §26

The Treaty has taken account of that variety in national legislation. In defining, in Article 58, the companies which enjoy the right of establishment, *the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company*. Moreover, Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to another. No convention in this area has yet come into force.

Case C-81/87 Daily Mail [1988] ECR 5483 §21

Under those circumstances, *Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State*.

Case C-81/87 Daily Mail [1988] ECR 5483 § 24

The answer to the first part of the first question must therefore be that in the present state of Community law *Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State*.

Case C-81/87 Daily Mail [1988] ECR 5483 §25

9.1.11 Article 66 TFEU et seq. (formerly Article 59 et seq. EC)

Since the Luxembourg company is involved on a stable and continuous basis in the economic life of Italy, that situation falls within the provisions of the chapter on freedom of establishment, namely Articles 52 to 58, and not those of the chapter concerning services (see, to that effect, Case 2/74 *Reyners v Belgian State* [1974] ECR 631, paragraph 21, and Case C-55/94 *Gebhard v Consiglio degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 25).

Case C-70/95 Sodemare [1997] ECR I-3395 §24

Furthermore, according to the order for reference, Mr Kemmler is not an employed person but a self-employed person with professional establishments in both Frankfurt and Brussels. His situation is not therefore covered by Articles 48 and 51 of the Treaty, which concern the free movement of workers, or by Article 59, which concerns the freedom to provide services. ***Since Mr Kemmler has a stable and permanent establishment in both the Member States concerned, only Article 52, concerning the right of establishment, is relevant to the decision in the case.***

Case C-53/95 Inasti [1996] ECR I-703 §8

The situation of a ***Community national who moves to another Member State of the Community in order there to pursue an economic activity is governed by the chapter of the Treaty on the free movement of workers, or the chapter on the right of establishment or the chapter on services, these being mutually exclusive.***

Case C-55/94 Gebhard [1995] ECR I-4165 §20

The provisions of the chapter on services are subordinate to those of the chapter on the right of establishment in so far, first, as the wording of the first paragraph of Article 59 assumes that the provider and the recipient of the service concerned are "established" in two different Member States and, second, ***as the first paragraph of Article 60 specifies that the provisions relating to services apply only if those relating to the right of establishment do not apply.*** It is therefore necessary to consider the scope of the concept of "establishment".

Case C-55/94 Gebhard [1995] ECR I-4165 §22

As the Advocate General has pointed out, 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. ***The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State*** (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.

Case C-55/94 Gebhard [1995] ECR I-4165 §27

However, that situation is to be distinguished from that of Mr Gebhard who, as a national of a Member State, pursues a ***professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base*** to, amongst others, nationals of that State. ***Such a national comes under the provisions of the chapter relating to the right of establishment*** and not those of the chapter relating to services.

Case C-55/94 Gebhard [1995] ECR I-4165 §28

It follows that a Member State may regard as a ***domestic broadcaster a radio and television organisation which establishes itself in another Member State in order to provide services there which are intended for the first State's territory***, since the aim of that measure is to prevent organisations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, ***wrongfully to avoid obligations under national law***, in this case those designed to ensure the pluralist and non-commercial content of programmes.

Case C-23/93 TV10 [1994] ECR I-4795 §21

In those circumstances it cannot be regarded as incompatible with the provisions of

Articles 59 and 60 of the Treaty to treat such organisations as domestic organisations.

Case C-23/93 TV10 [1994] ECR I-4795 §22

In that connection, the Netherlands Government and the Commission rightly observed that Articles 59 and 60 of the Treaty do not apply in such a case. *It is clear from the actual wording of Article 60 that an activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration does not fall within the Community provisions concerning the provision of services.* On the other hand, such activities may fall within the scope of Articles 48 to 51 or Articles 52 to 58 of the Treaty, depending on the case.

Case C-196/87 Stevmann [1988] ECR 6159 §16

In that respect, it must be acknowledged that *an insurance undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency.* In the light of the aforementioned definition contained in the first paragraph of Article 60, such an insurance undertaking cannot therefore avail itself of Articles 59 and 60 with regard to its activities in the Member State in question.

Case C-205/84 Commission v Germany [1986] ECR 3755 §21

Similarly, as the Court held in its judgment of 3 December 1974 (Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299) *a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State.* Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.

Case C-205/84 Commission v Germany [1986] ECR 3755 §22

9.1.12 Article 106 TFEU (formerly Article 86 (1) EC)

[...] Article 86(1) EC precludes Member States, in the case of public undertakings and undertakings to which they grant special or exclusive rights, from maintaining in force national legislation contrary to Articles 43 EC and 49 EC.

First, it is certainly possible that the concession in question in the main proceedings is, having regard to the criteria identified by the Court, particularly the place where the work is to be carried out and the economic interest at stake, of a certain cross-border interest (see, by analogy, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-0000, paragraph 31). That is all the more true as the national legislation is applicable without distinction to all concessions.

Second, legislation such as that at issue in the main proceedings, by the deferment which it involves of the award of a new concession by a public procedure, constitutes, at least during the period of that deferment, a difference in treatment to the detriment of the undertakings which might be interested in such a concession and are located in a Member State other than that to which the contracting authority belongs.

That difference in treatment can, however, be justified by objective circumstances, such as the necessity of complying with the principle of legal certainty. [...] In those circumstances, and without it being necessary to consider the principle of the protection of legitimate expectations, the principle of legal certainty not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of the requirements of the public service and from the economic point of view.

It is for the referring court to determine whether, in particular, the extension of the length of the transitional period, brought about by legislation such as that at issue in the main proceedings, can be regarded as being necessary to comply with the principle of legal certainty.

Case C-347/06 ASM Brescia [2008] ECR I-05641 §61-71

9.1.13 Article 220 EC⁴

The Treaty has taken account of that variety in national legislation. In defining, in Article 58, the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company. Moreover, *Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to another. No convention in this area has yet come into force.*

Case C-81/87 Daily Mail [1988] ECR 5483 §21

9.1.14 Article 221 EC⁵

Furthermore, *the condition relating to the control of the capital of certain legal persons owning vessels is also contrary to Article 221 of the Treaty since it restricts participation by nationals of other Member States in the capital of such legal persons.*

Case C-334/94 Commission v France [1996] ECR I-1307 §18

In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52. Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State, and in that regard *Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company.*

Case C-81/87 Daily Mail [1988] ECR 5483 §17

⁴ Repealed and replaced, in substance, by Article 19 TEU

⁵ Article 221 §1 EC: repealed and replaced, in substance, by article 19 §2 first subparagraph TEU; Article 221 §2 and 3 replaced by article 251 TFEU

9.2 **RELATION TO SECONDARY LAW**

9.2.1 **Absence of Harmonisation**

Whilst it is true that, *in a sector which has not been subject to full harmonisation* at Community level, *Member States remain*, in principle, *competent to define the conditions for the pursuit of the activities in that sector*, they must, when exercising their powers, *respect the basic freedoms guaranteed by the EC Treaty* (see Case C-393/05 *Commission v Austria* [2007] ECR I-10195, paragraph 29, and Case C-404/05 *Commission v Germany* [2007] ECR I-10239, paragraph 31 and the case-law cited).

Case C-438/08 *Commission v Portugal* [2009] ECR I-0000 §27

The Commission maintains, however, that the absence of Community legislation in this field [...] was remedied by the Community rules, governing the transfer of the company seat to another Member State, laid down in regulations such as Regulation No 2137/85 on the EEIG and Regulation No 2157/2001 on the SE or, moreover, Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European cooperative society (SCE) (OJ 2003 L 207, p. 1), as well as by the Hungarian legislation adopted subsequent to those regulations.

The Commission argues that those rules may – and should – be applied *mutatis mutandis* to the cross-border transfer of the real seat of a company incorporated under the law of a Member State. [...]

Accordingly, the application *mutatis mutandis* of the Community legislation to which the Commission refers – even if it were to govern the cross-border transfer of the seat of a company governed by the law of a Member State – cannot in any event lead to the predicted result in circumstances such as those of the case before the referring court.

Case C-210/06 *Cartesio* [2008] ECR I-09641 §115, 116, 120

It should be noted in that respect that, whilst Community harmonisation rules are useful for facilitating cross-border mergers, the *existence of such harmonisation rules cannot be made a precondition* for the implementation of the freedom of establishment laid down by Articles 43 EC and 48 EC (see, to that effect, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 11).

Case C-411/03 *SEVIC Systems* [2005] ECR I-10805 §26

It should nevertheless also be noted that whilst, by reason of the adoption of the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (OJ 1978 L 295, p. 36), harmonised rules exist in the Member States concerning internal mergers, *cross-border mergers pose specific problems*.

Case C-411/03 *SEVIC Systems* [2005] ECR I-10805 §27

In the absence of harmonisation of the conditions under which a person holding a postgraduate academic title may make use of it in Member States other than the one in which it was awarded, *the Member States remain, as a matter of principle, competent to lay down the detailed rules governing the use of such a title on their territory*.

Case C-19/92 *Kraus* [1993] ECR I-1663 §27

Community law does not preclude a Member State from adopting, in the absence of harmonisation, measures designed to prevent the opportunities created under the Treaty from being abused in a manner contrary to the legitimate interests of the State (see the judgment in Knoors, cited above, paragraph 25).

Case C-19/92 Kraus [1993] ECR I-1663 §34

9.2.2 During the Transitional Period

In these circumstances *the ‘general programme’ and the directives provided for by Article 54 were of significance only during the transitional period*, since the freedom of establishment was fully attained at the end of it.

Case C-2/74 Revners [1974] ECR 631 §13

It appears from the above that in the system of the chapter on the right of establishment the ‘*general programme*’ and the directives provided for by the Treaty are intended to accomplish two functions, the first being *to eliminate obstacles in the way of attaining freedom of establishment during the transitional period*, the second being *to introduce into the law of Member States a set of provisions intended to facilitate the effective exercise of this freedom* for the purpose of assisting economic and social interpenetration within the Community in the sphere of activities as self-employed persons.

Case C-2/74 Revners [1974] ECR 631 §21

9.2.2.1 General Programmes

In particular as is apparent from Article 54(3)(e) of the Treaty *and the General programme for the abolition of restrictions on freedom of establishment of 18 December 1961* (Official Journal, English Special Edition, Second Series IX, p.7), *the right to acquire, use or dispose of immovable property on the territory of a Member State is the corollary of freedom of establishment*.

Case C-305/87 Commission v Greece [1989] ECR 1461 §22

The same idea is expressed by Title I of *the general programme* for the abolition of restrictions on freedom of establishment, *which designates as beneficiaries, in the first and third indents, the “nationals of member states” without any distinction as regards nationality or residence*.

Case C-115/78 Knoors [1979] ECR 399 §16

For the purpose of achieving this objective by progressive stages during the transitional period *Article 54 provides for the drawing up by the Council of a ‘general programme’* and, for the implementation of this programme, directives intended to attain freedom of establishment in respect of the various activities in question.

Case C-2/74 Revners [1974] ECR 631 §19

9.2.2.2 Role of Directives

For the purpose of achieving this objective by progressive stages during the transitional period Article 54 provides for the drawing up by the Council of a ‘general programme’ and, for the implementation of this programme, directives intended to attain freedom of establishment in respect of the various activities in question.

Case C-2/74 Revners [1974] ECR 631 §19

9.2.3 After the Transitional Period

At the end of the transitional period, the Member States no longer have the possibility of maintaining restrictions on the freedom of establishment, since *Article 52 has*, as from this period, *the character of a provision which is complete in itself and legally perfect*.

Case C-2/74 Revners [1974] ECR 631 §12

9.2.3.1 Role of Directives

It must be observed, first, that *the Directive*, which is based on Articles 49, 57(1) and 66 of the Treaty, *aims to facilitate freedom of movement* of persons and services *by allowing nationals of the Member States to pursue a profession, on a self-employed or employed basis, in a Member State other than that in which they have obtained their professional qualification*.

Joined Cases C-225/95, C-226/95 and C-227/95 Kapasalakis [1998] ECR I-0000 §18

In that regard, it should be noted that, whilst those provisions, which have direct effect, prohibit imposing unjustified restrictions on the freedoms concerned, they are not sufficient in themselves to ensure elimination of all obstacles to free movement of persons, services and capital, and that *the directives provided for by the Treaty in this matter preserve an important scope in the field of measures intended to make easier the effective exercise of the rights arising out of those provisions* (see, as far as freedom of establishment is concerned, Case 2/74 *Reyners* [1974] ECR 631, paragraphs 29, 30 and 31).

Case C-57/95 France v Commission [1997] ECR I-1627 §20

It is not possible to invoke against the direct effect of the rule on equal treatment with nationals contained in Article 52 *the fact that the Council has failed to issue the directives provided for by Articles 54 and 57 or the fact that certain of the directives actually issued have not fully attained the objectives of non-discrimination* required by Article 52.

Case C-11/77 Patrick [1977] ECR 1199 §12

After the expiry of the transitional period the directives provided for by the chapter on the right of establishment *have become superfluous* with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect.

Case C-11/77 Patrick [1977] ECR 1199 §13

See also: Case C-2/74 Revners [1974] ECR 631 §30

Besides these liberalising measures, *Article 57 provides for directives intended to ensure mutual recognition of diplomas, certificates and other evidence of formal qualifications and in a general way for the co-ordination of laws with regard to establishment and the pursuit of activities as self-employed persons*.

Case C-2/74 Revners [1974] ECR 631 §20

These directives have however not lost all interest since they preserve an important scope in the field of measures intended to make easier the effective exercise of the right of freedom of establishment.

Case C-2/74 Revners [1974] ECR 631 §31

It is right therefore to reply to the question raised that, since the end of the transitional period, Article 52 of the Treaty is a directly applicable provision *despite the absence in a particular sphere, of the directives* prescribed by Articles 54(2) and 57(1) of the Treaty.

Case C-2/74 Revners [1974] ECR 631 §32

9.2.3.2 Sector-based Directives

Secondly, *neither Directive 2005/36 nor any other measure implementing the fundamental freedoms lays down rules, concerning access to activities in the pharmacy field, which seek to set the conditions for opening new pharmacies in Member States.*

Joined Cases C-570/07 and C-571/07 Blanco Pérez [2010] ECR I-0000 §45

Case C-531/06, Commission v Italy [2009] ECR I-0000 §37

The effect of the machinery established by the Directive is to prevent the Member States from invoking depositor protection in order to impede the activities of credit institutions authorized in other Member States. Accordingly, it is clear, that *the Directive abolishes obstacles to the right of establishment* and the freedom to provide services.

Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405 §19

As far as *Directive 64/223* is concerned, the aim of that directive is the attainment, *in the field of wholesale trade activities*, of freedom of establishment, as guaranteed, with direct effect after the expiry of the transition period, by Article 52 of the Treaty (see the judgment in Case 198/86 *Conradi and Others* [1987] ECR 4469, paragraph 8).

Case C-418/93 Semeraro [1996] ECR I-2975 §30

There is therefore no need to examine Directive 64/223 separately from Article 52 in this instance.

Case C-418/93 Semeraro [1996] ECR I-2975 §31

The answer to the second question must therefore be that *Directive 73/148*, properly construed, *confers no right on a company to transfer its central management and control to another Member State.*

Case C-81/87 Daily Mail [1988] ECR 5483 §29

The purpose of *directive 77/249* is to facilitate the *effective exercise by lawyers of the freedom to provide services*. To that end the directive requires the Member States to recognise as a lawyer for the purpose of pursuing the activities of lawyers any person established in another Member State as a lawyer under one of the designations set out in Article 2(1), which include "Rechtsanwalt" in the Federal Republic of Germany.

Case C-292/86 Gullung [1988] ECR 111 §15

Directive no 64/427 is intended to facilitate the realisation of freedom of establishment and of freedom to provide services *in a large group of trade activities relating to industry and small craft industries*, pending the harmonisation of the conditions for access to the trades in

question in the various Member States, which is an indispensable precondition for complete freedom in this sphere.

Case C-115/78 Knoors [1979] ECR 399 §9

It may therefore be stated that *Directive no 64/427 is based on a broad definition of the “beneficiaries”* of its provisions, in the sense that the nationals of all Member States must be able to avail themselves of the liberalising measures which it lays down, provided that they come objectively within one of the situations provided for by the directive, and no differentiation of treatment on the basis of their residence or nationality is permitted.

Case C-115/78 Knoors [1979] ECR 399 §17

In this case, however, it should be borne in mind that, having regard to the nature of the trades in question, *the precise conditions set out in Article 3 of Directive no 64/427*, as regards the length of periods during which the activity in question must have been pursued, *have the effect of excluding*, in the fields in question, *the risk of abuse* referred to by the Netherlands government.

Case C-115/78 Knoors [1979] ECR 399 §26

9.3 **RELATION TO NATIONAL LAW**

Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question *whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article* – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – *is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law.* In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. *That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.*

Case C-210/06 Cartesio [2008] ECR I-09641 §109-110

Although direct taxation is a matter for the *Member States*, they *must* nevertheless *exercise their direct taxation powers consistently with Community law* (see Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 21; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; and Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 36; and Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 19).

Case C-264/96 ICI [1998] ECR I-0000 §19

Accordingly, *when deciding an issue concerning a situation which lies outside the scope of Community law, the national court is not required, under Community law, either to interpret its legislation in a way conforming with Community law or disapply that legislation. Where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules.*

Case C-264/96 ICI [1998] ECR I-0000 §34

In assessing the compatibility of the non-profit condition with those provisions of the Treaty, it must first be borne in mind that, as the Court has already held in Case 238/82 *Duphar and Other v Netherlands State* [1984] ECR 523, paragraph 16, and Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-637, paragraph 6, *Community law does not detract from the powers of the Member States to organize their social security systems.*

Case C-70/95 Sodemare [1997] ECR I-3395 §27

It should be specified in this connection that, unlike in Case C-15/90 *Middleburgh* [1991] ECR I-4655, paragraphs 14 and 15, the rules which, *as regards freedom of establishment*, are essential for the purpose, in particular of ensuring that benefits are in fact used for the upkeep of dependent children and avoiding overlapping payments, have been adopted by the Community legislators as regards the periods in question. *In cases such as those before the national court, therefore, the national authorities must apply by analogy such of those rules as are applicable to self-employed persons coming within the scope of Regulation No 1408/71.*

Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511 §40

On that point, it must however be stressed that Community law sets limits to the exercise of those powers by the Member States in so far as *provisions of national law adopted in that connection must not constitute an obstacle to the effective exercise of the fundamental freedoms guaranteed by Articles 48 and 52 of the Treaty* (see, to that effect, the judgment in Case 222/86 *UNECTEF v Heylens and Others* [1987] ECR 4097, paragraph 11).

Case C-19/92 *Kraus* [1993] ECR I-1663 §28

Although in principle *criminal legislation and the rules of criminal procedure*, among which the national provision in issue is to be found, *are matters for which the Member States are responsible*, the Court has consistently held (see *inter alia* the judgment of 11 November 1981 in Case 203/80 *Casati* ((1981)) ECR 2595) that *Community law sets certain limits to their power. Such legislative provisions may not discriminate against persons* to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.

Case C-186/87 *Cowan* [1989] ECR 195 §19

It must be observed in that regard that *directly applicable provisions of the Treaty are binding on all the authorities of the Member States and they must therefore comply with them without its being necessary to adopt national implementing provisions*. However, as the Court held in its judgment of 20 March 1986 in Case 72/85 (*Commission v Netherlands* (1986) ECR 1219), the right of individuals to rely on directly applicable provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty. It is clear from previous judgments of the Court, in particular its judgment of 25 October 1979, cited above, that *if a provision of national law that is incompatible with a provision of the Treaty, even one directly applicable in the legal order of the Member States, is retained unchanged, this creates an ambiguous state of affairs* by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law and that *maintaining such a provision in force therefore amounts to a failure by the state in question to comply with its obligations under the Treaty*.

Case C-168/85 *Commission v Italy* [1986] ECR 2945 §11

However, it may be seen from the provisions of Articles 54 and 57 of the Treaty that *freedom of establishment is not completely ensured by the mere application of the rule of national treatment, as such application retains all obstacles other than those resulting from the non-possession of the nationality of the host State and, in particular, those resulting from the disparity of the conditions laid down by the different national laws for the acquisition of an appropriate professional qualification*.

Case C-136/78 *Auer* [1979] ECR 437 §21

However, it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting wrongly to evade the application of their national legislation as regards training for a trade.

Case C-115/78 Knoors [1979] ECR 399 §25

In so far as Community law makes no special provision, these objectives may be attained by measures enacted by the *Member States*, which under Article 5 of the Treaty *are bound to take 'all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community', and to abstain 'from any measure which could jeopardise the attainment of the objectives of this Treaty'*.

Case C-71/76 Thieffry [1977] ECR 765 §16

The fact that a *national legislation provides for recognition of equivalence only for university purposes does not of itself justify the refusal to recognise such equivalence* as evidence of a professional qualification.

Case C-71/76 Thieffry [1977] ECR 765 §25

In these circumstances, the answer to the question referred to the Court should be that *when a national of one Member State desirous of exercising a professional activity such as the profession of advocate in another Member State has obtained a diploma in his country of origin which has been recognised as an equivalent qualification by the competent authority under the legislation of the country of establishment* and which has thus enabled him to sit and pass the special qualifying examination for the profession in question, *the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes*, even in the absence of the directives provided for in Article 57, *a restriction incompatible with the freedom of establishment guaranteed by Article 52 of the Treaty.*

Case C-71/76 Thieffry [1977] ECR 765 §27

Besides these liberalising measures, Article 57 provides for directives intended to ensure *mutual recognition* of diplomas, certificates and other evidence of formal qualifications and in a general way for the *co-ordination of laws with regard to establishment and the pursuit of activities as self-employed persons.*

Case C-2/74 Revners [1974] ECR 631 §20

It appears from the above that in the system of the chapter on the right of establishment the 'general programme' and the directives provided for by the Treaty are intended to accomplish two functions, the first being to eliminate obstacles in the way of attaining freedom of establishment during the transitional period, the second being *to introduce into the law of Member States a set of provisions intended to facilitate the effective exercise of this freedom* for the purpose of assisting economic and social interpenetration within the Community in the sphere of activities as self-employed persons.

Case C-2/74 Revners [1974] ECR 631 §21

As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, this rule is, by its essence, capable of being directly invoked by nationals of all the other Member States.

Case C-2/74 Revners [1974] ECR 631 §25

9.4 **RELATION TO INTERNATIONAL LAW**

In that connection, the first point to note is that *the argument* of the Hellenic Government *based on the International Law of the sea is not supported* by the judgment in *Factortame and Others*, cited above, paragraph 17. In that judgment the Court expressly stated that, in exercising their power to determine the conditions which must be fulfilled in order for a vessel to be entered in their registers and granted the right to fly their flag, *Member States must comply with the rules of Community law*. Although this finding only related to Article 5 of the 1958 Geneva Convention, it cannot be invalidated by two United Nations Conventions of 1982 and 1986, both signed after the accession of the Hellenic Republic to the Communities.

Case C-62/96 Commission v Greece [1997] ECR I-6725 §22

As the Advocate General points out in paragraph 38 of his Opinion, *in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply a fortiori in the Community legal order* since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

Cases C-46/93 and 48/93 Factortame III [1996] ECR I-1029 §34

10 - SPECIFIC AREAS

10.1 GENERAL SYSTEM OF MUTUAL RECOGNITION OF DIPLOMAS

10.1.1 General principles

The reply to the question referred for a preliminary ruling must therefore be that Article 43 EC is to be interpreted as meaning that where a Community national applies to the competent authorities of a Member State for authorisation to practise a profession, access to which depends, under national legislation, on the possession of a diploma or professional qualification or on periods of practical experience, those authorities are required *to take into consideration all of the diplomas, certificates and other evidence of formal qualifications of the person concerned, and his relevant experience, by comparing the specialised knowledge and abilities so certified*, and that experience, *with the knowledge and qualifications required by the national legislation, even where a directive on the mutual recognition of diplomas has been adopted for the profession concerned*, but where application of that directive does not result in automatic recognition of the applicant's qualification or qualifications.

Case C-31/00 Dreessen [2002] ECR I-663 §31

Likewise, in applying their national provisions, *Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State* (see Case C-340/89 *Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg* [1991] ECR I-2357, paragraph 15). Consequently, *they must take account of the equivalence of diplomas* (see the judgment in *Thieffry*, paragraphs 19 and 27) and, if necessary, *proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned* (see the judgment in *Vlassopoulou*, paragraph 16).

Case C-55/94 Gebhard [1995] ECR I-4165 §38

Thus, *the authorisation procedure must in the first place be intended solely to verify whether the postgraduate academic title obtained in another Member State was properly awarded*, following a course of studies which was actually completed, in an establishment of higher education which was competent to award it.

Case C-19/92 Kraus [1993] ECR I-1663 §38

10.1.2 Role of directives

Secondly, *neither Directive 2005/36 nor any other measure implementing the fundamental freedoms lays down rules, concerning access to activities in the pharmacy field, which seek to set the conditions for opening new pharmacies in Member States*.

Joined Cases C-570/07 and C-571/07 Blanco Pérez [2010] ECR I-0000 45

Council *Directive 89/48/EEC* of 21 December 1988, *relating to a general system of recognition of higher education diplomas* awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p.16) *does not cover an academic title* such as that in point before the national court, *which was awarded on completion of*

studies of only one year's duration.

Case C-19/92 Kraus [1993] ECR I-1663 §25

In contrast, *Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC* (OJ 1992 L 209, p.25) *extends the system of recognition to diplomas evidencing completion of studies of at least one year's duration.* That directive, however, was adopted after the occurrence of the circumstances giving rise to the main proceedings and the period prescribed for its transposition into national law has not yet expired.

Case C-19/92 Kraus [1993] ECR I-1663 §26

Thus a Member State *cannot*, after 1 January 1973, make the exercise of the right to free establishment by a national of a new Member State *subject to an exceptional authorisation in so far as he fulfils the conditions laid down by the legislation of the country of establishment for its own nationals.*

Case C-11/77 Patrick [1977] ECR 1199 §15

In this connection *the legal requirement*, in the various Member States, *relating to the possession of qualifications for admission to certain professions constitutes a restriction on the effective exercise of the freedom of establishment* the abolition of which is, under Article 57(1), to be made easier by directives of the Council for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

Case C-11/77 Patrick [1977] ECR 1199 §16

With a view to making it easier for persons to take up and pursue activities as self-employed persons, Article 57 assigns to the Council the duty of *issuing directives concerning, first, the mutual recognition of diplomas*, and secondly, the co-ordination of the provisions laid down by law or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons.

Case C-71/76 Thieffry [1977] ECR 765 §11

Besides these liberalising measures, *Article 57 provides for directives intended to ensure mutual recognition of diplomas, certificates and other evidence of formal qualifications* and in a general way for the co-ordination of laws with regard to establishment and the pursuit of activities as self-employed persons.

Case C-2/74 Reyners [1974] ECR 631 §20

10.2 SOCIAL WELFARE

The reply to the referring court must therefore be that Article 52 of the EC Treaty *does not preclude the imposition of a contribution such as the moderation contribution payable in the Member State of residence and calculated taking into account the income obtained in another Member State on self-employed persons* pursuing professional activities in that capacity in those two Member States.

Case C-249/04 Allard [2005] ECR I-4535 § 34

In that regard, it must be stated that, as Community law stands at present, *a Member State may*, in the exercise of the powers it retains to organize its social security system, *consider that a social welfare system* of the kind at issue in this case *necessarily implies*, with a view to attaining its objectives, *that an admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making*.

Case C-70/95 Sodemare [1997] ECR I-3395 §32

Moreover, *the fact that it is impossible for profit-making companies automatically to participate in the running of a statutory social welfare system* of a Member State by concluding a contract which entitles them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature *is not liable to place profit-making companies from other Member States in a less favourable factual or legal position than profit-making companies from the Member State in which they are established*.

Case C-70/95 Sodemare [1997] ECR I-3395 §33

In view of the foregoing, *the non-profit condition cannot be regarded as contrary to Articles 52 and 58* of the Treaty.

Case C-70/95 Sodemare [1997] ECR I-3395 §34

The answer to the second and third questions must therefore be that *Articles 52 and 58* of the Treaty *do not preclude a Member State from allowing only non-profit-making private operators to participate in the running of its social welfare system* by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature.

Case C-70/95 Sodemare [1997] ECR I-3395 §35

10.3 TAXATION

[...] Articles 43 EC and 48 EC preclude Member State legislation under which an undertaking, which has its seat in that State, is obliged to pay a levy such as VTL, the amount of which is calculated on the basis of its wage costs including those wage costs incurred at a branch of that undertaking established in another Member State, if, in practice, such an undertaking is prevented, with regard to that branch, from benefiting from the possibilities provided for in that legislation of reducing that levy or from having access to those possibilities.

Case C-96/08 CIBA [2010] ECR I-0000 §49

It follows from the whole of the above considerations that the answer to the questions referred must be that Article 31 of the European Economic Area Agreement does not preclude a national tax system which, after having allowed the taking into account of losses incurred by a permanent establishment situated in a State other than the one in which its principal company is situated, for the purposes of calculating the tax on that company's income, provides for a tax reintegration of those losses at the time when that permanent establishment makes profits, where the State where that same permanent establishment is situated does not confer any right to carry forward losses incurred by a permanent establishment belonging to a company established in another State, and where, under a convention for the prevention of double taxation between the two States concerned, the income of such an entity is exonerated from taxation in the State in which the principal company has its seat.

Case C-157/07 Finanzamt für Körperschaften III in Berlin [2010] ECR I-0000 §55

In accordance with settled case-law, *national provisions which apply to holdings by nationals or companies of the Member State concerned in the capital of a company established in another Member State, giving them definite influence on the company's decisions and allowing them to determine its activities, come within the substantive scope of the provisions of the Treaty on freedom of establishment* (see Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraphs 22 and 70, and Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 20).

[...] that is the case where a resident company owns 100% of the shares in a company established in another Member State, or, again, where the shares of a company established in another Member State are held, directly or indirectly, by members of one family, residing in another Member State, who pursue the same interests, take decisions by agreement, through the same representative at general meetings of that company, and decide on its activities (see *Rewe Zentralfinanz*, paragraph 23, and Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraphs 13, 14 and 31).

In the light of the foregoing, the answer to the question referred must be that, in the absence of valid justification, Articles 52 and 58 of the Treaty preclude the application of tax legislation of a Member State which, for the purposes of valuing the unlisted shares of a company in circumstances such as those in the main proceedings, causes that company's holding in a partnership established in another Member State, subject to the condition that such a holding is capable of allowing it a definite influence on the decisions of the partnership established in the other Member State and enabling it to determine its activities, to be assigned a greater value than its holding in a partnership established in the Member State concerned.

Case C-360/06 Heinrich Bauer Verlag [2008] ECR I-07333 §27-29, 42

Article 43 EC does not preclude a situation in which a *company established in a Member State cannot deduct from its tax base losses relating to a permanent establishment belonging to it and situated in another Member State*, to the extent that, by virtue of a double taxation convention, the income of that establishment is taxed in the latter Member State where those losses can be taken into account in the taxation of the income of that permanent establishment in future accounting periods.

Case C-414/06 Lidl Belgium [2008] ECR I-0000 §54

According to settled case-law, all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as obstacles (see Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11).

The Court has held in particular that *such restrictive effects may arise specifically where, on account of a tax law, a company may be deterred from setting up subsidiary bodies such as permanent establishments in other Member States and from carrying on its activities through such bodies* (see Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraphs 32 and 33, and Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 35).

It is settled case-law that, in the absence of unifying or harmonising measures adopted by the Community, the Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means, inter alia, of international agreements (see, Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraph 54; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 52; and Case C-231/05 *Oy AA* [2007] ECR I-0000, paragraph 52).

Freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a company as to the establishment of commercial structures abroad may be to the company's advantage or not, according to circumstances (see, by analogy, Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45).

It is contrary to [Article 52] in conjunction with [Article 58] of the Treaty for a Member State, when determining the national basis of assessment, to exclude a currency loss suffered by a company with a registered office in that State upon repatriation of start-up capital granted to its permanent establishment in another Member State.

Case C-293/06 Deutsche Shell v Finanzamt Hamburg [2008] I-1129 §28, 29, 41, 43, 45

Therefore, the answer to the question referred must be that the principle of freedom of establishment laid down by *Article 52* of the Treaty must be interpreted *as precluding a Member State from establishing, in order to prevent a risk of tax avoidance, a mechanism for taxing latent increases in value* such as that laid down by Article 167a of the CGI, *where a taxpayer transfers his tax residence outside that State*.

Case C-9/02 Hughes de Lastevrie du Saillant [2004] ECR I-2409 §69

By laying down as a condition for the exemption from inheritance tax available for family undertakings *the employment of a set number of workers in a region of the Member State concerned in the three years preceding the date of death of the deceased*, the legislation at issue in the main proceedings treats the owner of such an undertaking and, after his death, *his heirs*, in a different way according to whether that undertaking employs workers in that Member State or in another Member State.

According to the case-law of the Court, legislation of a Member State which provides *for a difference in treatment between taxpayers on the basis of the place where the company of which those taxpayers are shareholders has its seat is in principle contrary* to Article 43 EC (see, to that effect, *Baars*, paragraphs 30 and 31). The same is true of legislation of a Member State which provides *for a difference in treatment between taxpayers on the basis of the place where the company owned by those taxpayers employs a certain number of workers for a certain period of time*.

Case C-464/05 Geurts v Belgische Staat [2007] ECR I-9325 §174

Having regard to the combination of those two factors, concerning the need to safeguard the balanced allocation of the power to tax between the Member States and the need to prevent tax avoidance, this Court therefore finds that a system, such as that at issue in the main proceedings, which grants a subsidiary the right to deduct a financial transfer in favour of its parent from its taxable income only where the parent and the subsidiary both have their principal establishment in the same Member State, pursues legitimate objectives compatible with the Treaty and justified by overriding reasons in the public interest, and is appropriate to ensuring the attainment of those objectives.

The answer to the question referred must therefore be that *Article 43 EC does not preclude a system instituted by legislation of a Member State*, such as that at issue in the main proceedings, *whereby a subsidiary resident in that Member State may not deduct an intra-group financial transfer which it makes in favour of its parent company from its taxable income unless that parent company has its establishment in that same Member State*.

Case C-231/05 Ov AA [2007] ECR I-06373 §60, 67

In the present case, as regards, first, the refusal, (i) to grant a right to deduct employers' insurance contributions and premiums due in respect of supplementary pension and life assurance where they are paid to an insurance undertaking or a welfare institution which is not established in Belgium, which results from Article 59 of the CIR 1992, and (ii) to grant, pursuant to Articles 145/1 and 145/3 of the CIR 1992, the tax reduction on personal supplementary pension and life assurance contributions and premiums paid to bodies established in other Member States, the national legislation has the effect of granting a tax advantage which varies depending on the place in which those contributions and premiums are collected and is accordingly likely to dissuade employed and self-employed persons from exercising their right to move freely in another Member State.

It follows that Articles 59, 145/1 and 145/3 of the CIR 1992 impair the free movement of employed persons and the freedom of establishment of self-employed persons as guaranteed by Articles 39 EC and 43 EC.

Case C-522/04 Commission v Belgium [2007] I-05701 § 66, 67

Third, by levying tax on transfers of capital or surrender values where the transfer is made by the pension fund or insurance institution with which the capital or surrender values have been built up in favour of the beneficiary or persons entitled through him, to another insurance institution established outside Belgium, Article 364b of the CIR 1992 dissuades employed and self-employed persons from establishing themselves in another Member State by preventing them from forwarding their savings.

It must therefore be found that Article 364b of the CIR 1992 impairs the freedom of movement of employed persons and the freedom of establishment of self-employed persons guaranteed by Articles 39 EC and 43 EC.

Case C-522/04 Commission v Belgium [2007] ECR I-05701 § 73, 74

National legislation which makes the receipt of dividends liable to tax, where the rate depends on whether the source of those dividends is national or otherwise, irrespective of the extent of the holding which the shareholder has in the company making the distribution, may fall within the scope of both Article 43 EC on freedom of establishment and Article 56 EC on free movement of capital (see, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, paragraphs 37 and 38, and *Test Claimants in the FII Group Litigation*, paragraphs 36, 80 and 142).

However, the chapter of the Treaty concerning the right of establishment does not include any provision extending its application to situations which involve the establishment in a non-member country of a Member State national or of a company incorporated under the legislation of a Member State (see, to that effect, the order of 10 May 2007 in Case C-102/05 *A and B* [2007] ECR I-0000, paragraph 29).

Case C-157/05 Holböck [2007] ECR I-4051 § 24, 28

In the light of all the above considerations, the answer to the national court's question must be that, in circumstances such as those of the main proceedings, in which a parent company holds shares in a non-resident subsidiary which give it a definite influence over the decisions of that foreign subsidiary and allow it to determine its activities, Articles 52 and 58 of the Treaty preclude legislation of a Member State which restricts the right of a parent company which is resident in that State to deduct for tax purposes losses incurred by that company in respect of write-downs to the book value of its shareholdings in subsidiaries established in other Member States.

Case C-347/04 Rewe Zentralfinanz [2007] ECR I-2647 § 70

In fact, *the income received by a resident taxpayer in the context of a self-employed activity in the territory of the Member State concerned and the income acquired by a non-resident taxpayer also in the context of a self-employed activity carried out in the territory of that Member State are in the same category of income*, that is to say, income arising from self-employed activities carried out in the territory of the same Member State.

In those circumstances, legislation of a Member State, [...], which lays down *minimum tax bases only for non-resident taxpayers constitutes indirect discrimination on grounds of*

nationality within the meaning of Article 52 of the Treaty. In fact, even if such legislation provides for a distinction on the basis of residence, in that it denies non-residents certain tax benefits which are, conversely, granted to persons residing within the national territory, it is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see, by analogy, *Schumacker*, paragraph 28).

Case C-383/05 Talotta [2007] ECR I-2555 §25, 32

Thirdly, for the same reasons as above, the view must be taken that the contested legislation also constitutes an obstacle to the freedom of establishment in Denmark of self-employed workers who are nationals of another Member State.

By not granting any right to deduct or exempt contributions paid to pension institutions established in other Member States, the contested legislation is liable to dissuade self-employed workers from establishing themselves in Denmark.

Consequently, it must be held that, by introducing and maintaining in force ***a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts entered into with pension institutions established in Denmark***, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States, the Kingdom of Denmark has ***failed*** to fulfil its obligations under Articles 39 EC, ***43 EC*** and 49 EC.

Case C-150/04 Commission v Denmark [2007] ECR I-1163 §43, 44, 77

Having regard to all of the foregoing, the answer to the question referred must be that Article 52 of the Treaty precludes a resident taxpayer from being refused, by the Member State of his residence, joint assessment to income tax with his spouse from whom he is not separated and who lives in another Member State, on the ground that that spouse received in that Member State both more than 10% of the household's income and more than DEM 24 000, where the income received by that spouse in the second Member State is not there subject to income tax.

Case C-329/05 Meindl [2007] ECR I-01107 § 32

Moreover, whilst the Court has recognised that the need to maintain the coherence of a tax system can justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty, for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, to that effect, *Keller Holding*, paragraph 40 and the case-law cited).

It must therefore be held that, by adopting and maintaining in force tax rules, such as those in Chapter 47 of the IL, which make entitlement to deferral of taxation on capital gains arising from the sale of a private residential property or of a right to reside in a private cooperative building conditional on the newly-acquired residence also being on Swedish territory, the Kingdom of Sweden has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC and under Articles 28 and 31 of the EEA Agreement.

Case C-104/06 Commission v Sweden [2007] ECR I-671 § 26, 35

The answer to Question 1 must therefore be that Article 43 EC and Article 48 EC are to be interpreted precluding national legislation which, in imposing a liability to tax on dividends paid to a non-resident parent company and allowing resident parent companies almost full exemption from such tax, constitutes a discriminatory restriction on freedom of establishment.

The answer to Questions 2 and 3 must therefore be that Article 43 EC and Article 48 EC are to be interpreted as precluding national legislation which imposes, only as regards non-resident parent companies, a withholding tax on dividends paid by resident subsidiaries, even if a tax convention between the Member State in question and another Member State, authorising that withholding tax, provides for the tax due in that other State to be set off against the tax charged in accordance with the disputed system, whereas a parent company is unable to set off tax in that other Member State, in the manner provided for by that convention.

Case C-170/05 Denkavit Internationaal and Denkavit France [2006] ECR I-11673 § 41, 56

Thus, where a Member State has a system for preventing or mitigating a series of charges to tax or economic double taxation for dividends paid to residents by resident companies, ***it must treat dividends paid to residents by non-resident companies in the same way*** (see, to that effect, Case C-315/02 *Lenz* [2004] ECR I-7063, paragraphs 27 to 49, and Case C-319/02 *Manninen* [2004] ECR I-7477, paragraphs 29 to 55).

The answer to Question 1(a) must therefore be that Articles 43 EC and 56 EC ***do not prevent a Member State, on a distribution of dividends by a company resident in that State, from granting companies receiving those dividends which are also resident in that State a tax credit equal to the fraction of the corporation tax paid on the distributed profits by the company making the distribution***, when it does not grant such a tax credit to companies receiving such dividends which are resident in another Member State and are not subject to tax on dividends in the first State.

Case C-374/04 Test Claimants in Class IV of the ACT Group Litigation [2006] ECR I-11753 § 55.74

In that respect, it is settled case-law that ***any advantage resulting from the low taxation to which a subsidiary established in a Member State other than the one in which the parent company was incorporated is subject cannot by itself authorise that Member State to offset that advantage by less favourable tax treatment of the parent company*** (see, to that effect, Case 270/83 *Commission v France* [1986] ECR 273, paragraph 21; see also, by analogy, Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 44, and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 52).

It follows that, in order for a restriction on the freedom of establishment to be justified ***on the ground of prevention of abusive practices***, the ***specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality***, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.

Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-07995 §49, 50, 51, 55

The answer to the third and fifth questions must therefore be that Article 43 EC must be interpreted as precluding a Member State from establishing ***a system for taxing increases in value in the case of a taxpayer's transferring his residence outside that Member State***, such as the system at issue in the main proceedings, which ***makes the granting of deferment of the payment of that tax conditional on the provision of guarantees and does not take full account of reductions in value capable of arising after the transfer of residence by the person concerned and which were not taken into account by the host Member State***.

Case C-470/04 N v Inspecteur van de Belastingdienst Oost/kantoor Almelo [2006] ECR I-07409 § 55

It follows from the above that the refusal to apply the reduced ***tax rate*** to branches renders the

possibility, for companies having their seat in another Member State, of exercising the right to freedom of establishment through a branch less attractive. It follows that a national law such as the one in dispute in the main proceedings restricts the freedom to choose the appropriate legal form in which to pursue activities in another Member State.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §17

As regards, first, the argument of the German Government and the Finanzamt that there is a fundamental difference between the distribution of profits by a subsidiary to its parent company and the transfer of profits within a company, the Court makes the following observations.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §22

In both cases the profits are made available to the company which controls the subsidiary and the branch respectively. The only real difference between the two situations lies in the fact that the *distribution of the profits of a subsidiary to its parent company presupposes the existence of a formal decision to that effect, whereas the profits of a branch of a company are part of the assets of that company* even in the absence of a formal decision to that effect.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §23

In addition, it is apparent from the decision to refer and the observations of the Finanzamt and the German Government that, even if the profits distributed by a subsidiary to its parent company were no longer part of the assets of that subsidiary, those *profits could still be made available to that subsidiary by its parent company in the form of share capital or a shareholder loan*.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §24

Therefore, the fact that profits distributed by a subsidiary to its parent company are no longer part of that subsidiary's assets does not justify the application of a tax rate to the profits of such a subsidiary which is lower than that applied to the same profits made by a branch.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §25

As regards the argument of the Finanzamt that the application of the reduced tax rate to subsidiaries is justified in order to avoid the double taxation of tax payers subject to tax primarily in Germany, it must be pointed out that the tax rate does not apply only to profits which are distributed to that category of tax payer. The reduced tax rate also applies to the distribution of profits by German subsidiaries to parent companies having their seat in another Member State, such as in Luxembourg for example.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §26

In those circumstances, it seems that *German subsidiaries and branches of companies having their seat in Luxembourg are in a situation in which they can be compared objectively*.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §30

In the light of the above considerations, the answer to the first question must be that *Article 52 [now, after amendment Article 43 EC] and Article 58 of the Treaty [now Article 48 EC] preclude a national law such as the one in dispute in the main proceedings which, in the case of a branch of a company having its seat in another Member State, lays down a tax rate on the profits of that branch which is higher than that on the profits of a subsidiary of*

such a company where that subsidiary distributes its profits in full to its parent company.

Case C-253/03 CLT-UFA [2006] ECR I-1831 §31

The answer to the second question must therefore be that *it is for the national court to determine the tax rate which must be applied to the profits made by a branch*, such as the one in dispute in the main proceedings, by reference to the overall tax rate which would have been applicable if the profits of a subsidiary had been distributed to its parent company.

Case C-253/03 CLT-UFA [2006] ECR [2006] §37

Unlike *operating branches or establishments, parent companies and their subsidiaries are distinct legal persons*, each being subject to a tax liability of its own, so that *a direct link in the context of the same liability to tax is lacking and the coherence of the tax system cannot be relied upon*.

Case C-168/01 Bosal Holding BV v Staatssecretaris van Financiën [2003] ECR I-09409 § 32

In these circumstances, the answer to the question referred must be that Article 52 of the Treaty and Article 31 of the EEA Agreement must be interpreted as precluding legislation of a Member State which excludes the possibility of deducting for tax purposes financing costs incurred by a parent company subject to unlimited tax liability in that State in order to acquire holdings in a subsidiary where those costs relate to dividends which are exempt from tax because they are derived from an indirect subsidiary established in another Member State or in a State which is party to the Agreement, whereas such costs may be deducted where they relate to dividends paid by an indirect subsidiary established in the same Member State as that of the place of the registered office of the parent company and which, in reality, also benefit from a tax exemption.

Case C-471/04 Keller Holding [2003] I-02107 § 50

It is clear from paragraphs 75 to 78 of *Commission v Denmark* that *a Member State may levy a registration tax on a company vehicle made available to a worker residing in that State by a company established in another Member State when it is intended that that vehicle should be used essentially in the first Member State on a permanent basis or where it is in fact used in that manner*.

Cases C-151/04 and 152/04 Nadin [2005] I-11203 § 41

Thus it may clearly be deduced from the judgment in X and Y that the difference in treatment created by the national legislation at issue in the main proceedings to the detriment of the taxpayer who assigns his shares or stock to companies, associations, establishments or bodies established in another Member State constitutes a restriction on freedom of establishment. In fact, *by making the assignment of the shares or stock at issue to assignees established in another Member State less attractive, the exercise by the latter of their right of establishment is liable to be restricted, provided that the shareholding transferred gives its holder definite influence over the company's decisions and allows him to determine its activities*. It is for the referring court to ascertain whether that condition is satisfied in the main proceedings.

Case C-268/03 De Baeck v Belgium [2004] ECR I-05961 §25

As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a

group's subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, *since that company will in any event be subject to the tax legislation of the State of establishment.*

Case C-264/96 ICI [1998] ECR I-0000 §26

In answer to the argument that revenue lost through the granting of tax relief on losses incurred by resident subsidiaries cannot be offset by taxing the profits of non-resident subsidiaries, it must be pointed out that diminution of tax revenue occurring in this way is not one of the grounds listed in Article 56 of the Treaty and cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article 52 of the Treaty.

Case C-264/96 ICI [1998] ECR I-0000 §28

It is true that in the past the Court has accepted that the need to maintain the cohesion of tax systems could, in certain circumstances, provide sufficient justification for maintaining rules restricting fundamental freedoms (see, to this effect, Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission v Belgium* [1992] ECR I-305). Nevertheless, in the cases cited, there was a direct link between the deductibility of contributions from taxable income and the taxation of sums payable by insurers under old-age and life assurance policies, and that link had to be maintained in order to preserve the cohesion of the tax system in question. In the present case, there is no such direct link between the consortium relief granted for losses incurred by a resident subsidiary and the taxation of profits made by non-resident subsidiaries.

Case C-264/96 ICI [1998] ECR I-0000 §29

Consequently, the answer to be given to the first question must be that *Article 52* of the Treaty *precludes legislation* of a Member State *which*, in the case of companies established in that State belonging to a consortium through which they control a holding company, by means of which they exercise their right to freedom of establishment in order to set up subsidiaries in other Member States, *makes a particular form of tax relief subject to the requirement that the holding company's business consist wholly or mainly in the holding of shares in subsidiaries that are established in the Member State concerned.*

Case C-264/96 ICI [1998] ECR I-0000 §30

In the light of all the foregoing considerations, the reply to the question submitted to the Court must be that *Article 52 of the Treaty does not preclude a Member State from making the carrying forward of previous losses*, requested by a taxpayer which has a branch in its territory but is not resident there, *subject to the condition that the losses must be economically related to the income earned by the taxpayer in that State*, provided that resident taxpayers do not receive more favourable treatment. On the other hand, *that article does preclude the carrying forward of losses being made subject to the condition that in the year in which the losses were incurred, the taxpayer must have kept and held in that State accounts relating to his activities carried on there which comply with the relevant national rules.* The Member State concerned may, however, require the non-resident taxpayer to demonstrate clearly and precisely that the amount of the losses which he claims to have incurred corresponds, under its domestic rules governing the calculation of income and losses which were applicable in the financial year concerned, to the amount of the losses actually incurred in that State by the taxpayer.

Case C-250/95 Futura & Singer [1997] ECR I-2471 §43

10.4 **SPECIFIC PROFESSIONS**

10.4.1 **Law**

Therefore, it must be stated that *neither Directive 89/48 nor Directive 98/5 preclude the application, to any person practising the profession of lawyer in a Member State, particularly as regards the taking up or pursuit thereof, of national provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organisation, qualifications, professional ethics, supervision and liability* (see, to that effect, as regards Directive 89/48, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 35 and the case-law cited).

Case C-359/09 Ebert [2011] ECR I-0000 §40

In the light of all of the foregoing considerations the answer to the fourth question is that *Article 8 of Directive 98/5* must be interpreted as meaning that it is open to a host Member State to *impose on lawyers registered with a Bar in that Member State who are also, whether full or part-time, in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise, restrictions on the practice of the profession of lawyer concurrently with that employment*, provided that those restrictions do not go beyond what is necessary in order to attain the objective of preventing conflicts of interest and apply to all the lawyers registered in that Member State.

Case C-225/09 Jakubowska [2010] ECR I-0000 §64

Having regard to all the foregoing, it must be held that:

- by maintaining, contrary to Article 59 of the Treaty, the *general prohibition whereby lawyers established in other Member States and practising in Italy* in the exercise of their freedom to provide services *cannot have in that State the infrastructure needed* to provide their services,
- by *requiring members of the Bar to reside in the judicial district of the court* to which the Bar at which they are enrolled is attached, contrary to Article 52 of the Treaty, and
- by incompletely transposing Directive 89/48, inasmuch as no rules have been laid down to *regulate the conduct of the aptitude test for lawyers from other Member States*,

the Italian Republic has *failed to fulfil its obligations* under Articles 52 and 59 of the Treaty and Directive 89/48.

Case C-145/99 Commission v Italy [2002] ECR I-2235 § 57

However, *the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good*, such as rules relating to organisation, qualifications, professional ethics, supervision and liability (see Case C-71/76 *Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris* [1977] ECR 765, paragraph 12). Such provisions may stipulate in particular that pursuit of a particular activity is restricted to *holders of a diploma, certificate or other evidence of formal qualifications, to persons belonging to a professional body or to persons subject to particular rules or supervision, as the case may be. They may also lay down the conditions for the use of professional titles, such as avvocato.*

Case C-55/94 Gebhard [1995] ECR I-4165 §35

Where the taking-up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them. It is for this reason that Article 57 provides that the Council is to issue directives, such as Directive 89/48, for the mutual recognition of diplomas, certificates and other evidence of formal qualifications or, as the case may be, for the co-ordination of national provisions concerning the taking-up and pursuit of activities as self-employed persons.

Case C-55/94 Gebhard [1995] ECR I-4165 §36

It is established that ***no measure has yet been adopted under Article 57(2) of the EEC Treaty concerning the harmonisation of the conditions of access to a lawyer's activities.***

Case C-340/89 Vlassopoulou [1991] ECR I-2357 §10

In the course of that examination, a Member State may, however, take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity. ***In the case of the profession of lawyer, a Member State may therefore carry out a comparative examination of diplomas, taking account of the differences identified between the national legal systems concerned.***

Case C-340/89 Vlassopoulou [1991] ECR I-2357 §18

Consequently, the answer to the question submitted by the Bundesgerichtshof must be that ***Article 52 of the EEC Treaty must be interpreted as requiring the national authorities of a Member State to which an application for admission to the profession of lawyer is made by a Community subject who is already admitted to practise as a lawyer in his country of origin and who practises as a legal adviser in the first-mentioned Member State to examine to what extent the knowledge and qualifications attested by the diploma obtained by the person concerned in his country of origin correspond to those required by the rules of the host State;*** if those diplomas correspond only partially, the national authorities in question are entitled to require the person concerned to prove that he has acquired the knowledge and qualifications which are lacking.

Case C-340/89 Vlassopoulou [1991] ECR I-2357 §23

In view of the special nature of the legal profession, however, the second Member State must have the right, in the interests of the due administration of justice, to require that lawyers enrolled at a bar in its territory should practise in such a way as to maintain sufficient contact with their clients and the judicial authorities and abide by the rules of the profession. nevertheless such requirements must not prevent the nationals of other Member States from exercising properly the right of establishment guaranteed them by the Treaty.

Case C-107/83 Klopp [1984] ECR 2971 §20

The question must therefore be answered to the effect that even in the absence of any directive co-ordinating national provisions governing access to and the exercise of the legal profession, Article 52 *et seq.* of the EEC Treaty prevent the competent authorities of a Member State from ***denying***, on the basis of the national legislation and the rules of professional conduct which are in force in that State, to a national of another Member State ***the right to enter and to exercise the legal profession solely on the ground that he maintains chambers simultaneously in another Member State.***

Case C-107/83 Klopp [1984] ECR 2971 §22

In these circumstances, the answer to the question referred to the Court should be that when a

national of one Member State *desirous* of exercising a professional activity such as the profession of advocate in another Member State has obtained a *diploma in his country of origin which has been recognised as an equivalent qualification by the competent authority under the legislation of the country of establishment* and which has thus enabled him to sit and pass the special qualifying examination for the profession in question, *the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes*, even in the absence of the directives provided for in Article 57, *a restriction incompatible with the freedom of establishment* guaranteed by Article 52 of the Treaty.

Case C-71/76 Thieffry [1977] ECR 765 §27

Differences exist, however, between the governments referred to *as regards the nature of the activities which are thus excepted from the principle of the freedom of establishment, taking into account the different organisation of the professions corresponding to that of avocat from one Member State to another.*

Case C-2/74 Reyners [1974] ECR 631 §40

The most typical activities of the profession of avocat, in particular, such as consultation and legal assistance and also representation and the defence of parties in court, *even when the intervention or assistance of the avocat is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority.*

Case C-2/74 Reyners [1974] ECR 631 §52

10.4.2 Insurance

In that respect, it must be acknowledged *that an insurance undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency.* In the light of the aforementioned definition contained in the first paragraph of Article 60, such an insurance undertaking cannot therefore avail itself of Articles 59 and 60 with regard to its activities in the Member State in question.

Case C-205/84 Commission v Germany [1986] ECR 3755 §21

10.4.3 Architects

The answer to the question referred to the Court must therefore be that, with effect from 1 January 1973, *a national of a new Member State who holds a qualification recognised by the competent authorities of the Member State of establishment as equivalent to the certificate issued and required in that State enjoys the right to be admitted to the profession of architect and to practise it under the same conditions as nationals of the Member State of establishment* without being required to satisfy any additional conditions.

Case C-11/77 Patrick [1977] ECR 1199 §18

10.4.4 Medical and Dental Professions

The *Recognition and Coordination Directives* were adopted on the basis, in particular, of the provisions of the EC Treaty intended to achieve freedom of movement of workers and to

abolish restrictions on freedom of establishment and freedom to provide services.

Case C-437/03 Commission v Austria [2005] ECR I-9373 §2

The aim of the Recognition Directive, according to the fourth recital in the preamble thereto, is the mutual recognition of diplomas, certificates and other evidence of formal qualifications of a dental practitioner enabling activities in the field of dentistry to be taken up and pursued and the mutual recognition of diplomas, certificates and other evidence of formal qualifications in respect of practitioners of specialised dentistry.

Case C-437/03 Commission v Austria [2005] ECR I-9373 §3

It is apparent from the sixth recital in the Recognition Directive and the first recital in the preamble to the *Coordination Directive* that the objective of the latter directive is **to coordinate the number of specialisations in dentistry and the type and the length of training courses for such specialisations** in order to enable Member States to proceed with the mutual recognition of diplomas, certificates and other evidence of formal qualifications by the Recognition Directive.

Case C-437/03 Commission v Austria [2005] ECR I-9373 §4

In those circumstances, the Commission is wrong to rely on case-law according to which Member States may not create a category of **dental practitioners** which does not correspond to any category provided for by the directives in question (Case C-40/93 *Commission v Italy* [1995] ECR I-1319, paragraph 24). Unlike the Member State concerned by that judgment, the Republic of Austria, first, has not created a new category of dental practitioners, but has simply maintained an existing category, and, secondly, specialists in dental surgery do not constitute a category of dental practitioners which is not provided for by the Recognition and Coordination Directives. They are, on the contrary, specifically covered by Article 19b of the first of those directives.

Case C-437/03 Commission v Austria [2005] ECR I-9373 §42

In view of the preceding considerations, it must be declared that, by allowing **dentists** ('Dentisten') under Paragraphs 4(3) and 6 of the Law on Dentists to engage in their occupation under the title 'Zahnarzt' (dental practitioner) or 'Zahnarzt (Dentist)' (dental practitioner (dentist)) and to make use of the exception laid down in Article 19b of the Recognition Directive, although they do not meet the minimum requirements under Article 1 of the Coordination Directive to be covered by the rules under those directives, the Republic of Austria has failed to fulfil its obligations under Articles 1 and 19b of the Recognition Directive and Article 1 of the Coordination Directive. The remainder of the application must be dismissed.

Case C-437/03 Commission v Austria [2005] ECR I-9373 §43

In the light of the foregoing, the reply to be given to the first question has to be that Article 36(2) of Directive 93/16 does not require the Member States to consider authorisation obtained before 1 January 1995 to carry on the **profession of general medical practitioner** under the national health system to be equivalent to obtaining the certificate of specific training in general medical practice for the purposes of access to general practitioner posts.

Joined Cases C-10/02 and C-11/02 Fascicolo and Others [2004] ECR I-11107 §35

In the light of the foregoing, the answer to be given to the second and third questions has to be that it is not contrary to Article 36(2) of Directive 93/16 for Member States to provide for **doctors** in possession of both the certificate of specific training in general medical practice

and authorisation on 31 December 1994 to practise as general practitioners under the national health system:

- a pool of reserved posts more extensive than that provided either for doctors in possession of that certificate or for doctors who have been granted authorisation, by permitting them to compete in those two classes of reserved posts simultaneously;
- yet more advantageous treatment by awarding them, when they compete for the quota of posts reserved to doctors authorised on 31 December 1999 to practise the profession, the number of additional points attributed on account of their having obtained that certificate.

Joined Cases C-10/02 and C-11/02 Fascicolo and Others [2004] ECR I-11107 §45

It must first be pointed out that nationals of a Member State who pursue their occupation in another Member State *are obliged to comply with the rules which govern the pursuit of the occupation in question in that Member State*. As the French government rightly observes, *in the case of the medical and dental professions those rules reflect in particular a concern to ensure that individuals enjoy the most effective and complete health protection possible*.

Case C-96/85 Commission v France [1986] ECR I-1475 §10

However, in so far as those rules have the effect of restricting freedom of movement for workers, the right of establishment and the freedom to provide services within the community, they are compatible with the treaty only *if the restrictions which they entail are actually justified in view of the general obligations inherent in the proper practice of the professions in question and apply to nationals and foreigners alike*. That is not the case where the restrictions are such as to create discrimination against practitioners established in other member states or raise obstacles to access to the profession which go beyond *what is necessary in order to achieve the intended goals*.

Case C-96/85 Commission v France [1986] ECR I-1475 §11

In that context, it must be stated first of all that the principle that a practitioner may have only one practice, put forward by the French government as indispensable to the continuity of medical care, is applied more strictly with regard to practitioners from other member states than practitioners established in France. Although, according to the documents before the court and the information provided by the parties, the councils of the ordre des medecins authorise doctors established in France to open a second practice only at a short distance from their main practice, doctors established in another Member State, even close to the frontier, are never permitted to open a second practice in France. *Similarly, the French legislation makes it possible in principle for dental surgeons established in France to be authorised to open one or more secondary practices, but a dental practitioner established in another Member State can never be authorised to open a second practice in France*.

Case C-96/85 Commission v France [1986] ECR I-1475 §12

Secondly, it must be observed that *the general rule prohibiting doctors and dental practitioners established in another Member State from practising in France is unduly restrictive*. First of all, *in the case of certain medical specialities, it is not necessary that the specialist should be close to the patient on a continuous basis after the treatment has been given*. That is so where the specialist carries out a single procedure, as is often the case of a radiologist, for example, or where subsequent care is provided by other medical personnel, as is often the case of a surgeon. Furthermore, as the French government indeed recognised, recent developments in the medical profession show that even in the area of general medicine

the increasing trend is for *practitioners to belong to group practices, so that a patient cannot always consult the same general practitioner.*

Case C-96/85 Commission v France [1986] ECR I-1475 §13

Those considerations show that the prohibition on the enrolment in a register of the ordre in France of any doctor or dental surgeon who is still enrolled or registered in another Member State is too absolute and general in nature to be justified by the need to ensure continuity of medical treatment or of applying French rules of medical ethics in France.

Case C-96/85 Commission v France [1986] ECR I-1475 §14

10.4.5 Audit

At Community level, authorisation to practise as an *auditor* is dealt with in the Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ 1984 L 126, p. 20, hereinafter referred to as "the Eighth Directive").

Case C-106/91 Ramrath [1992] ECR I-3351 §6

10.4.6 Independent Commercial Agents

In the light of all those considerations, the answer to the first question must be that Article 19 of the Directive [86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents] must be interpreted as meaning that the *indemnity for termination of contract* which results from the application of Article 17(2) of the Directive *cannot be replaced*, pursuant to a collective agreement, by an indemnity determined in accordance with criteria other than those prescribed by Article 17, *unless it is established that the application of such an agreement guarantees the commercial agent, in every case, an indemnity equal to or greater* than that which results from the application of Article 17.

Case C-465/04 Honyvem Informazioni [2006] ECR I-2879 §32

Therefore the answer to the second question must be that, within the framework prescribed by Article 17(2) of the Directive, the *Member States enjoy a margin of discretion* which they may exercise, in particular, in relation to the criterion of equity.

Case C-465/04 Honyvem Informazioni [2006] ECR I-2879 §36

The answer to the questions referred is therefore that Article 1(2) of the Directive [86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents] is to be interpreted as meaning that, where a self-employed intermediary had authority to conclude a single contract, subsequently extended over several years, the condition laid down by that provision that the authority be continuing requires that the principal should have conferred continuing authority on that intermediary to negotiate successive extensions to that contract.

Case C-3/04 Poseidon Chartering [2006] ECR I-2505 §27

10.5 **GAMBLING**

Where a company established in a Member State (such as Stanley) pursues the activity of *collecting bets through the intermediary of an organisation of agencies established in another Member State* (such as the defendants in the main proceedings), *any restrictions on the activities of those agencies* constitute obstacles to the freedom of establishment.

In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that *the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences*, those rules constitute prima facie a restriction on the freedom of establishment, *even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State*.

It is therefore possible that the *conditions imposed by the legislation for submitting invitations to tender for the award of these licences* also constitute an obstacle to the freedom of establishment.

10.6 HEALTH

Consequently, given *the similarities*, from the point of view of the risks to public health, *between the pharmacy sector and the biomedical analysis sector* and the fact that, contrary to the assertions made by the Commission, those two sectors cannot really be distinguished from one another, either from the point of view of the findings with regard to medical prescriptions or in terms of financing needs, the principles laid down in Case C-531/06 *Commission v Italy and Apothekerkammer des Saarlandes and Others*, concerning restrictions on the holding of capital in pharmacies, would appear to be fully transposable to the present case.

Thus, given the power afforded to the Member States to determine the level of protection that they wish to give to public health, it must be accepted that *Member States may require that biomedical analyses be carried out by biologists enjoying genuine professional independence*. They may also take measures for eliminating or reducing a risk that that independence might be compromised, because that in turn would be liable to have an adverse effect on public health and the quality of medical services (see, to that effect, Case C-531/06 *Commission v Italy* paragraph 59 and *Apothekerkammer des Saarlandes and Others*, paragraph 35).

Case C-89/09 *Commission v France* [2010] ECR I-0000 §65, 66

It should first be noted that, pursuant to Article 168(7) TFEU, as clarified by the case-law of the Court and by recital 26 in the preamble to Directive 2005/36, *EU law does not detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions to govern the organisation of health services such as pharmacies. In exercising that power, however, Member States must comply with EU law and, in particular, with the Treaty provisions on the fundamental freedoms, since those provisions prohibit Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the healthcare sector* (see, to that effect, *Hartlauer*, paragraph 29; Case C-531/06 *Commission v Italy* [2009] ECR I-0000, paragraph 35; and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-0000, paragraph 18).

That being so, when assessing whether that obligation has been complied with, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that *it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a measure of discretion* (see, to that effect, Case C-141/07 *Commission v Germany* [2008] ECR I-6935, paragraph 51, and *Apothekerkammer des Saarlandes and Others*, paragraph 19).

Joined Cases C-570/07 and C-571/07 *Blanco Perez* [2010] ECR I-0000 §43, 44

Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes Hartlauer* [2009] ECR I-0000 §19

Case C-531/06, *Commission v Italy* [2009] ECR I-0000 §35, 36

Secondly, *neither Directive 2005/36 nor any other measure implementing the fundamental freedoms lays down rules, concerning access to activities in the pharmacy field, which seek to set the conditions for opening new pharmacies in Member States*.

Joined Cases C-570/07 and C-571/07 *Blanco Pérez* [2010] ECR I-0000 45

In that connection, it should first be noted that, in view of the discretion referred to in paragraph 44 above, ***the fact that one Member State imposes more stringent rules than another in relation to the protection of public health does not mean that those rules are incompatible with the Treaty provisions on the fundamental freedoms*** (see, to that effect, Case C-110/05 *Commission v Italy* [2009] ECR I-519, paragraph 65 and the case-law cited).

Joined Cases C-570/07 and C-571/07 Blanco Perez [2010] ECR I-0000 §68

Secondly, it should be borne in mind that, according to the case-law of the Court, public health establishments and infrastructures may be subject to planning. That may include prior authorisation for the establishment of new service providers, where this proves indispensable for filling in possible gaps in access to public health services and for avoiding the duplication of structures, so as to ensure the provision of public health care which is adapted to the needs of the population, which covers the entire territory and which takes account of geographically isolated or otherwise disadvantaged regions (see, by analogy, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 76 to 80; Case C-372/04 *Watts* [2006] ECR I-4325, paragraphs 108 to 110; and *Hartlauer*, paragraphs 51 and 52).

Fourthly, it should be borne in mind that, where there is uncertainty as to the existence or extent of risks for public health, a Member State can take protective measures without having to wait until the reality of those risks becomes fully apparent (*Apothekerkammer des Saarlandes and Others*, paragraph 30).

Joined Cases C-570/07 and C-571/07 Blanco Perez [2010] I-0000 §70, 74

First, it is clear, both from the case-law of the Court and from Article 152(5) EC and recital 26 in the preamble to Directive 2005/36, ***that Community law does not detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation of health services such as pharmacies. In exercising that power, however, the Member States must comply with Community law, in particular the provisions of the Treaty on the freedoms of movement, including freedom of establishment. Those provisions prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the healthcare sector*** (see, to this effect, Case C-372/04 *Watts* [2006] ECR I-4325, paragraphs 92 and 146, and Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 29).

Second, neither Directive 2005/36 nor any other measure implementing the freedoms of movement guaranteed by the Treaty lays down conditions governing access to activities in the pharmacy field that specify the category of persons who are entitled to operate a pharmacy. Consequently, the national legislation must be examined in the light of the provisions of the Treaty alone.

Joined Cases C-171/07 and C-172/07, Apothekerkammer des Saarlandes [2009] ECR I-0000 §18, 20

It is important that, *where there is uncertainty as to the existence or extent of risks to human health, a Member State should be able to take protective measures without having to wait until the reality of those risks becomes fully apparent. Furthermore, a Member State may take the measures that reduce, as far as possible, a public-health risk* (see, to this effect, Case C-170/04 *Rosengren and Others* [2007] ECR I-4071, paragraph 49), including, more specifically, a risk to the reliability and quality of the provision of medicinal products to the public.

Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes [2009] ECR I §30

Case C-531/06 Commission v Italy [2009] ECR I-0000 §54

In the light of those risks to public health and to the financial balance of social security systems, the Member States may make persons entrusted with the retail supply of medicinal products subject to strict requirements, including as regards the way in which the products are marketed and the pursuit of profit. In particular, the Member States may restrict the retail sale of medicinal products, in principle, to pharmacists alone, because of the safeguards which pharmacists must provide and the information which they must be in a position to furnish to consumers (see, to this effect, *Delattre*, paragraph 56).

Case C-531/06 Commission v Italy [2009] ECR I-0000 §58

First, it should be recalled that it is clear, both from the case-law of the Court and from Article 152(5) EC, *that Community law does not detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation and delivery of health services and medical care. In exercising that power, however, the Member States must comply with Community law, in particular the provisions of the Treaty on the freedoms of movement, including freedom of establishment.* Those provisions prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the healthcare sector (see, to that effect, Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16; Case C-372/04 *Watts* [2006] ECR I-4325, paragraphs 92 and 146; and Case C-141/07 *Commission v Germany* [2008] ECR I-0000, paragraphs 22 and 23).

Case C-169/07 Hartlauer [2009] I-0000 §29

In accordance with settled case-law, when assessing whether that obligation has been complied with, account must be taken of the fact that *a Member State has the power to determine the level of protection which it wishes to afford to public health and the way in which that level is to be achieved. Since the level of protection may vary from one Member State to the other, Member States must be allowed discretion* (*Commission v Germany*, paragraph 51 and the case-law cited).

Case C-169/07 Hartlauer [2009] I-0000 §30

It follows from the case-law that two objectives may, more precisely, be covered by that derogation in so far as they contribute to achieving a high level of protection of health, namely the *objective of maintaining a balanced high-quality medical or hospital service open to all and the objective of preventing the risk of serious harm to the financial balance of the social security system* (see, to that effect, *Watts*, paragraphs 103 and 104 and the case-law cited).

As regards the first of those objectives, Article 46 EC allows the Member States, in particular, to restrict the freedom to provide medical and hospital services in so far as the *maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival, of the population* (see, to that effect, Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 67, and *Watts*, paragraph 105).

As regards the second of those objectives, it should be noted that *the planning of medical services, of which the requirement that authorisation is needed for the setting up of a new health institution is a corollary, is intended to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources, since the medical care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for healthcare are not unlimited, whatever the mode of funding applied* (see, with regard to hospital care in the context of the freedom to provide services, *Müller-Fauré and van Riet*, paragraph 80, and *Watts*, paragraph 109).

Case C-169/07 Hartlauer [2009] ECR I-0000 §47, 48,49