



**GUIDE TO THE CASE LAW  
Of the European Court of Justice  
on Articles 49 et seq. TFEU**

**FREEDOM OF ESTABLISHMENT**

**European Commission**

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).

A separate chapter in the guide concerning Article 56 TFEU is dedicated to the case law on Directive 2006/123/EC on services in the internal market (Services Directive).

The guides are produced and updated by the European Commission, Internal Market, Industry, Entrepreneurship and SMEs Directorate-General.

This guide, which concerns Article 49 TFEU, aims to present the cases in a practical way by gathering together the essential passages 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 recent case law, provides an approach to Article 49 intended to help not only academics, but also practitioners directly involved in dealing with infringements.

In the 2015 Single Market Strategy<sup>1</sup> and the accompanying Staff Working Document<sup>2</sup>, the Commission states the intention to engage in a more active enforcement policy. In this respect, the guides, by presenting the relevant case law in an organised way, aim to provide clarity on the legal interpretations given by the Court of fundamental notions, on the proportionality analysis and on the correct application of fundamental freedoms of the Treaty.

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 noted 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.

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<sup>1</sup><http://ec.europa.eu/DocsRoom/documents/14007?locale=en>

<sup>2</sup><http://ec.europa.eu/DocsRoom/documents/14012>

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Initial EC Numbering	TEC Numbering following the Treaty of Amsterdam	TFEU numbering after the Treaty of Lisbon
Article 2	Article 2 <sup>3</sup>	
Article 3	Article 3 paragraph 1 <sup>4</sup>	
Article 3	Article 3 paragraph 2	Article 8
Article 3b	Article 5 <sup>5</sup>	
Article 5	Article 10 <sup>6</sup>	
Article 6	Article 12 (repealed)	Article 18
Article 7	Article 6	Article 11
Article 8	Article 17	Article 20
Article 8a	Article 18	Article 21
Article 30	Article 28	Article 34
Article 37	Article 31	Article 37
Article 48	Article 39	Article 45
Article 52	Article 43	Article 49
Article 54	Article 44	Article 50
Article 55	Article 45	Article 51
Article 56	Article 46	Article 52
Article 57	Article 47	Article 53
Article 58	Article 48	Article 54
Article 59	Article 49	Article 56
Article 61	Article 51	Article 58
Article 64	Article 53	Article 60
Article 65	Article 54	Article 61
Article 73b	Article 56	Article 63
Article 73c	Article 57	Article 64
Article 73f	Article 59	Article 66
Article 90	Article 86	Article 106
Article 164	Article 220 <sup>7</sup>	
Article 165	Article 221 paragraph 1 <sup>8</sup>	
Article 165	Article 221 paragraphs 2 and 3	Article 251

<sup>3</sup>Repealed and replaced, in substance by Article 3 TEU

<sup>4</sup>Repealed and replaced, in substance, by Articles 3 to 6 TFEU

<sup>5</sup> Replaced, in substance, by Article 5 TEU

<sup>6</sup> Replaced, in substance, by Article 4, paragraph 3 TEU

<sup>7</sup>Repealed and replaced, in substance, by article 19 TEU

<sup>8</sup>Repealed and replaced, in substance, by Article 19 paragraph 2, first subparagraph TEU

## 1 – FIELDS OF APPLICATION

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### 1.1 NATURAL PERSONS

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Any resident of a Member State, *whatever his nationality*, who has a shareholding in the capital of a company established in another Member State which gives him *definite influence over the company's decisions and allows him to determine its activities* falls within the scope of *Article 49 TFEU* (see judgment in N, C-470/04, EU:C:2006:525, paragraph 27).

Case C-87/13 X [2014] not published vet §21

As regards the Treaty chapter on freedom of establishment, *it does not contain any provision which extends the scope of that chapter to cover situations concerning a shareholding in a company which has its registered office in a third country* (see, to that effect, Case C-102/05 A and B [2007] ECR I-3871, paragraph 29, and Case C-157/05 Holböck [2007] ECR I-4051, paragraph 28) and, as it is, the case before the referring court concerns a shareholding in a capital company which has its registered office in Canada.

Case C-31/11 Scheunemann [2012] not published vet §33

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-470/04N [2006] ECR I-7409, paragraph 28).

Case C-464/05 Geurts v Belgische Staat [2007] ECR I-9325 §14

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-7409 §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

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

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### 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

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

It should be borne in mind that, in the case of companies, *their seat* for the purposes of Article 54 TFEU serves, in the same way as *nationality* in the case of individuals, as the connecting factor with the legal system of a Member State. However, acceptance of the proposition that the Member State of residence may freely apply different treatment merely by reason of the fact that the seat of a company is situated in another Member State would deprive Article 49 TFEU of all meaning. *Freedom of establishment aims to guarantee the benefit of national treatment in the host Member State, by prohibiting any discrimination based on the place in which companies have their seat* (see Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* EU:C:2006:773, paragraph 43; Case C-170/05 *Denkavit Internationaal and Denkavit France* EU:C:2006:783, paragraph 22; and Case C-284/06 *Burda* EU:C:2008:365, paragraph 77).

Joined cases C-39/13, C-40/13 and C-41/13, SCA Group Holding [2014] not published yet §45

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-4695 §20

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

In that connection, it should be pointed out, first, that the system of penalties at issue is applied without distinction to companies established in Austria and to those established in other Member States but with a branch in Austria. Accordingly, the system does not place companies which are established in Member States other than the Republic of Austria, but which have a branch there, in a factual or legal situation that is less favourable than that of companies established in Austria.

Secondly, as the Commission correctly points out, no penalty is imposed if the company concerned fulfils its legal obligation to disclose, as required under EU law – an obligation applicable in all Member States. *Consequently, the penalties that may arise are not capable of prohibiting, impeding or discouraging a company governed by the law of a Member State from establishing itself, through the creation of a branch, in another Member State.*

Case C-418/11 - Texdata Software [2013] not published yet § 67, 68

It should be recalled in this connection that the Treaty offers *no guarantee* to a company covered by Article 54 TFEU that transferring its place of effective management to another Member State will *be neutral as regards taxation*. Given the relevant disparities in the tax legislation of the Member States, *such a transfer may be to the company's advantage in terms of tax or not*, according to circumstances (*see, to that effect, Case C-365/02 Lindfors [2004] ECR I-7183, paragraph 34; Case C-403/03 Schempp [2005] ECR I-6421, paragraph 45; and Case C-194/06 Orange European Smallcap Fund [2008] ECR I-3747, paragraph 37*). *Freedom of establishment cannot therefore 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* (*see Case C-293/06 Deutsche Shell [2008] ECR I-1129, paragraph 43*).

Case C-371/10 National Grid Indus [2011] ECR I-12273 §62

That competence also implies that *a Member State cannot be required to take account, for the purposes of applying its tax law, of the possible negative results arising from particularities of legislation of another Member State* applicable to a permanent establishment situated in the territory of the said State which belongs to a company with a registered office in the first State (*see, to that effect, Columbus Container Services, paragraph 51, and Case C-293/06 Deutsche Shell [2008] ECR I-0000, paragraph 42*).

The Court has held that 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 (*Deutsche Shell, paragraph 43*).

Case C-157/07 Krankenhaus Ruhesitz am Wannsee-Seniorenheimstatt [2008] ECR I-8061 §49, 50

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-9641 §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*).

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*).

Accordingly, the *Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security*. Given the disparities in the social security legislation of the Member States, such an extension or transfer may be to the worker's advantage in terms of social security or not, according to circumstance. It follows that, in principle, any disadvantage, by comparison with the situation of a worker who pursues all his activities in one Member State, resulting from the extension or transfer of his activities into or to one or more other Member States and from his being subject to additional social security legislation is not contrary to Articles 48 and 52 of the Treaty if that legislation does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return.

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*.

*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.

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*.

### 1.2.3.2 Transfer of the central office by a national company

Under legislation such as that at issue in the main proceedings, the possibility of transferring, by means of relief, losses sustained by a company that is resident for tax purposes in a Member State and belongs to a consortium to another company that is resident for tax purposes in the same Member State and is a member of a group is subject to the condition that ***a link company which is a member of both the consortium and the group is resident in that Member State or carries on a trade there through a permanent establishment.***

The ***residence condition*** laid down for the link company thus introduces a difference in treatment between, on the one hand, resident companies connected, for the purposes of the national tax legislation, by a link company established in the United Kingdom, which are entitled to the tax advantage at issue, and, on the other hand, resident companies connected by a link company established in another Member State, which are not entitled to it.

However, it does not follow from any provision of European Union law that the origin of the shareholders, be they natural or legal persons, of companies resident in the European Union affects the right of those companies to rely on freedom of establishment. As the Advocate General has observed in point 60 of his Opinion, the status of being a European Union company is based, under Article 54 TFEU, on the location of the corporate seat and the legal order where the company is incorporated, ***not on the nationality of its shareholders.***

**Case C-80/12 Felixstowe Dock and Railway Company and Others [2014] not published yet §18, 20, 40**

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**

That being so, ***the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.*** The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

**Case 212/97 Centros [1999] ECR I-01459 § 27**

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.***

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 § 24, 25

## 2 – DEFINITION OF "ESTABLISHMENT"

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### 2.1 ECONOMIC ACTIVITY

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*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).

Case C-384/08 *Attanasio* [2010] ECR I-2055 §36

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 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).

Where a Community national lives in one Member State and has a shareholding in the capital of a company established in another Member State which gives him *substantial influence* over the company's decisions and allows him to determine its activities, as is always the case where he holds 100% of the shares, that may thus fall within the freedom of establishment (see, to that effect, *Baars*, paragraphs 22 and 26).

Case C-470/04 N [2006] ECR I-7409 § 26, 27

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 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.*

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 §20, 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.*

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.

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 §9, 13, 14

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

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

With regard, in the first place, to the concept of ‘establishment’, it should be noted that recital 19 in the preamble to *Directive 95/46* states that *establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements and that the legal form of such an establishment, whether simply a branch or a subsidiary with a legal personality, is not the determining factor* (judgment in *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 48). Moreover, that recital states that, when a single controller is established on the territory of several Member States, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities.

As the Advocate General observed, in essence, in points 28 and 32 to 34 of his Opinion, this results in a flexible definition of the concept of ‘establishment’, which departs from a formalistic

approach whereby undertakings are established solely in the place where they are registered. Accordingly, *in order to establish whether a company, the data controller, has an establishment, within the meaning of Directive 95/46, in a Member State other than the Member State or third country where it is registered, both the degree of stability of the arrangements and the effective exercise of activities in that other Member State must be interpreted in the light of the specific nature of the economic activities and the provision of services concerned.* This is particularly true for *undertakings offering services exclusively over the Internet.*

In that regard, it must, in particular, be held, in the light of the objective pursued by that directive, consisting in ensuring effective and complete protection of the right to privacy and in avoiding any circumvention of national rules, that the presence of only one representative can, in some circumstances, *suffice to constitute a stable arrangement if that representative acts with a sufficient degree of stability through the presence of the necessary equipment for provision of the specific services concerned in the Member State in question.*

In addition, in order to attain that objective, it should be considered that the concept of ‘establishment’, within the meaning of Directive 95/46, extends to any real and effective activity — even a minimal one — exercised through stable arrangements.

Case C-230/14 Weltimmo [2015] not published yet § 28, 29, 30, 31

The legislation at issue in the main proceedings governs only the conditions for establishing an *optician’s shop* in a part of Italian territory, with a view to a stable and continuous participation of such professionals in the economic life of that Member State. In those circumstances, *the provisions concerning the freedom to supply services, which apply only if those relating to the freedom of establishment do not apply, are not relevant* (see, by analogy, Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 39 and the case-law cited).

Case C-539/11 Ottica New Line di Accardi Vincenzo [2013] not published yet §16

Furthermore, in accordance with the first paragraph of Article 50 EC, *the provisions of the Treaty concerning freedom to supply services apply only if those relating to the right of establishment do not apply.* Therefore Article 49 EC is also not relevant in the present proceedings. 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-384/08 Attanasio Group [2010] ECR I-2055 § 39

*No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty.*

It follows that the mere fact that a business established in one Member State supplies identical or similar services with a greater or lesser degree of frequency or regularity *in a second Member*



*State*, without having an infrastructure there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, is ***not sufficient for it to be regarded as established in the second Member State.***

Case C-215/01 Schnitzer [2003] ECR I-14847 § 31,32

As regards the definition of the respective scopes of the principles of freedom to provide services and freedom of establishment, it should be noted that the ***key element is whether or not the economic operator is established in the Member State in which it offers the services in question*** (see Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 22). Where it is established (in a principal or secondary establishment) in the Member State in which it offers the service (Member State of destination or host Member State), it falls within the scope of the principle of freedom of establishment, as defined in Article 43 EC. On the other hand, where the economic operator is not established in that Member State of destination, it is a trans frontier service provider covered by the principle of freedom to provide services laid down in Article 49 EC.

In this context, the concept of establishment means that the operator offers its services on a stable and continuous basis from an established professional base in the Member State of destination (see Gebhard, paragraphs 25 and 28, and Case 205/84 Commission v Germany [1986] ECR 3755, paragraph 21). ***On the other hand, all services that are not offered on a stable and continuous basis from an established professional base in the Member State of destination constitute provision of services within the meaning of Article 49 EC.***

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 §24, 25, 27

The ***decisive criterion*** for the purposes of the application of the chapter of the Treaty concerning services to an economic activity is ***the absence of stable and continuous participation by the person concerned in the economic life of the host Member State.***

Although the representative ***activity of a patent agent before a national patent office, consisting among other things of the filing and pursuit of patent applications and their protection,*** includes a series of activities which extend over a period of time, ***it could not be said that such activity necessarily involves a stable and continuous participation in the economic life of the host Member State.*** In addition, there is nothing to prevent a client instructing a patent agent with a view to a single action or several occasional actions connected with the carrying-on of the activity in question. The disadvantages which such a step would, according to the Italian Government, involve are irrelevant to whether the activity in question is to be regarded in the host Member State as a provision of services for the purposes of Community law.

Therefore, the activity of patent agents is capable of coming within the field of application of the Treaty chapter concerning the freedom to provide services.

Case C-131/01 Commission v Italy [2003] ECR I-1659 § 23, 24, 25

The Italian Government maintains, in essence, that that prohibition is designed to prevent abuse of the freedom of establishment. If it did not exist, lawyers exercising their freedom to provide services could create an establishment under the guise of a certain structure. It further states, however, that in order to remove all doubt regarding the compatibility of the second paragraph of Article 2 of Law No 31/82 with Article 59 of the Treaty, a draft law repealing that national provision has been submitted to the Italian Parliament for its consideration.

As the Court has previously held, the fact that *a 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, paragraph 27).*

Case C-145/99 Commission v Italy [2002] ECR I-2235 §21, 22

*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).

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.

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 § 25, 27, 28

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.

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.

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.

### **2.3 SELF-EMPLOYED ACTIVITIES**

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As regards Articles 45 TFEU and 49 TFEU, it should be noted that the legislation at issue in the main proceedings draws no distinction according to whether *management of the business is an activity engaged in for remuneration.* Nor is there anything in the order for reference or the documents before the Court to indicate whether the situation under consideration by the referring court falls within the scope of one or other of those provisions. It must therefore be held that legislation such as that at issue in the main proceedings may affect *both freedom of movement for workers and freedom of establishment* and, in consequence, must be examined in the light both of Article 45 TFEU and of Article 49 TFEU.

That consideration, which related to a situation in which a business established in a Member State was precluded by a provision of national law from registering for a trade because the person whom it had appointed as manager — who, in that instance, was salaried — did not reside in that Member State, also applies, by analogy, where the condition at issue concerns a manager who is not an employee. The Court found that the *rules governing freedom of movement for workers could easily be frustrated if Member States were able to circumvent prohibitions under those rules merely by imposing on employers conditions to be met by any worker whom they wished to employ, which, if imposed directly on the worker, would constitute restrictions of the exercise of the worker's right to freedom of movement under Article 45 TFEU* (see, to that effect, the judgment in *Clean Car Autoservice*, EU:C:1998:205, paragraph 21). A finding to that effect must also be made where the employer wishes to employ, not a salaried worker, but a worker with self-employed status whose situation is covered by Article 49 TFEU (see also, so far as concerns the possibility for employees of a service provider to rely on freedom to provide services, the judgment in *Abatay and Others*, C-317/01 and C-369/01, EU:C:2003:572, paragraph 106).

The concept of establishment within the meaning of that provision is a very broad one, allowing a national of the European Union 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 European Union in the sphere of activities of self-employed persons (*see, inter alia, Case C-161/07 Commission v Austria [2008] ECR I-10671, paragraph 24*).

The freedom of establishment conferred on nationals of one Member State in the territory of another Member State includes in particular ***access to and exercise of activities of self-employed persons under the same conditions as are laid down by the law of the Member State of establishment for its own nationals*** (*see, inter alia, Case 270/83 Commission v France [1986] ECR 273, paragraph 13, and, to that effect, Commission v Austria, paragraph 27*). In other words, 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 there which differ from those laid down for its own nationals (*Commission v Austria, paragraph 28*).

Case C-47/08 Commission v Belgium [2011] ECR I-4105 § 78,79

On the question of the applicability of Article 45 TFEU, it should be noted at the outset that there is ***no single definition of worker/employed or self-employed person in European Union law***; it varies according to the area in which the definition is to be applied. Thus the concept of ‘worker’ used in the context of Article 45 TFEU does not necessarily coincide with the definition applied in relation to Article 48 TFEU and Regulation No 1408/71 (*see von Chamier-Glisczinski, paragraph 68 and the case-law cited*).

Case C-345/09 van Delft and Others [2010] ECR I-9879 § 88

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

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***.

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

In that regard, it is necessary to bear in mind that the freedom of establishment provided for in Articles 43 EC to 48 EC, is conferred both on natural persons who are nationals of a Member State and on legal persons within the meaning of Article 48 EC. Subject to the exceptions and conditions specified, ***it includes the right to take up and pursue all types of self-employed activity in the territory of any other Member State, to set up and manage undertakings, and to set up agencies, branches or subsidiaries*** (*see, in particular, Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 23, and Case C-255/97 Pfeiffer [1999] ECR I-2835, paragraph 18*).

Case C-79/01 - Pavroll and Others [2002] ECR I-8923 §24

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 Jany and Others v Staatssecretaris van Justitie [2001] ECR I-8615 §67

The answer to question 1(a) must therefore be that the fact that *a person is related by marriage to the director and sole shareholder* of the company for which he pursues an effective and genuine activity *does not preclude that person from being classified as a 'worker'* within the meaning of Article 48 of the Treaty and of Regulation No 1612/68, so long as he pursues his activity in the context of a relationship of subordination.

Case C-337/97 Meeusen [1999] ECR I-3289 §17

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

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

In the Netherlands, Mr Asscher is the *director of a company of which he is the sole shareholder*; his activity is thus not carried out in the context of a relationship of subordination, and so he is to be treated not as a 'worker' within the meaning of Article 48 of the Treaty but as pursuing an activity as a self-employed person within the meaning of Article 52.

Case C-107/94 - Asscher v Staatssecretaris van Financiën [1996] ECR I-3089 § 26

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.*

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.

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 §31, 32, 33

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

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

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In view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary ruling proceedings, the fact that the referring court did not make those initial findings relating to the possible existence of certain cross-border interest does not mean that the request is inadmissible if, in spite of those deficiencies, the Court, in the light of the information contained in the court file, considers that it is in a position to provide a useful answer to the referring court. That is particularly the case where the decision to refer contains sufficient relevant information for the assessment of the possible existence of such an interest. Nevertheless, the response provided by *the Court takes effect only if it is possible for the referring court to establish certain cross-border interest in the case at issue in the main proceedings, on the basis of a detailed assessment of all the relevant facts in the case in the main proceedings* (see judgment in *Azienda sanitaria locale No 5 'Spezzino' and Others*, EU:C:2014:2440, paragraph 48 and the case-law cited). It is subject to that proviso that the following considerations are set out.

C-470/13 Generali-Providencia Biztosító [2014] not published vet §29

As regards, secondly, Article 49 TFEU, it is common ground that all elements of the disputes before the referring court are confined within a single Member State. In those circumstances, it is necessary to determine whether the Court has jurisdiction in the present cases to give a ruling on that provision (see, by analogy, *inter alia*, Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 64; Case C-245/09 *Omalet* [2010] ECR I-13771, paragraphs 9 and 10; and *Duomo Gpa and Others*, paragraph 25).

As regards, more specifically, *Article 49 TFEU*, the Court has consistently held that that provision *cannot be applied to activities which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single*

*Member State* (see, to that effect, *inter alia*, Case 20/87 *Gauchard* [1987] ECR 4879, paragraph 12; Case 204/87 *Bekaert* [1988] ECR 2029, paragraph 12; Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33; and Case C-84/11 *Susisalo and Others* [2012] ECR, paragraph 18 and the case-law cited).

Case C-419/12 *Crono Service and Others* [2014] not published yet §34, 36

Where a Community national lives in one Member State and has a shareholding in the capital of a company established in another Member State which gives him *substantial influence* over the company's decisions and allows him to determine its activities, as is always the case where he holds *100% of the shares*, that may thus fall within the freedom of establishment (see, to that effect, *Baars*, paragraphs 22 and 26).

Case C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006] ECR I-7409 § 27

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 115/75 *Knors 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 *Knors* [1979] ECR 399 §24

The same reasoning must be followed as regards Article 48 of the Treaty. In its judgment in *Knors*, 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 *Knors* [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

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### 3.1 PRIMARY ESTABLISHMENT

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#### 3.1.1 Natural persons

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*).

Where a Community national lives in *one Member State and has a shareholding in the capital of a company established in another Member State which gives him substantial influence over the company's decisions and allows him to determine its activities, as is always the case where he holds 100% of the shares, that may thus fall within the freedom of establishment* (see, to that effect, Baars, paragraphs 22 and 26).

Case C-470/04 N [2006] ECR I-7409 §26, 27

That is equally 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

It is thus apparent that the expression 'to the extent that it is permitted under that law to do so', in paragraph 112 of *Cartesio*, cannot be understood as seeking to remove, from the outset, the legislation of the host Member State on company conversions from the scope of the provisions of the Treaty on the Functioning of the European Union governing the freedom of establishment, but as *reflecting the mere consideration that a company established in accordance with national law exists only on the basis of the national legislation which 'permits' the incorporation of the company, provided the conditions laid down to that effect are satisfied*.

In the light of the foregoing, the Court concludes that national legislation which enables national companies *to convert*, but does not allow companies governed by the law of another Member State to do so, falls within the scope of Articles 49 TFEU and 54 TFEU.

Case C-378/10 VALE Építési [2012] not published vet§ 32, 33

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**

***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 Svstems [2005] ECR I-10805 §19**

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**

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)

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### 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

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.

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 § 21, 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

The legislation at issue in the main proceedings accordingly creates a *difference in treatment* since the ability to elect for the tax entity regime is dependent on whether the parent company holds its indirect stakes through a subsidiary established in the Netherlands or in another Member State (see, by analogy, *Case C-418/07 Papillon* EU:C:2008:659, paragraph 22).

Contrary to the view taken by some of the parties, it is, in that regard, irrelevant that, even in a purely internal situation, no parent company can form a tax entity with sub-subsidiaries without also including the intermediate subsidiary. While a Netherlands parent company which holds Netherlands sub-subsidiaries by means of a non-resident subsidiary cannot, in any case, form a tax entity with those sub-subsidiaries, by contrast, a Netherlands parent company which holds Netherlands sub-subsidiaries through a resident subsidiary still has the ability to elect to do so.

An analogous difference of treatment exists where, as is the situation in *Case C-39/13*, it is not resident sub-subsidiaries that are at issue, but resident subsubsubsubsidiaries which cannot be integrated into a tax entity with the resident parent company because both the intermediate subsidiary and the intermediate sub-subsidiary are established in another Member State.

Inasmuch as, from a taxation perspective, *they put cross-border situations at a disadvantage compared with domestic situations, the provisions of the Law on corporation tax of 1969 at issue in the main proceedings thus constitute a restriction which is, in principle, prohibited by the provisions of the FEU Treaty relating to freedom of establishment* (*Papillon* EU:C:2008:659, paragraph 32).

It follows from the foregoing that Articles 49 TFEU and 54 TFEU must be *interpreted as precluding legislation of a Member State under which a resident parent company can form a single tax entity with a resident sub-subsidiary where it holds that sub-subsidiary through one or more resident companies, but cannot where it holds that sub-subsidiary through non-resident companies which do not have a permanent establishment in that Member State.*

Joined cases C-39/13, C-40/13 and C-41/13 SCA Group Holding and Others [2014] not published yet §24, 25, 26, 27, 43

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-3601 §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).

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 §14, 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.*

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 Svstems [2005] ECR I-10805 §17, 18

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

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**

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**

## 4 – COROLLARIES OF THE FREEDOM OF ESTABLISHMENT

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### 4.1 ENTRY AND RESIDENCE

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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

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.*

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 §16, 17

However, this case is concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by ***Articles 48 and 52 of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse.*** Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, ***his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State.*** Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign spouses of their own nationals rules on entry and residence more favourable than those provided for by Community law.

Case C-370/90 - The Queen v Immigration Appeal Tribunal and

Surinder Singh, ex parte Secretary of State for the Home Department [1992] ECR I-04265 §23

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).

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.***



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.

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

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Moreover, while Article 45(3)(d) TFEU and Article 17(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) provide for a right of a person, after ceasing work, to stay in the Member State to which he moved for the purpose of working there, it follows from the case-law that *a person who has carried out all his occupational activity in the Member State of which he is a national and has exercised the right to reside in another Member State only after his retirement, without any intention of working in that other State, cannot rely on the principle of freedom of movement for workers* (Case C-520/04 Turpeinen [2006] ECR I-10685, paragraph 16, and Case C-544/07 Ruffler [2009] ECR I-3389, paragraph 52).

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.*

## **4.3 OTHER RIGHTS OF THE FREEDOM OF ESTABLISHMENT**

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Just as the Court has held in relation to registration of a ship (see Case C-221/89 Factortame and Others [1991] ECR I-3905, paragraph 22), it must be held that where an *aircraft constitutes an instrument by which a Community national pursues an economic activity which involves a fixed establishment in another Member State, registration of that aircraft cannot be dissociated from the exercise of the freedom of establishment*. The conditions laid down for the registration of aircraft must therefore not discriminate on grounds of nationality or form an obstacle to the exercise of that freedom.



Case C-203/98 Commission v Belgium [1999] ECR I-4899 §12

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.*

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 §21, 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

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### 5.1 GENERAL PRINCIPLES

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In that connection, it should be pointed out, first, that the system of penalties at issue is applied without distinction to companies established in Austria and to those established in other Member States but with a branch in Austria. Accordingly, the system does not place companies which are established in Member States other than the Republic of Austria, but which have a branch there, in a factual or legal situation that is less favourable than that of companies established in Austria.

Secondly, as the Commission correctly points out, no penalty is imposed if the company concerned fulfils its legal obligation to disclose, as required under EU law – an obligation applicable in all Member States. Consequently, *the penalties that may arise are not capable of prohibiting, impeding or discouraging a company governed by the law of a Member State from establishing itself, through the creation of a branch, in another Member State.*

Case C-418/11 Texdata Software [2013] not published yet § 67, 68

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-4629 §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-4103 §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

Mr de Lasteyrie and the Commission both argue that the suspension of payment is not granted automatically and that the taxpayer must, in any case, be capable of providing *guarantees capable of ensuring payment of the tax*. Those measures are, they submit, clearly not proportionate to the aim pursued. Legislation of other Member States, such as the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Sweden, shows that solutions less restrictive of the freedom of establishment are possible. As for the system of guarantees, the Commission also argues that it is discriminatory having regard to the impossibility of lodging as a guarantee securities that are not quoted on a French stock exchange without a bank guarantee ensuring full payment of the taxes due.

Case C-9/02 de Lasteyrie du Saillant [2004] ECR I-2409 § 37

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).

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 §19, 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

*In the absence of Community harmonization, a Member State may certainly impose, directly or indirectly, technical rules which are specific to it and which are not necessarily to be found in the other Member States* on maritime transport undertakings which, like the undertaking employing Mr Peralta, are established on its territory and which operate vessels flying its flag. But the difficulties which might arise for those undertakings from that situation do not affect freedom of establishment within the meaning of Article 52 of the Treaty. Fundamentally, those difficulties are no different in nature from those which may originate in disparities between national laws governing, for example, labour costs, social security costs or the tax system.

Case C-379/92 - Peralta [1994] ECR I-3453 §34

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**

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Next, it must be borne in mind that Article 49 TFEU is intended to ensure that all nationals of all Member States who establish themselves in another Member State for the purpose of pursuing activities there as 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 national legislation (see, *inter alia*, the judgments in *Commission v France*, 270/83, EU:C:1986:37, paragraph 14, and *Commission v Netherlands*, C-157/09, EU:C:2011:794, paragraph 53).

Case C-151/14 Commission v Latvia [2015] not published yet §52

That consideration, which related to a situation in which a business established in a Member State was precluded by a provision of national law from registering for a trade because the person whom it had appointed *as manager* — who, in that instance, was salaried — *did not reside in that Member State*, also applies, by analogy, where the condition at issue concerns a manager who is not an employee. The Court found that *the rules governing freedom of movement for workers could easily be frustrated if Member States were able to circumvent prohibitions under those rules merely by imposing on employers conditions to be met by any worker whom they wished to employ*, which, if imposed directly on the worker, would constitute restrictions of the exercise of the worker's right to freedom of movement under Article 45 TFEU (see, to that effect, the judgment in *Clean Car Autoservice*, EU:C:1998:205, paragraph 21). A finding to that effect must also be made where the employer wishes to employ, not a salaried worker, but a worker with self-employed status whose situation is covered by Article 49 TFEU (see also, so far as concerns the possibility for employees of a service provider to rely on freedom to provide services, the judgment in *Abatay and Others*, C-317/01 and C-369/01, EU:C:2003:572, paragraph 106).

The freedom of establishment conferred by Article 49 TFEU on EU nationals entails for them access to, and pursuit of, activities as self-employed persons and the forming and management of undertakings, under the same conditions as those laid down for its own nationals by the laws of the Member State of establishment. According to settled case-law, *Article 49 TFEU is thus intended to ensure that all nationals of all Member States who establish themselves in another Member State for the purpose of pursuing activities there as 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 national legislation (see, *inter alia*, the judgments in *Commission v France*, 270/83, EU:C:1986:37, paragraph 14, and *Commission v Belgium*, C-47/08, EU:C:2011:334, paragraph 80).

Case C-474/12 Schiebel Aircraft [2014] not published yet §26, 27

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-4629 §118, 119

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 §29, 30, 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-5641 §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 nonresidents are in the majority of cases foreigners (see, by analogy, *Schumacher*, paragraph 28).

Case C-383/05 Talotta [2007] ECR I-2555 §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 Denkavit International [2006] ECR I-11949 §23, 24, 25, 29**

In the case of companies, it should be borne in mind that their *registered office* for the purposes of Article 48 EC serves, in the same way *as nationality* in the case of individuals, as the connecting factor with the legal system of a State. Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply different treatment merely by reason of its registered office being situated in another Member State would deprive Article 43 EC of all meaning (see, to that effect, Case 270/83 Commission v France [1986] ECR 273, paragraph 18; Case C-330/91 Commerzbank [1993] ECR I-4017, paragraph 13; Metallgesellschaft and Others, paragraph 42; and Marks & Spencer, paragraph 37). *Freedom of establishment thus aims to guarantee the benefit of national treatment in the host Member State, by prohibiting any discrimination based on the place in which companies have their seat* (see, to that effect, Commission v France, paragraph 14, and Saint-Gobain ZN, paragraph 35).

**Case C-446/04 Test Claimants in the FII Group Litigation [2006] ECR I-11753 §40**

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 f Community airlines') are capable of being affected* by that clause.

**Case C-466/98 Commission v UK and Northern Ireland [2002] ECR I-9427 §47, 48**

In making natural and legal persons from Member States other than the Kingdom of Belgium subject to a special regime under which it is necessary to have been resident or established in Belgium for at *least one year* in order to have an aircraft registered there, the provisions of the Royal Decree which are in point here clearly constitute *discrimination on grounds of nationality* which impedes the exercise of the freedom of establishment of those persons.

**Case C-203/98 Commission v Belgium [1999] ECR I-4899 §13**



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.

*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-6717 §31, 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

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

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

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.*

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 § 21, 24

There is no provision of the Treaty which, within the field of application of the Treaty, makes it possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of that State, as long as, at the time at which they rely on the benefit of the provisions of Community law, they possess the nationality of one of the Member States and that, in addition, the other conditions for the application of the rule on which they rely are fulfilled.

Case C-136/78 Ministère public v Auer [1979] ECR 437 § 28

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

### 5.3 NON-DISCRIMINATORY MEASURES

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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-12941 §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-11599 §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-4629 §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-384/08 Attanasio [2010] ECR I-2055 §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.***

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-10219 §28, 30, 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.

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 §21, 22

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

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

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

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 *SteinhauservCity of Biarritz*[1985] ECR 1819, paragraph 14).

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*.

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.

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 §12, 13, 15, 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

*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

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### 5.4.1 Restrictions emanating from the state of destination

In view of the foregoing, the answer to the question referred is that Article 49 TFEU must be interpreted as *not precluding national legislation*, such as that at issue in the main proceedings, which *excludes the application of the principle of the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries to parent companies having their seat in the territory of another Member State*.

Case C-186/12 Impacto Azul [2013] not published vet§39

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-2291 §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-11091 §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] ECRI-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

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

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

Article 49 TFEU requires the abolition of restrictions on the freedom of establishment. Therefore, even though, according to their wording, the provisions of the FEU Treaty on 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* (judgment in X, C-686/13, EU:C:2015:375, paragraph 27 and the case-law cited).

Case C-386/14 Groupe Steria [2015] not published yet §14

It should be noted that Article 49 TFEU precludes restrictions on the freedom of establishment. That provision prohibits any national measure which is liable to hinder or render less attractive the exercise by European Union nationals of the freedom of establishment guaranteed by the Treaty. *The concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade* (see Case C-518/06 *Commission v Italy* [2009] ECR I-3491, paragraphs 63 and 64, and Case C-577/11 *DKV Belgium* [2013] ECR, paragraphs 31 to 33).

C-327/12 Soa Nazionale Costruttori [2013] not published yet § 45

It is settled case-law in this regard that the term ‘restriction’ within the meaning of Articles 49 TFEU and 56 TFEU covers all measures which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services (Case C-518/06 *Commission v Italy*, paragraph 62 and the case-law cited).

As regards the question of the circumstances in which a measure applicable without distinction,



such as *the system of premium rate increases* at issue in the main proceedings, may come within that concept, it should be borne in mind that rules of a Member State do not constitute a restriction within the meaning of the FEU Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory (see Case C-518/06 *Commission v Italy*, paragraph 63 and the case-law cited).

By contrast, the *concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade* (Case C-518/06 *Commission v Italy*, paragraph 64 and the case-law cited).

Case C-577/11 DKV Belgium [2013] not published yet §31, 32, 33

It should be borne in mind, first, that Article 21 TFEU and, in their respective areas, Articles 45 TFEU and 49 TFEU, and Articles 22 and 24 of Directive 2004/38, prohibit national measures which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement within the European Union. Such measures, even if they apply without regard to the nationality of the individuals concerned, constitute restrictions on the fundamental freedoms guaranteed by those articles (*see, to that effect, Case C-152/05 Commission v Germany [2008] ECR I-39, paragraphs 21 and 22; Case C-253/09 Commission v Hungary [2011] ECR I-12391, paragraphs 46, 47 and 86; and Case C-46/12 L.N. [2013] ECR, paragraph 28*).

In the present case, as the Constitutional Court has stated in its orders for reference, the provisions of Book 5 of the Flemish Decree prevent persons without a ‘*sufficient connection*’ with a target commune, within the meaning of Article 5.2.1(2) of that decree, from *purchasing land or buildings thereon, or from taking out a lease of more than nine years or from acquiring rights to a long lease or building lease*.

In addition, *those provisions deter Union citizens who own or rent a property in the target communes from leaving them to reside in another Member State or pursue a professional activity there*. If they have not stayed in the commune for a certain period of time, those citizens will not necessarily have a ‘sufficient connection’ any more with the commune in question, as is required by Article 5.2.1(2) of the Flemish Decree for the purpose of exercising the rights referred to in the previous paragraph.

Joined cases C-197/11 and C-203/11 Libert and Others [2013] not published yet § 38, 39, 40

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-3601 §19, 20

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* (Case C-264/96 ICI [1998] ECR I-4695, paragraph 21; Case C-298/05 Columbus Container Services [2007] ECR I-10451, paragraph 33; and Lidl Belgium, paragraph 19).

Case C-418/07 Papillon [2008] ECR I-8947 §16

Furthermore, the Court has considered that, even though the provisions of the Treaty 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 also comes within the definition contained in Article 48 EC. ***The rights guaranteed by Articles 43 EC to 48 EC would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State*** (Daily Mail and General Trust, paragraph 16).

Case C-438/05 Viking [2007] ECR I-10779 §69

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

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 §35

In this case, analogously with what the Court has already found in relation to a similar system (*de Lasteyrie du Saillant*, paragraph 46), a taxpayer wishing to transfer his residence outside Netherlands territory, in exercise of the rights guaranteed to him by Article 43 EC, was subjected at the time of the facts to ***disadvantageous treatment in comparison with a person who maintained his residence in the Netherlands. That taxpayer became liable, simply by reason of such a transfer, to tax on income which had not yet been realised and which he therefore did not have, whereas, if he had remained in the Netherlands, increases in value would have become taxable only when, and to the extent that, they were actually realised.*** That difference in treatment was likely to discourage the person concerned from transferring his residence outside the Netherlands.

Case C-470/04 N v Inspecteur van de Belastingdienst Oost/kantoor Almelo [2006] ECR I-7409 §35

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 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

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

Even though those provisions 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. ***As the Commission rightly observed, the rights guaranteed by Article 52 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State.*** In regard to natural persons, the right to leave their territory for that purpose is expressly provided for in Directive 73/148, which is the subject of the second question referred to the Court.

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.

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 §20, 24

#### 5.4.3 Restrictions emanating from associations or organisations not governed by public 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).

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

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

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### 6.1 DISCRIMINATORY MEASURES

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#### 6.1.1 Participation in the exercise of official authority (Article 51 TFEU)

It follows from all of the foregoing that the first paragraph of Article 51 TFEU must be interpreted as meaning that *the activities of vehicle roadworthiness testing centres*, such as those covered by the legislation at issue in the main proceedings, *are not connected with the exercise of official authority within the meaning of that provision, notwithstanding the fact that the operators of those centres have the power to take vehicles off the road in cases where vehicles display, during the control, safety defects entailing an imminent danger.*

Case C-168/14 Grupo Itevelesa and Others [2015] not published vet §61

In those circumstances, the answer to the second question is that the first paragraph of Article 51 TFEU must be interpreted as meaning that *the derogation from the right of establishment contained in that provision does not apply to certification activities carried out by companies classified as certification bodies.*

Case C-593/13 Rina Services and Others [2015] not published vet §22

As regards Article 51 TFEU, in accordance with which *activities based on the exercise of official authority* are excepted from the application of the provisions of the Treaty in the field of freedom of establishment, it should be noted that that exception does not apply to the main proceedings.

That exception is restricted to activities which in themselves are *directly and specifically* connected with the exercise of official authority (Case C-47/08 Commission v Belgium [2011] ECR I-4105, paragraph 85 and the case-law cited).

Case C-327/12 Soa Nazionale Costruttori [2013] not published vet§ 50, 51

Thus, according to settled case-law, the derogation for which that article provides must be *restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority* (see *Reyners, paragraph 45; Case C-42/92 Thijssen [1993] ECR I-4047, paragraph 8; and Case C-283/99 Commission v Italy [2001] ECR I-4363, paragraph 20*), which excludes from being regarded as ‘connected with the exercise of official authority’, within the meaning of that derogation, *functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision* (*Thijssen, paragraph 22; Commission v Austria, paragraph 36; and Commission v Germany, paragraph 38*).

Case C-438/08 Commission v Portugal [2009] ECR I-10219 § 36

As regards the concept of the ‘exercise of official authority’ within the meaning of the first

paragraph of Article 45 EC, the assessment of that concept must take account, in accordance with settled case-law, of the character as European Union law of the limits imposed by that provision on the permitted exceptions to the principle of freedom of establishment, so as to ensure that the *effectiveness of the Treaty in the field of freedom of establishment is not frustrated by unilateral provisions of the Member States* (see, to that effect, *Reyners*, paragraph 50; *Commission v Greece*, paragraph 8; and *Case C-438/08 Commission v Portugal* [2009] ECR I-10219, paragraph 35).

It is also settled case-law that *the first paragraph of Article 45 EC is an exception to the fundamental rule of freedom of establishment*. As such, *the exception must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests it allows the Member States to protect* (*Commission v Greece*, paragraph 7; *Commission v Spain*, paragraph 34; *Case C-451/03 Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45; *Case C-393/05 Commission v Austria* [2007] ECR I-10195, paragraph 35; *Case C-404/05 Commission v Germany* [2007] ECR I-10239, paragraphs 37 and 46; and *Commission v Portugal*, paragraph 34).

In addition, the Court has repeatedly held that the exception in the first paragraph of Article 45 EC must be *restricted to activities which in themselves are directly and specifically connected with the exercise of official authority* (*Reyners*, paragraph 45; *Thijssen*, paragraph 8; *Commission v Spain*, paragraph 35; *Servizi Ausiliari Dottori Commercialisti*, paragraph 46; *Commission v Germany*, paragraph 38; and *Commission v Portugal*, paragraph 36).

In this respect, the Court has had occasion to rule that the exception in the first paragraph of Article 45 EC *does not extend to certain activities that are auxiliary or preparatory to the exercise of official authority* (see, to that effect, *Thijssen*, paragraph 22; *Commission v Spain*, paragraph 38; *Servizi Ausiliari Dottori Commercialisti*, paragraph 47; *Commission v Germany*, paragraph 38; and *Commission v Portugal*, paragraph 36), *or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact* (see, to that effect, *Reyners*, paragraphs 51 and 53), or to certain activities which do not involve the exercise of decision-making powers (see, to that effect, *Thijssen*, paragraphs 21 and 22; *Case C-393/05 Commission v Austria*, paragraphs 36 and 42; *Commission v Germany*, paragraphs 38 and 44; and *Commission v Portugal*, paragraphs 36 and 41), powers of constraint (see, to that effect, *inter alia*, *Commission v Spain*, paragraph 37) or powers of coercion (see, to that effect, *Case C-47/02 Anker and Others* [2003] ECR I-10447, paragraph 61, and *Commission v Portugal*, paragraph 44).

It must be ascertained in the light of the above considerations whether the activities entrusted to notaries in the Belgian legal system involve a direct and specific connection with the exercise of official authority.

[Case C-47/08 - Commission v Belgium](#) [2011] ECR I-4105 § 83, 84, 85, 86, 87

[See also: C-54/08 Commission v Germany](#) [2011] ECR I-4355 §86

[See also: C-53/08 Commission v Austria](#) [2011] ECR I-4309 §84

[See also: C-50/08 Commission v France](#) [2011] ECR I-4195 §86

*Acting in pursuit of an objective in the public interest is not, in itself, sufficient for a particular activity to be regarded as directly and specifically connected with the exercise of official authority*. It is not disputed that activities carried out in the context of various

regulated professions frequently, in the national legal systems, involve an obligation for the persons concerned to pursue such an objective, without falling within the exercise of official authority.

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

As regards the primary argument, it must be remembered that, as a derogation from the fundamental rule of freedom to provide services, Article 55 EC, read in conjunction with the first paragraph of Article 45 EC, must be interpreted in a manner which *limits its scope to what is strictly necessary to safeguard the interests which it allows the Member States to protect* (see, to that effect, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45 and the case-law cited).

Thus, according to settled case-law, derogation under those articles must be restricted to activities which, in themselves, are *directly and specifically connected* with the exercise of official authority (see *Servizi Ausiliari Dottori Commercialisti*, cited above, paragraph 46 and the case-law cited), which excludes from being regarded as connected with the exercise of official authority, within the meaning of that derogation, functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision (*Thijssen*, cited above, paragraph 22).

Secondly, while Regulation No 2092/91 does not preclude the Member States from conferring on *private bodies rights and powers of public authority to carry out their inspection activities*, or even from entrusting to them other activities which, taken in themselves, are directly and specifically connected with the exercise of official authority, it is however clear from the Court's case-law that *the extension of the exception allowed by Articles 45 EC and 55 EC to an entire profession is not possible when the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole* (see, as regards Article 45 EC, *Reyners*, cited above, paragraph 47).

Case C-404/05 Commission v Germany [2007] ECR I-10239§ 37, 38, 47

As regards the primary argument, it must be remembered that, as a derogation from the fundamental rule of freedom to provide services, Article 55 EC, read in conjunction with the first paragraph of Article 45 EC, must be interpreted in a manner which *limits its scope to what is strictly necessary to safeguard the interests which it allows the Member States to protect* (see, to that effect, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45 and the case-law cited).

Thus, according to settled case-law, derogation under those articles must be restricted to activities which, in themselves, are *directly and specifically* connected with the exercise of official authority (see *Servizi Ausiliari Dottori Commercialisti*, cited above, paragraph 46 and the case-law cited), which excludes from being regarded as connected with the exercise of official authority, within the meaning of that derogation, functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision (*Case C-42/92 Thijssen* [1993] ECR I-4047, paragraph 22).

It is therefore apparent that *private bodies carry out their activities under the active supervision of the competent public authority* which, in the final analysis, is responsible for the inspections and decisions of those bodies, as is demonstrated by that authority's obligations noted in the preceding paragraph of the present judgment. That conclusion is also supported by the system of supervision of private bodies put in place by the Law of 1975 on Foodstuffs, which provides that it is the Landeshauptmänner, as the supervisory authorities, who adopt the measures referred to in Article 9(9)(b) of Regulation No 2092/91, since private bodies have, in that field, only the power to propose such measures. *It follows that the auxiliary and preparatory role devolved on private bodies by that regulation vis-à-vis the supervisory authority cannot be regarded as being directly and specifically connected with the exercise of official authority, within the meaning of Article 55 EC, read in conjunction with the first paragraph of Article 45 EC.*

Case C-393/05 Commission v Austria [2007] ECR I-10195 § 35, 36, 42

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

Thus, according to settled case-law, derogation under those articles 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; Case C-42/92 Thijssen [1993] ECR I-4047, paragraph 8; Commission v Spain, paragraph 35; and Case C-283/99 Commission v Italy [2001] ECR I-4363, paragraph 20*).

Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941 § 46

*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).

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 §17, 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).

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).

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*.

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-6717 §34, 35, 36, 37

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*'.

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*.

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*.

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*.

*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*.

*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.*

*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.*

*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.*

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.*

*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 §42, 43, 44, 45, 46, 47, 51, 52, 54, 55

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

It should be borne in mind that since such a concession is of 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. In excluding those undertakings, *that difference in treatment works primarily to their detriment and therefore amounts to indirect discrimination on grounds of nationality, which is, in principle, prohibited by Articles 49 TFEU and 56 TFEU (see, to that effect, ASM Brescia, paragraphs 59 and 60 and the case-law cited).*

Such a measure might, exceptionally, be allowed on one of the grounds set out in Article 52 TFEU or justified by overriding reasons in the public interest, in accordance with the Court's case-law (*see, by analogy, Engelmann, paragraphs 51 and 57 and the case-law cited, and Joined Cases C-357/10 to C-359/10 Duomo Gpa and Others [2012] ECR I-0000, paragraph 39 and the case-law cited*). On this last point, it is clear from a combined reading of paragraphs 51 and 57 of Engelmann that *no distinction need be drawn between objective circumstances and overriding reasons in the public interest. Objective circumstances must, ultimately, be accepted as overriding reasons in the public interest.*

Case C-221/12 Belgacom [2013] not published vet§37,38

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 §52**

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-10219 §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).

**Case C-326/07 Commission v Italy [2009] ECR I-2291 §69,70**

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-1721 §47, 48, 49**

Finally, with regard to the argument of the Spanish Government concerning the closeness between the field of ***private security*** and that of ***public security***, the Court has already held that ***the exception laid down in Article 46(1) EC authorising the Member States to maintain special regimes for foreign nationals justified on grounds of public safety did not apply to the general system for private security undertakings*** (*Commission v Spain*, paragraphs 45 and 46, and Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraphs 28 and 30).

**Case C-514/03 - Commission v Spain [2006] ECR I-963 § 28**

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*).

In this case, the *ship registration scheme* has the effect of restricting the freedom of establishment of shipowners. When shipowner companies wishing to register their ships in the Netherlands do not satisfy the conditions in issue, their only course of action is to ***alter the structure of their share capital or of their boards of directors***; and such changes may entail serious disruption within a company and also require the completion of numerous formalities which have financial consequences. Likewise, shipowners must adjust their recruitment policies in order to ensure that their local representatives are not nationals of a State which is not a Member State of the Community or of the EEA.

In that regard, the Netherlands Government's argument that, unlike a nationality condition linked with a Member State, a condition requiring Community or EEA nationality cannot constitute a 'restriction' for the purposes of Article 43 EC cannot be upheld. In the absence of a harmonised rule valid for the entire Community, a condition of Community or EEA nationality, like a condition of nationality of a specific Member State, may constitute an obstacle to freedom of establishment.

A restriction such as the one in issue ***cannot be justified by grounds of the exercise of effective control and jurisdiction over ships flying the Netherlands flag***. The Netherlands registration scheme is not apt to ensure the attainment of its objectives and goes beyond what is necessary to attain them. It is difficult to imagine how ***the structure of the share capital*** or the boards of directors of the shipowning companies or the nationality of the local representative may affect the exercise of effective control of the ship by the flag State. Those circumstances are not material to the adoption of measures such as the inspection of the ship, the registration of the details concerning it, verification of the qualification and the working conditions of the crew, and also the opening and conduct of an inquiry in the event of an accident or navigation incident on the high seas.

As regards the argument that, in order to ensure effective control, it is necessary to ensure a link with the actual owner (the ultimate beneficiary in the property of the ship), it must be observed that, for the purposes of such a control, it is sufficient to provide that the management of the ship must be carried out from a place of business in the Netherlands by a person with powers of representation (*see, to that effect, Case C-221/89 Factortame and Others [1991] ECR I-3905, paragraph 36*). Thus, the Member State may deal directly with the representative of the shipowner.

**Case C-299/02 Commission v Netherlands [2004] ECR I-9761 § 18, 19, 20, 21, 25**

It should be recalled in that context that, according to settled case-law, ***fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories***. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (*see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 71*).

Since both the Community and its Member States are required to respect fundamental

rights, the *protection of those 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 freedom to provide services* (see, in relation to the free movement of goods, *Schmidberger*, paragraph 74).

However, measures which restrict the freedom to provide services may be justified on *public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures* (see, in relation to the free movement of capital, *Église de Scientologie*, paragraph 18).

Case C-36/02 Omega [2004] ECR I-9609 § 33, 35, 36

Secondly, with regard to the question whether there is an overriding reason based on the general interest which may justify the prohibition, it must be borne in mind that *the protection of public health is one of the reasons cited in Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC) as capable of justifying restrictions on the freedom of establishment*. The provisions of that paragraph apply to the freedom to provide services pursuant to Article 66 of the EC Treaty (now Article 55 EC).

Case C-294/00 Gräbner [2002] ECR I-6515 § 42

However, as the United Kingdom Government and the Commission have correctly pointed out, under the Court's case-law a national authority's use of a public-policy derogation presupposes that there is a *genuine and sufficiently serious threat* affecting one of the fundamental interests of society (see *Joined Cases 115/81 and 116/81 Adoui and Cornuaille* [1982] ECR 1665, paragraph 8, *Case C-348/96 Calfa* [1999] ECR I-11, paragraph 21, and, on the interpretation of the provisions adopted within the context of the association arrangements between the European Economic Community and Turkey, *Case C-340/97 Nazli* [2000] ECR I-957, paragraphs 56 to 61).

Case C-268/99 Janv and Others [2001] ECR I-8615 § 59

Moreover, the right of Member States to restrict the free movement of persons and services on grounds of public policy, public security or public health is not intended to exclude economic sectors such as the *private security sector* from the application of that principle, from the point of view of access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public policy, public security or public health (see *Commission v Spain*, cited above, paragraph 42).

Case C-355/98 Commission v Belgium [2000] ECR I-1221 § 29

*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.

*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.

*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-6717 §44, 45, 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-4695 §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

### 6.1.3 Protection of MS' security (Article 346 TFEU)

In the light of all the foregoing considerations, the answer to the question referred is that Articles 45 TFEU and 49 TFEU must be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings, under which, in the case *of businesses wishing to trade in military weapons and munitions and broker the sale and purchase of such goods, members of their statutory representation bodies, or their managing partner*,

*must hold the nationality of that Member State. It is for the national court, however, to verify whether the Member State which, in order to justify that legislation, relies on the derogation allowed under Article 346(1)(b) TFEU is able to show that such derogation is necessary in order to protect its essential security interests.*

Case C-474/12 Schiel Aircraft [2014] not yet published §39

## 6.2 NON-DISCRIMINATORY MEASURES

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

According to the Court, the exclusion of non-resident companies from such a scheme is justified in view of the need to safeguard the balanced allocation of the power to impose taxes between the Member States. *Since the parent company is at liberty to decide to form a tax entity with its subsidiary and, with equal liberty, to dissolve such an entity from one year to the next, the possibility of including a non-resident subsidiary in the single tax entity would be tantamount to granting the parent company the freedom to choose the tax scheme applicable to the losses of that subsidiary and the place where those losses are taken into account (judgment in X Holding, C-337/08, EU:C:2010:89, paragraphs 31 to 33).*

Case C-386/14 Groupe Steria [2015] not published vet § 26

However, according to the case-law of the Court, such a difference in treatment may be justified by *three overriding reasons in the public interest*, taken together, that is to say, *by the need to preserve the balanced allocation of powers of taxation between the Member States, the need to prevent the double use of losses and the need to combat tax avoidance (see, to that effect, judgments in Marks & Spencer, EU:C:2005:763, paragraph 51; Oy AA, C-231/05, EU:C:2007:439, paragraph 51; and A, C-123/11, EU:C:2013:84, paragraph 46).*

Case C-172/13 Commission v United Kingdom [2015] not published vet §24

*(available only in French)*

S'agissant de *la protection des travailleurs*, la Cour a reconnu qu'elle figure parmi les raisons impérieuses d'intérêt général qui peuvent justifier des restrictions à la liberté d'établissement (voir, notamment, arrêt International Transport Workers' Federation et Finnish Seamen's Union, EU:C:2007:772, point 77 et jurisprudence citée).

En outre, il ressort de la jurisprudence de la Cour que *l'objectif d'assurer la sécurité dans les eaux portuaires constitue également une raison impérieuse d'intérêt général* (arrêt Naftiliaki Etaireia Thasou et Amaltheia I Naftiki Etaireia, EU:C:2011:163, point 45) et que le service de lamanage constitue un service technique nautique essentiel au maintien de la sécurité dans les eaux portuaires, qui présente les caractéristiques d'un service public (arrêt Corsica Ferries France, EU:C:1998:306, point 60).

Case C-576/13 Commission v Spain [2014] not published vet §50, 51

The objective of the regime set out in Book 5 of the Flemish Decree, as a regional planning measure, is thus to *guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population.*



In that regard, it must be noted that such requirements relating to *social housing policy* in a Member State can constitute *overriding reasons in the public interest* and therefore justify restrictions such as those established by the Flemish Decree (*see Woningstichting Sint Servatius, paragraphs 29 and 30, and Case C-400/08 Commission v Spain [2011] ECR I-1915, paragraph 74*).

**Case C-197/11 Libert and Others [2013] not published yet § 51, 52**

Such overriding reasons recognised by the Court include: *environmental protection* (see, inter alia, Case C-384/08 Attanasio Group [2010] ECR I-0000, paragraph 50 and the case-law cited); *town and country planning* (see, by analogy, Case C-567/07 Woningstichting Sint Servatius [2009] ECR I-9021, paragraph 29 and the case-law cited); and *consumer protection* (see, inter alia, Case C-260/04 Commission v Italy [2007] ECR I-7083, paragraph 27 and the case-law cited). On the other hand, *purely economic objectives cannot constitute an overriding reason in the public interest* (see, to that effect, inter alia, Case C-96/08 CIBA [2010] ECR I-0000, paragraph 48 and the case-law cited).

**Case C-400/08 Commission v Spain [2011] ECR I-1915 § 74**

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-384/08 Attanasio [2010] ECR I-2055 §50**

The Court has thus acknowledged in particular that, in *the area of games and bets*, excesses in which have damaging social consequences, *national regulations seeking to prevent the stimulation of demand by limiting the human passion for gambling could be justified* (*Schindler, paragraphs 57 and 58; Läärä and Others, paragraphs 32 and 33; and Zenatti, paragraphs 30 and 31*).

**Case C-316/07 Stoß [2010] ECR I-8069 § 75**

Those Governments take the view that the justification for such rules in the light of Community law may be based, first, *on the need to preserve the allocation of the power to impose taxes between the Member States concerned and, secondly, on the need to prevent the danger that losses may be taken into account twice*.

As regards the first of these justifications, it should be noted that the preservation of the allocation of the power to impose taxes between Member States may make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses (*see Marks & Spencer, paragraph 45, and Case C-231/05 Oy AA [2007] ECR I-6373, paragraph 54*).

To give companies the right to elect to have their losses taken into account in the Member State in which they are established or in another Member State would seriously undermine

a balanced allocation of the power to impose taxes between the Member States, since the tax base would be increased in the first State, and reduced in the second, by the amount of the losses surrendered (see *Marks & Spencer*, paragraph 46, and *Oy AA*, paragraph 55).

**C-414/06 Lidl Belgium [2008] ECR I-3601 § 30, 31, 32**

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-10517 §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-519 § 60,

Case C-438/08 Commission v Portugal [2009] ECR I-10219 § 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).

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 § 23, 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

To justify the restriction on freedom of establishment resulting from the prohibition at issue, the French Government prayed in aid both the protection of consumers and the encouragement of medium and long-term saving.

Case C-442/02 - CaixaBank France [2004] ECR I-8961 § 19

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).

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 §17, 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*.

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-4695 §28, 29

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 I-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

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.*

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 §12, 15

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

In the present case, the national legislation at issue in the main proceedings makes the issue of *prior administrative authorisation* subject to conditions under which the centres of a single undertaking or group of undertakings must comply with *certain minimum distances* and must not hold a *market share in excess of 50%*.

In the light of the foregoing considerations, the answer to the third and fourth questions is that Article 49 TFEU must be interpreted as *precluding national legislation*, such as that at issue in the main proceedings, which makes the authorisation for an undertaking or group of undertakings to open a *vehicle roadworthiness testing centre* subject to the condition, first, that there is a minimum distance between that centre and centres belonging to that undertaking or group of undertakings which are already authorised and, secondly, that that

undertaking or group of undertakings will, if such an authorisation is granted, not hold a market share in excess of 50%, *unless it is established that that condition is genuinely appropriate in order to achieve the objectives of consumer protection and road safety and does not go beyond what is necessary for that purpose, these being matters for the referring court to determine.*

Case C-168/14 Grupo Itevelesa and Others [2015] not published yet §68, 84

As regards public contracts, it is the concern of the European Union, in relation to the freedom of establishment and the freedom to provide services, to ensure the widest possible participation by tenderers in a call for tenders (see, to that effect, CoNISMa, C-305/08, EU:C:2009:807, paragraph 37). The application of a provision which excludes persons who have committed serious infringements of national rules governing social security contributions from participating in procedures for the award of public works contracts, such as Article 38(1)(i) of Legislative Decree No 163/2006, may compromise the widest possible participation by tenderers in a call for tenders.

In the light of all the foregoing considerations, the answer to the question referred is that Articles 49 TFEU and 56 TFEU and the principle of proportionality must be interpreted as *not precluding national legislation which, with regard to public works contracts the value of which is below the threshold laid down in Article 7(c) of Directive 2004/18, requires the contracting authorities to exclude from the award procedure for such a contract a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed.*

Case C-358/12 Consorzio Stabile Libor Lavori Pubblici [2014] not published yet §29, 41

Therefore, a provision of a Member State, such as Paragraph 33(5) of the ligningsloven, which provides, in the event that a resident company transfers to a non-resident company in the same group a permanent establishment situated in another Member State or in another State that is party to the EEA Agreement, for the reincorporation of the losses previously deducted in respect of the establishment transferred *goes beyond what is necessary to attain the objective relating to the need to safeguard the balanced allocation of the power to impose taxes if the first Member State taxes the profits made in respect of that establishment before its transfer, including those resulting from the gain made upon the transfer.*

Case C-48/13 Nordea Bank [2014] not published yet § 36

In view of the above, it must be held that national legislation, such as that at issue in the main proceedings, which imposes on SOAs *minimum tariffs for certification services* offered to undertakings seeking to participate in procedures for the award of public works contracts, *constitutes a restriction of the freedom of establishment* within the meaning of Article 49 TFEU, but that such legislation is suitable for attaining the objective of protecting the recipients of those services. It is for the referring court to determine whether, in the light of, inter alia, the method of calculating the minimum tariffs, particularly in the light of the number of categories of work for which the certificate is drawn up, that national legislation goes beyond what is necessary to attain that objective.

Case C-327/12 Soa Nazionale Costruttori [2013] not published yet §69

In that regard, it must be noted that such requirements relating to *social housing policy* in a

Member State *can constitute overriding reasons in the public interest* and therefore justify restrictions such as those established by the Flemish Decree (see *Woningstichting Sint Servatius, paragraphs 29 and 30, and Case C-400/08 Commission v Spain [2011] ECR I-1915, paragraph 74*).

However, it is also important to establish whether the existence of a ‘*sufficient connection*’ with the target commune in question constitutes a necessary and appropriate measure to attain the objective put forward by the Vlaamse Regering, as referred to in paragraphs 50 and 51 above.

In that regard, it is relevant that Article 5.2.1(2) of the Flemish Decree sets out three conditions, any one of which is to be met and compliance with which must be verified as a matter of course by the provincial assessment committee in order to establish whether the requirement for a ‘sufficient connection’ between the prospective buyer or tenant and the target commune is satisfied. The first condition is the requirement that a person to whom the immovable property is to be transferred has been resident in the target commune or a neighbouring commune for at least six consecutive years prior to the transfer. In accordance with the second condition, the prospective buyer or tenant must, at the date of the transfer, carry out activities in the commune in question which occupy on average at least half a working week. The third condition requires the prospective buyer or tenant to have a professional, family, social or economic connection with the commune in question as a result of a significant circumstance of long duration.

However, as the Advocate General has noted in point 37 of his Opinion, *none of those conditions directly reflects the socio-economic aspects relating to the objective* put forward by the Vlaamse Regering of protecting exclusively the less affluent local population on the property market. Such conditions may be met not only by the less affluent local population but also by other persons with sufficient resources who, consequently, have no specific need for social protection on the property market. *Those conditions thus go beyond what is necessary to attain the objective pursued.*

In addition, it should be noted that *less restrictive measures* other than those set out in the Flemish Decree *could meet the objective pursued* without necessarily resulting in a de facto prohibition on purchasing or leasing by any prospective buyer or tenant who does not fulfil the aforementioned conditions. Provision could, for example, be made for subsidies for purchase or other subsidy mechanisms specifically designed to assist less affluent persons, in particular those who are able to prove that they have a low income, to purchase or rent immovable property in the target communes.

**Case C-197/11 Libert and Others [2013] not published yet § 52, 53, 54, 55, 56**

Unlike pharmacists, non-pharmacists by definition lack training, experience and responsibility equivalent to those of pharmacists. Accordingly, they do not provide the same safeguards as pharmacists.

A Member State may therefore take the view, in the exercise of its discretion referred to in paragraph 36 of the present judgment, that, unlike the case of a pharmacy operated by a pharmacist, the operation of a pharmacy by a non-pharmacist may represent a risk to public health, in particular to the reliability and quality of the supply of medicinal products at retail level, because the pursuit of profit in the course of such operation does not involve moderating factors such as those, noted in paragraph 61 of the present judgment, which

characterise the activity of pharmacists (*see by analogy, with regard to the provision of social welfare services, Case C-70/95 Sodemare and Others [1997] ECR I-3395, paragraph 32*).

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).

However, having regard to the discretion which the Member States are allowed, as referred to in paragraph 36 of the present judgment, a Member State may take the view that there is a risk that legislative rules designed to ensure the professional independence of pharmacists would not be observed in practice, given that the interest of a non-pharmacist in making a profit would not be tempered in a manner equivalent to that of self-employed pharmacists and that the fact that pharmacists, when employees, work under an operator could make it difficult for them to oppose instructions given by him.

Nor, contrary to the Commission's submissions, can the risks to the independence of the profession of pharmacist be excluded with the same effectiveness by the means consisting in the imposition of an obligation to take out insurance, such as ***insurance*** for vicarious civil liability. ***While that measure might enable the patient to obtain financial reparation for any harm suffered by him, it operates after the event and would be less effective than the rule excluding non-pharmacists in that it would not in any way prevent the operator concerned from exerting influence over the employed pharmacists.***

Case C-531/06 Commission v Italy [2009] ECR I-4103 §62, 63, 66, 84, 86

Moreover, the Court has already held that ***national legislation under which the pursuit of an activity is subject to a condition linked to the economic or social need for that activity constitutes a restriction in that it tends to limit the number of providers of services*** (*see, to that effect, Case C-63/99 Gloszczuk [2001] ECR I-6369, paragraph 59, and Case C-255/04 Commission v France [2006] ECR I-5251, paragraph 29*).

In those circumstances, it must be concluded that the national legislation at issue in the main proceedings (*requires prior authorisation based on an assessment of the needs of the market for setting up and operating new independent outpatient dental clinics, whatever their size; however, the setting up of new group practices is not subject to any system of authorisation, regardless of their size*) does not pursue the stated objectives in a consistent and systematic manner, since it does not make the setting up of group practices subject to a system of prior authorisation, as is the case with new outpatient dental clinics.

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 I-1721 §36, 63, 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

(...) 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-384/08 Attanasio [2010] ECR I-02055 §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

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.

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.

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 §28, 30, 31

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***.

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.

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 §35, 36, 38**

It submits, first, that the prohibition at issue in the main proceedings is necessary for maintaining the provision of basic banking services without charge. Introducing remuneration for sight accounts would substantially increase the operating costs of banks, which, to recover those costs, would increase charges and introduce charges for the various banking services currently provided free, in particular the issuing of cheques.

It must be observed, however, that while the *protection of consumers* is among the overriding requirements that can justify restrictions on a fundamental freedom guaranteed by the EC Treaty, the prohibition at issue in the main proceedings, even supposing that it ultimately presents certain benefits for the consumer, constitutes a measure *which goes beyond what is necessary to attain that objective*.

Even supposing that removing the prohibition of paying remuneration on sight accounts necessarily entails for consumers an increase in the cost of basic banking services or a charge for cheques, the possibility might be envisaged inter alia of allowing consumers to choose between an unremunerated sight account with certain basic banking services remaining free of charge and a remunerated sight account with the credit institution being able to make charges for banking services previously provided free, such as the issuing of cheques.

As regards, next, the French authorities' concern to encourage long-term saving, it must be observed that, while the *prohibition of remuneration on sight accounts* is indeed suitable for encouraging medium and long-term saving, it nevertheless remains a measure which *goes beyond what is necessary to attain that objective*.

**Case C-442/02 CaixaBank France [2004] ECR I-8961 § 20, 21, 22, 23**

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).

Having regard to the foregoing, it must be held that, by adopting and maintaining in its legislation Article 311 of the *Wetboek van Koophandel* and Article 8:169 of the *Burgerlijk Wetboek*, under which certain conditions are fixed concerning:

- the *nationality of the shareholders* of companies owning seagoing ships which they wish to register in the Netherlands;
- the *nationality of the directors* of companies owning seagoing ships which those

companies wish to register in the Netherlands;

- *the nationality of the natural persons responsible for the day-to-day management* of the place of business from which the shipping business which is necessary for registration of a ship in the Netherlands registers is carried out in the Netherlands;
- the *nationality of the directors* of shipping companies owning seagoing ships registered in the Netherlands; and
- the *residence of the directors* of shipping companies owning seagoing ships registered in the Netherlands,

the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 43 EC and 48 EC.

Case C-299/02 Commission v Netherlands [2004] ECR I-9761 §18, 39

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).

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.

As Community law stands at present and contrary to the Commission's submission, the aims pursued by the second condition would not be attained if, in order to ascertain the constituent amounts of the basis of assessment, the Luxembourg authorities had to refer to accounts kept by the non-resident taxpayer pursuant to another Member State's rules.

Case C-250/95 Futura & Singer [1997] ECR I-2471 §26, 31, 32

According to the 14th recital in the preamble to the Directive, the Parliament and the Council chose to avoid, from the very beginning, *any market disturbance resulting from the offer by branches of some credit institutions of higher cover than that offered by credit institutions authorized by the host Member State*. Since the possibility of such a disturbance could not be wholly ruled out, it follows that the Community legislature has shown to the requisite legal standard that it was pursuing a legitimate objective. Moreover, the restriction constituted by the export prohibition on the activities of the credit institutions concerned is *not manifestly disproportionate*.

Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405 §57

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).

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 für Justiz, Bundesund Europaangelegenheiten Baden-Württemberg* [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 §37, 38

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).

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.

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 §32, 36, 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

The question raised by the Supreme Court of Ireland seeks to ascertain, however, whether, having regard to the rules laid down in the Treaty, nationals of other Member States who have exercised their right of establishment in Ireland under Article 52 of the Treaty by participating in the formation of a company within the meaning of Article 58 of the Treaty can be required to meet a *residence requirement*.

That question must be answered in the affirmative if the obligation to reside on or near land is imposed by a Member State, within the framework of legislation concerning the ownership of rural land which is intended to achieve the objectives set out above, both on its own nationals and on those of the other Member States and is applied to them equally. A *residence requirement so delimited does not in fact amount to discrimination which might be found to offend against Article 52 of the Treaty*.

Case C-182/83 Fearon v Irish Land Commission [1984] ECR 3677 § 9, 10

### 6.3 MEASURES AIMING TO PROHIBIT THE CIRCUMVENTION OF NATIONAL RULES

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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-7995 § 37, 50

*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 *Knoods*, cited above, paragraph 25).

***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 §34, 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

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### 7.1 INTERPRETATION OF ARTICLE 49 TFEU AS A ‘FUNDAMENTAL’ PRINCIPLE OF EUROPEAN UNION LAW

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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

Finally, the Italian Government cannot plead failure to respect the *principle of reciprocity* or rely on a possible infringement of the Treaty by another Member State to justify its own default (see the judgments in Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 9, and Case 325/82 *Commission v Germany* [1984] ECR 777, paragraph 11).

Case C- 101/94 Commission v Italy [1996] ECR I-02691 § 27



*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).

*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).

*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.*

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 §28, 29, 30, 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.

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 §13, 22

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

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 §24, 43

## **7.2 DIRECT APPLICABILITY OF ARTICLE 49 TFEU**

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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

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-2/74 Reyners [1974] ECR 631 §26

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 Reyners [1974] ECR 631 §30

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

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.***

***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.

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 § 10, 12, 13, 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**

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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-3 58/98 *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-5701 § 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 disappplied 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-4695 §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.*

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 §24, 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.

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 §11, 14

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

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

However, the fact remains that, according to established case-law, the right to *a refund of charges levied* in a Member State in breach of rules of Community law is the consequence and complement of the rights conferred on individuals by Community provisions as interpreted by the Court (see, inter alia, Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12, and *Metallgesellschaft and Others*, paragraph 84). *The Member State is therefore required in principle to repay charges levied in breach of Community law* (*Joined Cases C-192/95 to C-218/95 Comateb and Others* [1997] ECR I-165, paragraph 20, and *Metallgesellschaft and Others*, paragraph 84).

Case C-446/04 Test Claimants in the FII Group Litigation [2006] ECR I-11753 §202

Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 234 EC a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.

Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have *the possibility of obtaining*

***redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance*** (see in that connection *Brasserie du Pêcheur and Factortame*, cited above, paragraph 35).

However, it should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.

It follows that ***the principle of res judicata does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.***

It may also be noted that, in the same connection, the ECHR and, more particularly, Article 41 thereof enables the European Court of Human Rights to order a State which has infringed a fundamental right to provide reparation of the damage resulting from that conduct for the injured party. The case-law of that court shows that such reparation may also be granted when the infringement stems from a decision of a national court adjudicating at last instance (see ECt.HR, *Dulaurans v France*, 21 March 2000, not yet published).

As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: ***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 incumbent on the State and the loss or damage sustained by the injured parties*** (*Haim*, cited above, paragraph 36).

**C-224/01 Köbler [2003] ECR I-10239 § 35, 36, 39, 40, 49, 51**

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**

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. 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.*

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 §20, 22, 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

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.*

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.*

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.



*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.*

*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 [1991] ECR I-1029 §33, 52, 53, 66, 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 & Volpiv 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.*

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.*

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.*

*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 §55, 56, 57, 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)

In the absence of Community rules on the refund of national charges levied though not due, it is *for the domestic legal system of each Member State to* designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that *such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)* (see, inter alia, Case 33/76 Rewe [1976] ECR 1989, paragraph 5, and Case 45/76 Comet [1976] ECR 2043, paragraphs 13 and 16; and, more recently, Case C-231/96 Edis [1998] ECR I-4951, paragraphs 19 and 34; Case C-343/96 Dilexport [1999] ECR I-579, paragraph 25; and Metallgesellschaft and Others, paragraph 85).

Case C-446/04 Test Claimants in the FII Group Litigation [2006] ECR I-11753 §203

According to settled case-law, *in the absence of Community legislation*, it is for the *internal legal order* of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 33/76 Rewe [1976] ECR 1989, paragraph 5; Case 45/76 Comet [1976] ECR 2043, paragraph 13; Case 68/79 Just [1980] ECR 501, paragraph 25; Frankovich and Others, cited above, paragraph 42, and Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12).

In the light of all the foregoing, the reply to the first and second questions must be that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where *the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties*. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.

C-224/01 Köbler [2003] ECR I-10239 § 46, 59

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.

Accordingly, thereply 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 §§3, 96

## 8 – PROCEDURAL GUARANTIES IN CONNECTION WITH RESTRICTIONS

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

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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*.

*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 §16, 17

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

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In the present case, the main proceedings concern the *penalty imposed for failure to comply with the disclosure obligation*, as laid down in the Eleventh Directive. As can be seen from paragraph 49 above, the EU legislature, by Article 12 of the Eleventh Directive, *left the Member States responsible for determining the appropriate penalties* – that is to say, penalties which are effective, proportionate and dissuasive – in order to ensure compliance with the disclosure obligation. In Austrian law, those penalties are laid down by Paragraph 283 of the UGB, as amended by the BBG.

It follows that the Austrian legislation at issue in the main proceedings constitutes a case of the ‘implementing of Union law’, for the purposes of Article 51(1) of the Charter.

### Case C-418/11 Texdata Software [2013] not published yet § 74, 75

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).

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 §40. 42

## 9 - SPECIFIC QUESTIONS

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### 9.1 RELATION TO OTHER PRIMARY LAW

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#### 9.1.1 Article 4(3) TEU<sup>9</sup>

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.*

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.*

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-4695 §32, 33, 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

#### 9.1.2 Article 18 TFEU<sup>10</sup>

A national procedural rule, such as the one described above, is liable to affect the economic

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<sup>9</sup> See the table of equivalences (Article 10 TEC/5 EC)

<sup>10</sup> See the table of equivalences (Article 12 TEC / Article 6 EC)

activity of traders from other Member States on the market of the State in question. Although it is, as such, not intended to regulate an activity of a commercial nature, it has the effect of placing such traders in a less advantageous position than nationals of that State as regards access to its courts. ***Since Community law guarantees such traders free movement of goods and services in the common market, it is a corollary of those freedoms that they must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of a Member State in the same way as nationals of that State.***

As the Court held in Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 27, national legislative provisions which fall within the scope of application of the Treaty are, by reason of their effects on intra-Community trade in goods and services, necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article 6 of the Treaty, without there being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty.

**Case C-43/95 *Data Delecta Aktiebolag and Forsberg* [1996] ECR I-4661 § 13, 14**

***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).

***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 § 20, 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'***.

*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 §15, 16

### 9.1.3 Article 21(1) TFEU<sup>11</sup>

Moreover, while Article 45(3)(d) TFEU and Article 17(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) **provide for a right of a person, after ceasing work, to stay in the Member State to which he moved for the purpose of working there**, it follows from the case-law that **a person who has carried out all his occupational activity in the Member State of which he is a national and has exercised the right to reside in another Member State only after his retirement, without any intention of working in that other State, cannot rely on the principle of freedom of movement for workers** (Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 16, and Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 52).

Case C-345/09 van Delft and Others [2010] ECR I-9879 § 90

A situation such as that of Mr Rüffler is covered by the right of **free movement and residence in the Member States of citizens of the European Union**. Persons who, **after retirement**, leave the Member State of which they are nationals and in which they have carried out all their occupational activity in order to set up residence in another Member State exercise the right which Article 18(1) EC confers on every citizen of the European Union to move and reside freely within the territory of the Member States (see, to that effect, *Turpeinen*, paragraphs 16 to 19).

Case C-544/07 Rüffler [2009] ECR I-3389 §56

However, as the Advocate General observed in point 60 of his Opinion, persons who have carried out all their occupational activity in the Member State of which they are **nationals and who have exercised the right to reside in another Member State only after their retirement, without any intention of working in that State, cannot rely on the freedom of movement guaranteed by Article 39 EC**. It appears that that is Ms *Turpeinen's* situation, having regard to the facts in the main proceedings as set out in the order for reference.

Since the main case is not covered by Article 39 EC, it is appropriate to rule on the applicability of Article 18 EC.

According to settled case-law, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (see, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 16).

<sup>11</sup> See the table of equivalences (Article 18 TEC / Article 8A EC)



Situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (*see, in particular, Grzelczyk, paragraph 33, and Pusa, paragraph 17*).

Case C-520/04 Turpeinen [2006] ECR I-10685 § 16, 17, 18, 19

*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

#### 9.1.4 Article 50 TFEU<sup>12</sup>

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*.

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.

Consequently *the term 'others'*, as contemplated in Article 54(3)(g) of the Treaty *cannot be limited merely to creditors* of the company.

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 §18, 19, 20, 21

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

*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

<sup>12</sup> See the table of equivalences (Article 44 TEC / Article 54 EC)

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.

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 Reyners [1974] ECR 631 §13, 32

### 9.1.5 Article 53 TFEU<sup>13</sup>

Lastly, the foregoing reasoning is fully supported by a teleological interpretation of the Directive. It is apparent from the 3rd and 13th recitals in the preamble to the Directive that its primary objective is to make it easier for persons holding diplomas awarded in a Member State to take up corresponding professional activities in the other Member States and to strengthen the right of European nationals to utilise their professional expertise in any Member State. The Court also notes that the Directive was adopted on the basis of Article 57(1) of the EC Treaty (now, after amendment, Article 47(1) EC). It is apparent from the wording of the latter provision that the purpose of directives such as the one at issue in the present proceedings is to facilitate the mutual recognition of diplomas, certificates and other evidence of formal qualifications by laying down rules and common criteria which result, as far as possible, in *automatic recognition of those diplomas, certificates and other evidence of formal qualifications*. However, it is not the purpose of those directives to make recognition of such diplomas, certificates and other evidence of formal qualifications more difficult in situations falling outside their scope, nor may they have such an effect (Case C-31/00 Dreessen [2002] ECR I-663, paragraph 26).

Case C-330/03 Colegio [2006] ECR I-801 §23

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*

<sup>13</sup> See the table of equivalences (Article 47 TEC / Article 57 EC)

*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.*

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.

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 §11, 12, 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.*

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 §20, 21

#### 9.1.6 Article 54 TFEU<sup>14</sup>

In that connection, it should be recalled that Article 49 TFEU requires the elimination of restrictions of the freedom of establishment. Under Article 54 TFEU, 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 Union are, for the purposes of the Treaty provisions relating to the freedom of establishment, to be treated in the same way as natural persons who are nationals of Member States. For those companies, *that freedom entails the right to exercise their activity in other Member States through a*

<sup>14</sup> See the table of equivalences (Article 48 TEC / Article 58 EC)

*subsidiary, a branch or an agency* (see Case C-337/08 X Holding [2010] ECR I-1215, paragraph 17, and judgment of 25 April 2013 in Case C-64/11 Commission v Spain, not published in the ECR, paragraph 23).

**Case C-418/11 Texdata Software [2013] not published yet § 63**

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 § 45**

The Court added, in paragraph 21 of *Daily Mail and General Trust*, that the EEC Treaty had taken account of that variety in national legislation. In defining, in Article 58 of that Treaty (later Article 58 of the EC Treaty, now Article 48 EC), *the companies which enjoy the right of establishment, the EEC Treaty placed on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company.*

In Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 70, the Court, whilst confirming those dicta, inferred from them that the question whether a company formed in accordance with the legislation of one Member State can transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation, and, in certain circumstances, the rules relating to that transfer, are determined by the national law in accordance with which the company was incorporated. The Court concluded that a Member State is able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that Member State subject to restrictions on the transfer to a foreign country of the company's actual centre of administration.

It should be pointed out, moreover, that the Court also reached that conclusion on the basis of the wording of Article 58 of the EEC Treaty. In defining, in that article, the companies which enjoy the right of establishment, the EEC Treaty regarded the differences in the legislation of the various Member States both as regards the required connecting factor for companies subject to that legislation and as regards the question whether — and, if so, how — the registered office (*siège statutaire*) or real seat (*siège réel*) 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 which must be dealt with by future legislation or conventions (see, to that effect, *Daily Mail and General Trust*, paragraphs 21 to 23, and *Überseering*, paragraph 69).

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.

Nevertheless, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved.

In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, cannot, in particular, *justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State*, to the extent that it is permitted under that law to do so.

Such a barrier to the actual conversion of such a company, without prior winding-up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate *constitutes a restriction on the freedom of establishment of the company concerned* which, unless it serves overriding requirements in the public interest, is prohibited under Article 43 EC (see to that effect, inter alia, CaixaBank France, paragraphs 11 and 17).

In the light of all the foregoing, the answer to the fourth question must be that, as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as *not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation*.

Case C-210/06 Cartesio [2008] ECR I-9641 § 106, 107, 108, 109, 110, 111, 112, 113, 124

Thus, despite the general terms in which paragraph 23 of Daily Mail and General Trust is cast, the Court did not intend to recognise a Member State as having the power, vis-à-vis companies validly incorporated in other Member States and found by it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law.

There are, therefore, no grounds for concluding from Daily Mail and General Trust that, where a company formed in accordance with the law of one Member State and with legal personality in that State exercises its freedom of establishment in another Member State, *the question of recognition of its legal capacity and its capacity to be a party to legal proceedings in the Member State of establishment falls outside the scope of the Treaty provisions on freedom of establishment, even when the company is found, under the law of the Member State of establishment, to have moved its actual centre of administration to that State*.

Case C-208/00 Überseering BV [2002] ECR I-9919 § 72, 73

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.

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 §25, 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.

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.*

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 § 21, 23, 24

### 9.1.7 Article 56 TFEU<sup>15</sup>

See Section 2.2 on Permanent Activity (of a stable and continuous nature).

<sup>15</sup> See the table of equivalences (Article 49 TEC / Article 59 EC)



### 9.1.8 Article 63 TFEU<sup>16</sup>

National legislation intended to apply only to those shareholdings which enable the holder to *exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment* (judgments in Test Claimants in the FII Group Litigation, C-35/11, EU:C:2012:707, paragraph 91 and the case-law cited and Hervis Sport- és Divatkereskedelmi, C-385/12, EU:C:2014:47, paragraph 22).

On the other hand, national provisions which apply to *shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital* (judgment in Test Claimants in the FII Group Litigation, C-35/11, EU:C:2012:707, paragraph 92 and the case-law cited).

Case C-686/13 X AB [2015] not published vet§18,19

National legislation intended to apply only to those shareholdings which enable the holder to exert a *definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment* (see Test Claimants in the FII Group Litigation, paragraph 37; Case C-81/09 Idrima Tipou [2010] ECR I-10161, paragraph 47; Accor, paragraph 32; and Case C-31/11 Scheunemann [2012] ECR, paragraph 23).

Case C-35/11 Test Claimants in the FII Group Litigation [2012] not published vet§ 91

As regards the Treaty chapter on freedom of establishment, it does not contain any provision which extends the scope of that chapter to cover situations concerning a *shareholding in a company which has its registered office in a third country* (see, to that effect, Case C-102/05 A and B [2007] ECR I-3871, paragraph 29, and Case C-157/05 Holböck [2007] ECR I-4051, paragraph 28) and, as it is, the case before the referring court concerns a shareholding in a capital company which has its registered office in Canada.

Accordingly, Article 49 TFEU et seq. does not apply in a situation such as that at issue in the case before the referring court.

Case C-31/11 Scheunemann [2012] not published yet §33, 34

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-6817 § 78, 80

<sup>16</sup> See the table of equivalences (Article 56 TEC / Article 73b EC)

Case C-543/08 Commission v Portugal [2010] ECR I-11241 § 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-2055 §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-2291 §33, 34, 35, 36, 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-3601 §16

Since that legislation applies to payments of dividends to shareholder companies irrespective of the size of their holding, it is capable of coming under both Article 43 EC on the freedom of establishment and Article 56 EC on the free movement of capital.

However, to the extent to which the holdings in question confer on their owner a *definite influence over the decisions of the companies concerned and allow it to determine their activities, it is the provisions of the Treaty relating to freedom of establishment which apply*. The facts of the test cases in the main proceedings indicate that consideration of the national legislation at issue in the main proceedings should be approached first from the point of view of Article 43 EC (see paragraph 37 of this judgment).

Case C-446/04 Test Claimants in the FII Group Litigation [2006] ECR I-11753 §80, 81

However, in order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured *a permanent presence in the host Member State* and, where *immovable property is purchased and held, that that property should be actively managed* (*Centro di Musicologia Walter Stauffer*, paragraph 19).

Consequently, it must be concluded that the provisions governing freedom of establishment cannot as a general rule be applied in circumstances such as those set out in the order of reference.

Case C-451/05 ELISA [2007] ECR I-8251 §64, 66

It should be recalled at the outset that *the right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary of freedom of establishment*, as is apparent from Article 44(2)(e) EC (Case 305/87 *Commission v Greece* [1989] ECR 1461, paragraph 22), generates capital movements when it is exercised (Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 29).

As is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), *capital movements include investments in real estate on the territory of a Member State by non-residents*. That nomenclature still has the same indicative value for the purposes of defining the

notion of capital movements (see Case C-222/97 Trummer and Mayer [1999] ECR I-1661, paragraph 21; Case C-464/98 Stefan [2001] ECR I-173, paragraph 5; Reisch and Others, paragraph 30; and Case C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-0000, paragraph 22).

It must thus be examined whether national legislation such as that at issue in the main proceedings constitutes a restriction on capital movements. In that regard, it follows from settled case-law that the measures prohibited by Article 56(1) EC, as restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents to do so in other States (see, to that effect, Case C-513/03 Van Hilten-van der Heijden [2006] ECR I-1957, paragraph 44).

**Case C-370/05 Festersen [2007] ECR I-1129 § 22, 23, 24**

As the list of 'direct investments' in the first section of that nomenclature and the relative explanatory notes show, the concept of direct investments concerns investments of any kind undertaken by natural or legal persons and 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 (*see, to that effect, Test Claimants in the FII Group Litigation, paragraphs 180 and 181*).

**Case C-157/05 Holböck [2007] ECR I-4051 § 34**

In the light of the foregoing, the answer to the questions referred must be that a national measure in accordance with which the *loan interest paid by a resident capital company to a non-resident shareholder* who has a substantial holding in the capital of that company is, under certain conditions, regarded as a *covert distribution of profits*, taxable in the hands of the resident borrowing company, primarily affects freedom of establishment within the meaning of Article 43 EC et seq. Those provisions cannot be relied on in a situation involving a company in a non-member country.

**Case C-492/04 Lasertec [2007] ECR I-3775 §28**

However, in order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured *a permanent presence* in the host Member State and, where *immovable property* is purchased and held, that property should be *actively managed*. It is clear from the account provided by the national court that the foundation does not have any premises in Germany for the purposes of pursuing its activities and that the services ancillary to the letting of the property are provided by a German property management agent.

It must therefore be concluded that the provisions governing freedom of establishment are not applicable in circumstances such as those in the dispute in the main proceedings.

**Case C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-8203 § 19, 20**

It must therefore be held that, by maintaining in force the provisions limiting the possibility of acquiring voting shares in BAA as well as the procedure requiring consent to the disposal of the company's assets, to control of its subsidiaries and to winding-up, the United Kingdom has failed to fulfil its obligations under Article 56 EC.

In that regard, it is appropriate to point out that in so far as the rules in question 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 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.

Case C-98/01 Commission v United Kingdom [2003] ECR I-4641 § 50, 52

It is clear from the second paragraph of Article 52 of the Treaty that freedom of establishment includes the right to set up and manage undertakings, in particular companies or firms, in a Member State by a national of another Member State. So, a national of a Member State who has a *holding* in the capital of a company established in another Member State which gives him *definite influence* over the company's decisions and allows him to determine its activities is exercising his right of establishment.

Case C-251/98 Baars [2000] ECR I-2787 § 22

### 9.1.9 Article 106 TFEU<sup>17</sup>

Having regard to the foregoing considerations, it must be held that Articles 101 TFEU, 102 TFEU and 106 TFEU must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which imposes on SOAs a *scheme of compulsory minimum tariffs for certification services* supplied to undertakings seeking to participate in procedures for the award of public works contracts.

In view of the above, it must be held that national legislation, such as that at issue in the main proceedings, which imposes on SOAs minimum tariffs for certification services offered to undertakings seeking to participate in procedures for the award of public works contracts, constitutes a *restriction of the freedom of establishment* within the meaning of Article 49 TFEU, but that such legislation is *suitable for attaining the objective* of protecting the recipients of those services. It is for the referring court to determine whether, in the light of, inter alia, the method of calculating the minimum tariffs, particularly in the light of the number of categories of work for which the certificate is drawn up, that national legislation goes beyond what is necessary to attain that objective.

Case C-327/12 Soa Nazionale Costruttori [2013] not published yet § 44, 69

[...] 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

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<sup>17</sup> See the table of equivalences (Article 86 TEC / Article 90 EC)

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-5641 §61, 62, 63, 64, 71, 72

#### 9.1.10 Charter of Fundamental Rights

It should also be remembered that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law (Case C-617/10 Åkerberg Fransson EU:C:2013:105, paragraph 17).

That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it. According to those explanations, *'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'* (Åkerberg Fransson EU:C:2013:105, paragraph 20).

*It follows that, where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction* (see, to that effect, the order in Case C-466/11 Currà and Others EU:C:2012:465, paragraph 26, and Åkerberg Fransson EU:C:2013:105, paragraph 22).

These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see Case C-400/10 PPU McB. EU:C:2010:582, paragraph 51; Case C-256/11 Dereci and Others EU:C:2011:734, paragraph 71; and Åkerberg Fransson EU:C:2013:105, paragraph 23).

Case C-483/12 Pelckmans Turnhout [2014] not published yet § 17, 19, 20, 21

Under Article 52(1) of the Charter, for such a limitation to be admissible, it must be provided for by law and respect the essence of those rights and freedoms. Furthermore, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

As the Advocate General states in points 63 to 70 of her Opinion, in circumstances such as those at issue in the main proceedings, *an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter.*

Case C-390/12 Pflieger and Others [2014] not published vet §58, 59

In the light of all the foregoing considerations, the answer to the question referred is that, subject to the verifications to be carried out by the referring court, Articles 49 TFEU and 54 TFEU, the principles of effective judicial protection and respect for the rights of the defence, and Article 12 of the Eleventh Directive are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that, where the statutory nine-month period for disclosing accounting documents is exceeded, a minimum periodic penalty of EUR 700 is to be imposed immediately on the capital company whose branch is located in the Member State concerned, without prior notice and without the company first being given an opportunity to state its views on the alleged breach of the disclosure obligation.

Case C-418/11 Texdata Software [2013] not published vet § 89

## 9.2 RELATION TO SECONDARY LAW

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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-4629 §45

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

*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 §30, 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.

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.

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 §9, 17, 26

### 9.3 RELATION TO NATIONAL LAW

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In accordance with the established case law of the Court, it is *for the national legal order to lay down detailed procedural rules to ensure the protection of the rights that operators derive from the direct effect of EU law*, provided, however, that those detailed rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (judgments in *Placanica and Others*, EU:C:2007:13, paragraph 63, and *Costa and Cifone*, EU:C:2012:80, paragraph 51).

C-463/13 Stanley International Betting and Stanleybet Malta [2015]not published vet§37

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-10219 §27

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-9641 §109, 110

The conditions for taking up the profession of civil engineer have not thus far been the subject of *harmonisation* at Community level. That being so, the Member States retain the power to define those conditions, as the Directive does not restrict their powers on this point. *They must, however, exercise their powers in this area in a manner which respects the basic freedoms guaranteed by the EC Treaty*(see *Joined Cases C-193/97 and C-194/97 De Castro Freitas and Escallier [1998] ECR I-6747, paragraph 23; Case C-58/98 Corsten [2000] ECR I-7919, paragraph 31; and Mac Quen, paragraph 24*).

Case C-330/03 Colegio [2006] ECR I-801 § 29

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*).

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 §26, 27

In that regard, it should be stated at the outset that consistent case-law shows that, in the absence of harmonisation of a profession, Member States remain, in principle, competent to define the exercise of that profession but must, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty (*see, in particular, Case C-58/98*

*Corsten [2000] ECR I-7919, paragraph 31, and Case C-108/96 Mac Quen and Others [2001] I-837, paragraph 24).*

Case C-294/00 Gräbner [2002] ECR I-6515 § 26

Although in the absence of such harmonisation with regard to the activities at issue in the main proceedings the Member States retain, in principle, the power to define the conditions governing access to such activities, ***they must none the less, when exercising their powers in this area, respect both the basic freedoms guaranteed by Article 52 of the EC Treaty*** (now, after amendment, Article 43 EC) ***and Article 59 of the Treaty and the effectiveness of a directive laying down transitional measures*** (De Castro Freitas and Escallier, cited above, paragraph 23). That applies not only to the substantive conditions governing access to those activities, but also to the requirements of a procedural nature provided for by national law.

Case C-58/98 Corsten [2000] I-7919 § 31

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).

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 disappplied 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-4695 §19, 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

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

## **9.4 RELATION TO INTERNATIONAL LAW**

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The application of Regulation No 4055/86 is in no way affected by the fact that the vessel carrying out the maritime transport at issue, and on which the workers in whose favour that industrial action was taken are employed, flies the flag of a third country, nor by the fact that the crew members of the vessel are, as in the present case, third country nationals.

For Article 1(1) of Regulation No 4055/86 to be applicable, it is sufficient for a provider of the maritime transport service to be a national of a State that is a party to the EEA Agreement who is established in a State that is a party to the EEA Agreement other than that of the person for whom the services are intended.

In the light of all of the foregoing considerations, the answer to the question is that Article 1 of Regulation No 4055/86 must be interpreted as meaning that a company established in a State that is a party to the EEA Agreement and which is proprietor of a vessel flying the flag of a third country, by which maritime transport services are provided from or to a State that is a party to the EEA Agreement, may rely on the *freedom to provide services, provided that it can, due to its operation of that vessel, be classed as a provider of those services and that the persons for whom the services are intended are established in States that are parties to the EEA Agreement other than that in which that company is established.*

Case C-83/13 Fonnship and Svenska Transportarbetarförbundet [2014] not published yet § 42, 43, 44

Article 52 of the Treaty is in particular properly applicable to airline companies established in a Member State which supply air transport services between a Member State and a non-member country. *All companies established in a Member State within the meaning of Article 52 of the Treaty are covered by that provision, even if their business in that State consists of services directed to non-member countries.*

It follows that Community airlines may always be excluded from the benefit of the air transport agreement between the Federal Republic of Germany and the United States of America, while that benefit is assured to German airlines. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the Federal Republic of Germany, accords to its own nationals.

Contrary to what the Federal Republic of Germany maintains, the *direct source of that discrimination is not the possible conduct of the United States of America but the clause on the ownership and control of airlines, which specifically acknowledges the right of the United States of America to act in that way.*

Case C-476/98 Commission v Germany [2002] ECR I-9855 § 146, 153, 154

The Court has thus held that the principle of national treatment requires a Member State which is a party to a bilateral international treaty with a non-member country for the

avoidance of double taxation *to grant to permanent establishments of companies resident in another Member State the advantages provided for by that treaty on the same conditions as those which apply to companies resident in the Member State that is party to the treaty* (see *Saint-Gobain*, paragraph 59, and judgment of 15 January 2002 in *Case C-55/00 Gottardo v INPS* [2002] ECR I-413, paragraph 32).

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.

By contrast, it is clear from Article 3(6) of the Bermuda II Agreement that the United States of America is in principle under an obligation to grant the appropriate operating authorisations and the required technical permissions to airlines of which a substantial part of the ownership and effective control is vested in the United Kingdom or its nationals (United Kingdom airlines).

It follows that Community airlines may always be excluded from the benefit of the Bermuda II Agreement, while that benefit is assured to United Kingdom airlines. Consequently, Community airlines suffer discrimination which prevents them from benefiting from the treatment which the host Member State, namely the United Kingdom, accords to its own nationals.

Contrary to what the United Kingdom maintains, *the direct source of that discrimination is not the possible conduct of the United States of America but Article 5 of the Bermuda II Agreement, which specifically acknowledges the right of the United States of America to act in that way.*

Consequently, by concluding and applying that agreement, the United Kingdom has failed to fulfil its obligations under Article 52 of the Treaty.

**C-466/98 Commission v United Kingdom [2002] ECR I-9427 §46, 47, 48, 49, 50, 51, 52**

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**

## 10 –SPECIFIC AREAS

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### 10.1 GENERAL SYSTEM OF MUTUAL RECOGNITION OF DIPLOMAS

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#### 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-4629 §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*.

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 §25, 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*.

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 §15, 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 Revners [1974] ECR 631 §20

## 10.2 TAXATION

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In order for that difference in treatment to be compatible with the provisions of the Treaty on the freedom of establishment, it must relate to situations which *are not objectively comparable or be justified by an overriding reason in the general interest* (see judgment in X Holding, C-337/08, EU:C:2010:89, paragraph 20).

The fact that the dividends received by a parent company which enjoy full tax exemption come from subsidiaries that are part of the tax-integrated group to which the parent company concerned also belongs does not amount to an objective difference in the situation of parent companies that would justify the difference in treatment identified (*see, to that effect, judgments in Papillon, C-418/07, EU:C:2008:659, paragraphs 23 to 30; X Holding,*

*C-337/08, EU:C:2010:89, paragraphs 21 to 24; and SCA Group Holding and Others, C-39/13 to C-41/13, EU:C:2014:1758, paragraphs 29 to 31).* With regard to legislation such as that at issue in the main proceedings, which, through the neutralisation of the add-back of the proportion of costs and expenses to the parent company's profits, provides for dividends received to be fully exempt from tax, ***the situation of companies belonging to a tax-integrated group is comparable to that of companies not belonging to such a group in so far as, in each case, the parent company bears the costs and expenses related to its shareholding in the subsidiary, and, moreover, the profits made by the subsidiary and from which the dividends distributed are derived are, in principle, liable to be subject to economic double taxation or to a series of charges to tax*** (see, to that effect, judgments in *Haribo Lakritzen Hans Riegel and Österreichische Salinen, C-436/08 and C-437/08, EU:C:2011:61, paragraph 113, and Santander Asset Management SGIIC and Others, C-338/11 to C-347/11, EU:C:2012:286, paragraph 42).*

According to the Court, the exclusion of non-resident companies from such a scheme is justified in view of the need ***to safeguard the balanced allocation of the power to impose taxes between the Member States***. Since the parent company is at liberty to decide to form a tax entity with its subsidiary and, with equal liberty, to dissolve such an entity from one year to the next, the possibility of including a non-resident subsidiary in the single tax entity would be tantamount to granting the parent company the freedom to choose the tax scheme applicable to the losses of that subsidiary and the place where those losses are taken into account (*judgment in X Holding, C-337/08, EU:C:2010:89, paragraphs 31 to 33*).

**Case C-386/14 Groupe Steria [2015] not published yet § 21, 22, 26**

***Second, according to the fiscal principle of territoriality, a Member State is entitled, in the case of a transfer of assets to a permanent establishment located within another Member State, to impose tax, at the time of the transfer, on the capital gains generated on its territory prior to that transfer.*** Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory (see, to that effect, judgment in *National Grid Indus, C-371/10, EU:C:2011:785, paragraphs 45 and 46 and the case-law cited*).

As regards the proportionality of the legislation at issue in the main proceedings, it should be noted, at the outset, that ***it is proportionate for a Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the amount of the tax due on the unrealised capital gains that have been generated in its territory pertaining to the assets transferred outside its territory, at the time when its powers of taxation in respect of the assets concerned cease to exist***, namely, in the present case, at the time of the transfer of the assets at issue outside the territory of that Member State (see, to that effect, judgments in *Commission v Spain, C-64/11, EU:C:2013:264, paragraph 31, and DMC, C-164/12, EU:C:2014:20, paragraph 60 and the case-law cited*).

In that regard, suffice it to note that recovery of tax on unrealised capital gains spread over five annual instalments, instead of immediate recovery, was considered to be a proportionate measure to attain that objective (*judgment in DMC, C-164/12, EU:C:2014:20, paragraph 64*). A staggered recovery of tax on unrealised capital gains over

10 annual instalments, such as that at issue in the main proceedings, can only therefore be considered, as the Advocate General has observed in points 72 and 73 of his Opinion, as a proportionate measure to attain that objective.

**Case C-657/13 Verder LabTec [2015] not published yet §43, 48, 52**

Having regard to the foregoing, the answer to the question referred is that Article 49 TFEU must be interpreted as meaning that *it does not preclude the tax legislation of a Member State which, in principle, exempts capital gains on holdings for business purposes from corporation tax and, by the same token, excludes the deduction of capital losses on such holdings, even where those capital losses are due to currency losses.*

**Case C-686/13 X [2015] not published yet §41**

In the light of the foregoing considerations, the answer to the questions referred is that Article 49 TFEU must be interpreted as not precluding legislation of a Member State under which, on the ground of *protection of the national cultural and historical heritage, costs relating to listed historic buildings may be deducted solely by owners of historic buildings situated in its territory*, provided that that possibility is available to owners of historic buildings which may form part of the cultural and historical heritage of that Member State despite being located in the territory of another Member State.

**Case C-87/13 X [2014] not published yet § 34**

A difference in *tax treatment of dividends* received by taxpayers who are residents of a Member State on the basis of the location of the seat of the distributing company, such as that which results from the legislation at issue in the main proceedings and is set out in paragraphs 49, 51 and 52 above, is liable to constitute a restriction of freedom of establishment, prohibited in principle by Article 49 TFEU, in that it makes it less attractive for the national of that Member State to establish himself in another Member State.

**Case C-375/12 Bouanich [2014] not published yet §59**

Under legislation such as that at issue in the main proceedings, the possibility of transferring, by means of relief, losses sustained by a company that is resident for tax purposes in a Member State and belongs to a consortium to another company that is resident for tax purposes in the same Member State and is a member of a group is subject to the condition that a link company which is a member of both the consortium and the group is resident in that Member State or carries on a trade there through a permanent establishment.

The *residence condition* laid down for *the link company* thus introduces a difference in treatment between, on the one hand, resident companies connected, for the purposes of the national tax legislation, by a link company established in the United Kingdom, which are entitled to the tax advantage at issue, and, on the other hand, resident companies connected by a link company established in another Member State, which are not entitled to it.

*However, it does not follow from any provision of European Union law that the origin of the shareholders, be they natural or legal persons, of companies resident in the European Union affects the right of those companies to rely on freedom of establishment.* As the Advocate General has observed in point 60 of his Opinion, the status of being a European

Union company is based, under Article 54 TFEU, on the location of the corporate seat and the legal order where the company is incorporated, not on the nationality of its shareholders.

**Case C-80/12 Felixstowe Dock and Railway Company and Others [2014] not published yet § 18, 20, 40**

On this point, it should be recalled that although the Court has held that the need to preserve the coherence of a tax system may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty, it is however necessary, for such a justification to be accepted, that a *direct link be established between the granting of the tax advantage concerned and the offsetting of that advantage by a particular tax* (see, inter alia, *Case C-181/12 Welte EU:C:2013:662*, paragraph 59 and the case-law cited).

Moreover, although the Netherlands Government sought to justify the restriction at issue in the main proceedings on the ground of *the risk of tax avoidance*, it is settled case-law that that ground *does not constitute, by itself, an autonomous justification for a tax restriction on freedom of establishment if it is not relied on in conjunction with a specific objective of combatting wholly artificial arrangements which do not reflect economic reality and the purpose of which is to escape the tax normally due* (see, to this effect, inter alia *Case C-264/96 ICI EU:C:1998:370*, paragraph 26, and *Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas EU:C:2006:544*, paragraph 55). Evidently, that is not the objective of the restriction provided for in the tax entity regime.

It follows from the foregoing that Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which treatment as a single tax entity is granted to a resident parent company which holds resident subsidiaries, but is precluded for resident sister companies the common parent company of which neither has its seat in that Member State nor has a permanent establishment there.

**Joined cases C-39/13, C-40/13 and C-41/13 SCA Group Holding [2014] not published yet §33,42,56**

Therefore, a provision of a Member State, such as Paragraph 33(5) of the ligningsloven, which provides, in the event that a resident company transfers to a non-resident company in the same group a permanent establishment situated in another Member State or in another State that is party to the EEA Agreement, for the reincorporation of the losses previously deducted in respect of the establishment transferred goes beyond what is necessary to attain the objective relating to the need to *safeguard the balanced allocation of the power to impose taxes* if the first Member State taxes the profits made in respect of that establishment before its transfer, including those resulting from the gain made upon the transfer.

**Case C-48/13 Nordea Bank [2014] not published yet § 36**

Consequently, the inability of a company with a permanent establishment in a Member State other than the Kingdom of Belgium to benefit, for the purpose of reducing its basis of assessment, from the deduction for risk capital calculated by taking account of the assets of that establishment is disadvantageous for that company.

Consequently, the refusal to take account of the assets of permanent establishments which are situated in a Member State other than the Kingdom of Belgium and the income from which is exempt from tax in Belgium by virtue of *a double taxation convention* cannot be

justified by reasons relating to the need to *safeguard the coherence of the national tax system*.

Case C-350/11 Argenta Spaarbank [2013]not published vet §32,49

Consequently, the answer to the question referred is that Article 49 TFEU must be interpreted, in circumstances such as those at issue in the main proceedings, as *precluding legislation of a Member State which makes the grant of a reduction in capital tax conditional upon remaining liable to that tax for the next five tax years*.

Case C-380/11 DI. VI. Finanziaria di Diego della Valle & C [2012]not published vet §52

It should be recalled in this connection that the Treaty offers *no guarantee to a company covered by Article 54 TFEU that transferring its place of effective management to another Member State will be neutral as regards taxation*. Given the relevant disparities in the tax legislation of the Member States, such a transfer may be to the company's advantage in terms of tax or not, according to circumstances (*see, to that effect, Case C-365/02 Lindfors [2004] ECR I-7183, paragraph 34; Case C-403/03 Schempp [2005] ECR I-6421, paragraph 45; and Case C-194/06 Orange European Smallcap Fund [2008] ECR I-3747, paragraph 37*). Freedom of establishment cannot therefore 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 (*see Case C-293/06 Deutsche Shell [2008] ECR I-1129, paragraph 43*).

Case C-371/10 National Grid Indus [2011] ECR I-12273 §62

That competence also implies that a *Member State cannot be required to take account*, for the purposes of applying its tax law, *of the possible negative results arising from particularities of legislation of another Member State applicable to a permanent establishment situated in the territory of the said State which belongs to a company with a registered office in the first State* (*see, to that effect, Columbus Container Services, paragraph 51, and Case C-293/06 Deutsche Shell [2008] ECR I-0000, paragraph 42*).

The Court has held that 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 (*Deutsche Shell, paragraph 43*).

Case C-157/07 Krankenhaus Ruhesitz am Wannsee-Seniorenheimstatt [2008] ECR I-8061 §49, 50

[...] 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-2911 §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-8061 §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-7333 §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-3601 §54**

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] ECR I-1129 § 29, 41, 43, 45**

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 §18, 19**

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 Oy AA [2007] ECR I-6373 §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.

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-5701 § 66, 67, 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 §26, 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-1107 § 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-11949 § 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-11673 § 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-7995 §49, 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-7409 § 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

In both cases [*distribution of profits by a subsidiary to its parent company and the transfer of profits within a company*] 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.

*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.*

*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.*

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] ECRI-1831 § 23, 25, 31, 37

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] ECR 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-5961 §25

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

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-9409 § 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] ECRI-2107 § 50

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.*

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.

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.

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-4695 §26, 28, 29, 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



## 10.3 SPECIFIC PROFESSIONS/SECTORS

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### 10.3.1 Legal professions: lawyers, notaries

In that regard, it must be held that the right of nationals of a Member State to choose, on the one hand, the Member State in which they wish to acquire their professional qualifications and, on the other, the Member State in which they intend to practise their profession is *inherent in the exercise, in a single market, of the fundamental freedoms guaranteed by the Treaties* (see, to that effect, the judgment in *Commission v Spain*, C 286/06, EU:C:2008:586, paragraph 72).

*Accordingly, the fact that a national of a Member State who has obtained a university degree in that State travels to another Member State, in order to acquire there the professional qualification of lawyer, and subsequently returns to the Member State of which he is a national in order to practise the profession of lawyer under the professional title obtained in the Member State where that qualification was acquired, constitutes one of the possible situations where the objective of Directive 98/5 is achieved and cannot constitute, in itself, an abuse of the right of establishment* stemming from Article 3 of Directive 98/5.

Joined Cases C-58/13 and C-59/13 *Torresi* [2014] §48, 49

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-269 §40

In this respect, the Court has had occasion to rule that *the exception in the first paragraph of Article 45 EC does not extend to certain activities that are auxiliary or preparatory to the exercise of official authority* (see, to that effect, *Thijssen*, paragraph 22; *Commission v Spain*, paragraph 38; *Servizi Ausiliari Dottori Commercialisti*, paragraph 47; *Commission v Germany*, paragraph 38; and *Commission v Portugal*, paragraph 36), or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact (see, to that effect, *Reyners*, paragraphs 51 and 53), or to certain activities which do not involve the exercise of decision-making powers (see, to that effect, *Thijssen*, paragraphs 21 and 22; Case C-393/05 *Commission v Austria*, paragraphs 36 and 42; *Commission v Germany*, paragraphs 38 and 44; and *Commission v Portugal*, paragraphs 36 and 41), powers of constraint (see, to that effect, *inter alia*, *Commission v Spain*, paragraph 37) or powers of coercion (see, to that effect, Case C-47/02 *Anker and Others* [2003] ECR I-10447, paragraph 61, and *Commission v Portugal*, paragraph 44).

It must be observed, in this respect, that the documents that may be authenticated under Belgian law are documents and agreements freely entered into by the parties. They decide themselves, within the limits laid down by law, the extent of their rights and obligations and choose freely the conditions which they wish to be subject to when they produce a document or agreement to the notary for authentication. The notary's intervention thus presupposes the

prior existence of an agreement or consensus of the parties.

***The activity of authentication entrusted to notaries does not therefore, as such, involve a direct and specific connection with the exercise of official authority*** within the meaning of the first paragraph of Article 45 EC.

***Acting in pursuit of an objective in the public interest is not, in itself, sufficient for a particular activity to be regarded as directly and specifically connected with the exercise of official authority.*** It is not disputed that activities carried out in the context of various regulated professions frequently, in the national legal systems, ***involve an obligation for the persons concerned to pursue such an objective, without falling within the exercise of official authority.***

However, the fact that notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into by individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article 43 EC deriving from the particular features of the activities of notaries, such as the restrictions which derive from the procedures by which they are appointed, the limitation of their numbers and their territorial jurisdiction, or the rules governing their remuneration, independence, disqualification from other offices and protection against removal, provided that those restrictions enable those objectives to be attained and are necessary for that purpose.

It is also true that a notary must refuse to authenticate a document or agreement which does not satisfy the conditions laid down by law, regardless of the wishes of the parties. However, following such a refusal, the parties remain free to remedy the unlawfulness, amend the conditions in the document or agreement, or abandon the document or agreement.

As to the probative force and the enforceability of notarial acts, these indisputably endow those acts with significant legal effects. ***However, the fact that an activity includes the drawing up of acts with such effects does not suffice for that activity to be regarded as directly and specifically connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.***

Case C-47/08 - Commission v Belgium [2011] ECR I-4105 § 86, 90, 92, 96, 97, 98, 99

See also: C-54/08 Commission v Germany [2011] ECR I-4355 §86

See also: C-53/08 Commission v Austria [2011] ECR I-4309 §84

See also: C-50/08 Commission v France [2011] ECR I-4195 §86

See also: C-61/08 Commission v Greece [2011] ECR I-4399 §75

See also: C-157/09 Commission v Netherlands [2011] not published vet §56

See also: C-51/08 Commission v Luxembourg [2011] ECR I-4231 §84

See also: Case C-151/14 Commission v Latvia [2015] not published vet §48

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-12329 §64

According to the Bar Council of Genoa, *the activity of praticante is a training activity, to which the provisions of Articles 39 EC and 43 EC do not apply.*

However, the period of practice at issue in the main proceedings comprises the pursuit of activities, normally remunerated by the client or by the firm for which the praticante works, with a view to access to a regulated profession to which Article 43 EC applies. *In so far as the remuneration of the praticante takes the form of a salary, Article 39 EC may also apply.*

*Both Article 39 EC and Article 43 EC may therefore apply to a situation such as that in the main proceedings.* However, the analysis does not differ according to whether it is freedom of movement for workers or the freedom of establishment which is relied upon in opposing the refusal, on the part of the Bar Council of Genoa acting in its capacity as the competent authority for enrolling praticanti on the register, to take the legal diploma obtained in another Member State and the professional experience acquired into account for the purposes of enrolment.

As the Court has already held, the exercise of the right of establishment is hindered if national rules fail to take account of learning, skills and qualifications already acquired by the person concerned in another Member State, so that the competent national authorities must measure whether such factors sufficiently demonstrate that missing learning and skills have been acquired (Vlassopoulou, paragraphs 15 and 20; Fernández de Bobadilla, paragraph 33).

Case C-313/01 Morgenbesser [2003] ECR I-13467 § 59, 60, 61, 62

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.*

*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 §35, 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.*

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.*

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 §10, 18, 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.

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 §20, 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.*

*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 §40, 52

### 10.3.2 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

### 10.3.3 Architects

In that connection, the Court held in the judgment in *Dreessen* (C 31/00, EU:C:2002:35, paragraphs 27 and 28) that *the Member States had to comply with their obligations as regards mutual recognition of professional qualifications, arising from the Court's interpretation of Articles 49 TFEU and 53 TFEU, in examining any application for authorisation to pursue the profession of architect if the applicant cannot avail himself of the mechanism for automatic recognition of professional qualifications.* That may be the case where, as a result of an error by the competent authorities of the Member State concerned, the formal qualification held by the applicant has not been notified to the Commission.

Likewise, it follows from the judgment in *Hocsman* (C 238/98, EU:C:2000:440, paragraph 23) that Member States must comply with their obligations in relation to the mutual recognition of professional qualifications pursuant to Article 49 TFEU, where the applicant cannot avail himself of the mechanism of recognition of professional qualifications provided for by the relevant directive by reason of the place where the formal qualification concerned was obtained and the applicant's academic and professional career.

Case C-477/13 Angerer [2015] §41, 42

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

#### 10.3.4 Medical and Dental Professions

None the less, firstly, it must be pointed out that the *profession of physiotherapist and, accordingly, that of any type of masseur, do not fall within the sector of medical professions proper but within the paramedical sector*. That sector, covering a wide range of different activities, cannot by definition avoid the system of mutual recognition of regulated professions as established by European Union law.

Secondly, it must be noted that the recipient of the services provided by a medical masseur-hydrotherapist de facto enjoys the particular vigilance required as regards the protection of health. *As the Greek Government, inter alia, stated at the hearing, the provision of the services supplied by a medical masseur-hydrotherapist consists merely of the implementation of a therapy prescribed to the patient not by that masseur but by a doctor*. It is that doctor whom the patient sees first and that doctor who then indicates to the masseur what is to be done as regards the technical execution of the therapy. Thus, the medical masseur-hydrotherapist is not chosen directly by the patient and does not act on his instructions, but is designated by and acts in close liaison with a representative of the medical profession, depending on and cooperating with each other.

*The first scenario concerns cases where, in the Member State of origin and the host Member State, the degree of similarity between the two professions is such that they may be regarded as ‘comparable’ and, accordingly, ‘the same profession’ within the meaning of Article 4(2) of Directive 2005/36*. In such a case, any shortcomings in the applicant’s education or training in relation to that required in the host Member State may be effectively made up for through the application of the compensation measures provided for in Article 14(1) of Directive 2005/36, thereby ensuring full integration of the party concerned into the professional system in the host Member State (see Colegio de Ingenieros de Caminos, Canales y Puertos, paragraph 34). Consequently, in such circumstances, there is *no infringement of Article 49 TFEU* where the host Member State does not grant partial access to a profession.

*The second scenario, by contrast, concerns cases which are not covered by Directive 2005/36 because the differences between the fields of activity are so great that in reality the applicant should follow a full programme of education and training in order to pursue, in another Member State, the activities for which he is qualified*. Viewed objectively, this is a factor which is liable to discourage the party concerned from pursuing those activities in the host Member State (see Colegio de Ingenieros de Caminos, Canales y Puertos, paragraph 35). In such circumstances, there is likely to *be an infringement of Article 49 TFEU*.

Case C-575/11 Nasiopoulos [2013] not published yet §28, 29, 31, 32

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.

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 §2, 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.

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.

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 §4, 42, 44

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.

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 §35, 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*.

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*.

*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*.

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*.

*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*.



### 10.3.5 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.

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 Honvrem Informazioni [2006] ECR I-2879 §32, 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

## 10.4 GAMBLING

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It follows that national authorities are entitled to choose between those approaches by reason of *the discretion enjoyed by Member States in a non-harmonised area such as betting and gambling*, a discretion which is, however, circumscribed by *the principles of equivalence and effectiveness*.

In accordance with the established case law of the Court, it is for the national legal order to lay down detailed procedural rules to ensure the protection of the rights that operators derive from the direct effect of EU law, provided, however, that those detailed rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (judgments in *Placanica and Others*, EU:C:2007:13, paragraph 63, and *Costa and Cifone*, EU:C:2012:80, paragraph 51).

In addition, in order to be consistent with the principle of equal treatment and to meet the obligation of transparency which flows from that principle, *an authorisation scheme for betting and gambling must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise by the authorities of their discretion so that it is not used arbitrarily* (judgment in *Garkalns*, C-470/11, EU:C:2012:505, paragraph 42).

Thus, it is settled case-law that restrictions on betting and gambling may be justified by overriding reasons in the public interest, such as ***consumer protection and the prevention of both fraud and incitement to squander money on gambling*** (judgment in *Digibet and Albers*, EU:C:2014:1756, paragraph 23 and the case-law cited).

However, it is appropriate to bear in mind the specific nature of legislation on betting and gambling, which is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of harmonisation on the issue at EU level, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected, since the identification of the objectives which are in fact pursued by the national legislation falls, in the context of a case referred to the Court under Article 267 TFEU, within the jurisdiction of the national court (judgment in *Digibet and Albers*, EU:C:2014:1756, paragraph 24 and the case-law cited).

Accordingly, in that specific field, ***national authorities enjoy a wide measure of discretion when determining what is required in order to ensure consumer protection and the preservation of order in society and — provided that the conditions laid down in the Court’s case-law are in fact met — it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary to prohibit, wholly or in part, betting and gambling or only to restrict them and, to that end, to lay down more or less strict supervisory rules*** (see judgment in *Digibet and Albers*, EU:C:2014:1756, paragraph 32 and the case-law cited).

**C-463/13 Stanley International Betting and Stanleybet Malta [2015] not published yet §36, 37, 38, 48, 51, 52**

The Court has ruled previously that, in so far as the national legislation at issue in the main proceedings prohibits – under penalty of criminal sanction – ***the pursuit of activities in the betting and gaming sector without a licence or police authorisation issued by the State, it constitutes a restriction on the freedom of establishment and the freedom to provide services*** (*Placanica and Others*, paragraph 42 and the case-law cited).

The Court has held previously in that regard that, in the light of the ***wide discretion the Member States have*** in relation to the objectives they wish to pursue and the level of consumer protection they seek and in the absence of any harmonisation in the sphere of betting and gaming, in the present state of development of European Union law ***there is no obligation of mutual recognition of authorisations issued by the various Member States*** (see, to that effect, *Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 Stoß and Others [2010] ECR I-8069, paragraph 112, and Case C-347/09 Dickinger and Ömer [2011] ECR I-8185, paragraphs 96 and 99*).

**Joined cases C-660/11 and C-8/12 Biasci and Others [2013] not published yet §21, 40**

It is thus necessary for the national courts to examine whether a restriction decided upon by a Member State is suitable for achieving the objective or objectives invoked by the Member State concerned, at the level of protection which it seeks, and whether it does not go beyond what is necessary in order to achieve those objectives (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 60).

The fact remains, however, that *the establishment of a measure as restrictive as a monopoly, which can be justified only in order to ensure a particularly high level of consumer protection, must be accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, the objective* thus determined by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities.

Case C-316/07 Stoß and Others [2010] ECR I-8069 § 78, 83

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.

In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, *Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32, and Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 37*).

According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

First of all, whilst in *Schindler, Läärä and Zenatti* the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as *consumer protection and the prevention of both fraud and incitement to squander on gaming*, restrictions based on such grounds and on the need to preserve public order must also be *suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner*.

Next, the restrictions imposed by the Italian rules in the field of invitations to tender must be applicable without distinction: *they must apply in the same way and under the same conditions to operators established in Italy and to those from other Member States alike*.

Case C-243/01 Gambelli [2003] ECR I-13031 §46, 48, 49, 64, 65, 67, 70

## 10.5 HEALTH

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Second, it should be borne in mind that, according to the settled case-law of the Court, Article 49 TFEU must be interpreted as not precluding, in principle, a Member State from adopting a system of prior authorisation for the establishment of new healthcare providers, such as pharmacies, 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, to that effect, *Blanco Pérez and Chao Gómez*, paragraphs 70 and 71 and the case-law cited).

The Court has thus held that national legislation setting out *certain criteria to which the issue of licences to open new pharmacies is subject is generally appropriate for attaining the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality* (see, to that effect, *Blanco Pérez and Chao Gómez*, paragraph 94; see orders of 17 December 2010 in Case C-217/09 *Polisseni*, paragraph 25 and of 29 September 2011 in Case C-315/08 *Grisoli*, paragraph 31).

Among those criteria, those relating to the number of the healthcare providers or permanent inhabitants in the different areas or to the distance between the pharmacies constitute objective data which cannot, in principle, give rise to difficulties of interpretation or assessment.

More specifically, as regards the conditions relating to *demographic density*, the Court considered that the uniform application of those conditions, without any possibility of derogation, would lead, in certain rural areas where the population is generally dispersed and less numerous, to certain inhabitants concerned finding themselves beyond reasonable distance of a pharmacy and thus possibly being denied *adequate access to pharmaceutical services* (see, to that effect, *Blanco Pérez and Chao Gómez*, paragraph 97).

However, in rural, isolated and infrequently ‘visited’ regions, there is a danger that the number of ‘people remaining to be served’ would not reach the limit strictly required and, consequently, that the need justifying the establishment of a new pharmacy may be considered insufficient.

Accordingly, the application of the criterion relating to the number of ‘people remaining to be served’, gives rise to a danger that equal and adequate access may not be guaranteed for certain people living in rural and isolated regions situated outside the existing pharmacies’ areas of supply, in particular for people with reduced mobility.

**Case C-367/12 Sokoll-Seebacher [2014] not published yet § 24, 25, 30, 42, 49, 50**

In those circumstances, the legislation at issue in the main proceedings, which *reserves the sale of prescription-only medicinal products*, including those the cost of which is borne not by the national health service but wholly by the purchaser, *exclusively to pharmacies*, the establishment of which is subject to planning rules, is *appropriate to guarantee attainment of the objective* of ensuring that the supply of medicinal products to the public is reliable and of good quality and, therefore, of ensuring the protection of public health.

In that regard, it should, first, be borne in mind that, according to the Court’s settled case-law, when assessing whether *the principle of proportionality* has been observed in the field of

public health, account must be taken of the fact that it is for the Member State *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* (see *Case C-141/07 Commission v Germany* [2008] ECR I-6935, paragraph 51; *Apothekerkammer des Saarlandes and Others*, paragraph 19, and *Blanco Pérez and Chao Gómez*, paragraph 44).

Having regard to all the foregoing, the answer to the question referred is that Article 49 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which does not allow a pharmacist, who is qualified and registered with the professional body but does not own a pharmacy in the grid, also to offer for retail sale, in the para-pharmacy owned by that pharmacist, prescription-only medicinal products the cost of which is borne not by the national health service but wholly by the purchaser.

**Joined cases C-159/12 to C-161/12 Venturini [2013] not published yet §55, 59, 66**

The legislation at issue in the main proceedings governs only the conditions for establishing an *optician's shop* in a part of Italian territory, with a view to a stable and continuous participation of such professionals in the economic life of that Member State. In those circumstances, the provisions concerning the freedom to supply services, which apply only if those relating to the freedom of establishment do not apply, are not relevant (see, by analogy, *Case C-384/08 Attanasio Group* [2010] ECR I-2055, paragraph 39 and the case-law cited).

**Case C-539/11 Ottica New Line di Accardi Vincenzo [2013] not published yet §16**

However, it must be observed that, under that law, *private pharmacies may open only three branches in Finland*, the operating licence for which is, furthermore, subject to the existence, in the geographical area concerned, of a sparse population which does not justify the existence of an independent pharmacy, whereas UHP has the right to have 16 branch pharmacies regardless of the number of inhabitants in the area concerned.

It must be held that the preferential system granted to UHP, in terms of the number of branch pharmacies allowed and the conditions for the operating licences of those branches, is likely to deprive a private pharmacist of the right to set up a branch pharmacy in one of the 16 geographical areas in which the UHP has established a branch, which is likely to render less attractive the pursuit, by private pharmacists from other Member States, of their activities in Finland through a permanent establishment. *The fact that the restrictive effects of that preferential system affect home country nationals and those from other Member States alike is not such as to exclude that preferential system from the scope of Article 49 TFEU* (see, to that effect, *Case C-353/89 Commission v Netherlands* [1991] ECR I-4069, paragraphs 24 and 25).

Therefore, the answer to the first question is that Article 49 TFEU must be interpreted as meaning that it does not preclude a national law, such as that at issue in the main proceedings, which provides for a licensing scheme for the operation of branch pharmacies specific to the UHP which is more favourable than that applicable to private pharmacies, provided that — which is for the referring court to verify — the branches of the UHP actually participate in the accomplishment of the specific tasks relating to the teaching of pharmacy students, research on pharmaceutical services and the manufacture of rare pharmaceutical preparations conferred on the latter by national law.

**Case C-84/11 Susisalo and Others [2012] not published yet § 33, 34, 44**

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-12941 §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-4629 §43, 44

Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes Hartlauer* [2009] ECR I-4171 §19

Case C-531/06 *Commission v Italy* [2009] ECR I-4103 §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-4629 §45

Case C-531/06 *Commission v Italy* [2009] ECR I-4103 §37

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).

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).

In that respect, it should be noted that *the national legislation provides for certain adjustment measures which make it possible to mitigate the consequences of applying the basic rule of 2 800 inhabitants*. Under the second subparagraph of Article 2(3) of Law 16/1997, the Autonomous Communities may establish units of population smaller than 2 800 per pharmacy for rural, mountainous or tourist areas, or for areas where, by reason of their geographical, demographic or public health characteristics, pharmaceutical services would not be possible if the general criteria were applied, and thereby make a pharmacy situated in that special area more accessible for the local population.

Secondly, *strict application of the other condition* laid down in Decree 72/2001, relating to the minimum distance between pharmacies, *poses a risk that adequate access to pharmaceutical services cannot be ensured in certain geographical areas which are densely populated*. In those areas, the population density around a pharmacy may be significantly higher than the number of inhabitants set as the standard density. In those specific circumstances, application of the condition requiring a minimum distance of 250 metres between pharmacies could well give rise to a situation in which more than 2 800 inhabitants live inside the perimeter laid down for a single pharmacy – or, indeed, in the circumstances envisaged in Article 2(3) of Law 16/1997, more than 4 000 inhabitants. Accordingly, it is possible that the inhabitants of areas such as those described may, because of the strict application of the ‘minimum distance’ rule, experience difficulty in having access to a pharmacy in circumstances which *allow adequate pharmaceutical services to be provided*.

That being so, those consequences can still be mitigated, even in such a case, in view of the flexibility provided for in Article 2(4) of Law 16/1997, under which the minimum distance between pharmacies is fixed ‘as a general rule’ at 250 metres: thus, depending on the concentration of the population, *the Autonomous Communities are able to authorise a shorter distance between pharmacies, and thereby increase the number of pharmacies available in areas with a very high population density*.

In that regard, it should be pointed out that, in order to attain in a consistent and systematic manner – in a situation such as that described in paragraph 99 above – the objective of

ensuring adequate pharmaceutical services, the competent authorities might even be disposed to interpret the general rule as meaning that a licence may be granted for opening a new pharmacy within a distance of less than 250 metres, not only in highly exceptional cases, but whenever the strict application of the general 250 metre rule risks being unable *to ensure adequate access to pharmaceutical services* in certain geographical areas with a high population density.

In those circumstances, it is for the referring court to determine whether the competent authorities make use – as described in paragraphs 98, 100 and 101 above – of the power conferred by such provisions in every geographical area with special demographic features, in which the strict application of the basic ‘2 800 inhabitants’ and ‘250 metres’ rules risks preventing the establishment of a sufficient number of pharmacies *to ensure adequate pharmaceutical services*.

Joined Cases C-570/07 and C-571/07 Blanco Perez [2010] ECR I-4629 §68, 70, 74, 98, 99, 100, 101,102

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 must be allowed discretion (see, to this effect, Case C-322/01 Deutscher Apothekerverband[2003] ECR I-14887, paragraph 103; Case C-141/07 Commission v Germany [2008] ECR I-0000, paragraph 51; and Hartlauer, paragraph 30).

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.

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).

In this connection, given the power accorded to the Member States to determine the level of protection of public health, it must be accepted that Member States may require that medicinal products be supplied by *pharmacists enjoying genuine professional independence*. They may also take measures which are capable of eliminating or reducing a risk that that independence will be prejudiced because such prejudice would be liable to affect the degree to which the provision of medicinal products to the public is reliable and of good quality.

Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes [2009] ECR I-4171 §19, 30, 34, 35

Case C-531/06 Commission v Italy [2009] ECR I-4103 §35, 36, 58, 54, 59

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).

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).

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-3 85/99 *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).

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 §29, 30, 47, 48, 49, 55