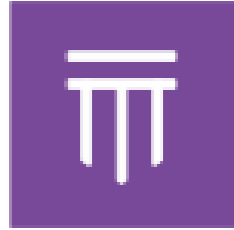


EU law seminar III 10.11.2020



# Free movement of services, corporations, capital

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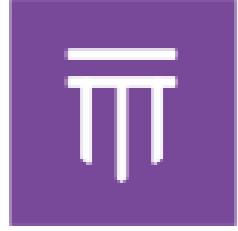
# Free movements

1. Free movement of goods – seminar I
2. Free movement of persons – workers and connection with EU citizenship  
II
3. Free movement of persons – self-employed and companies -III

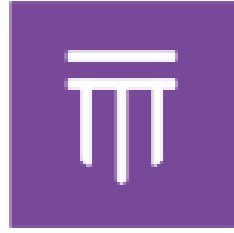
Self-employed EU citizens are covered by:

- Freedom to provide services (Art 56 TFEU) +
- Right of establishment (Art. 49 TFEU)

# Learning objectives



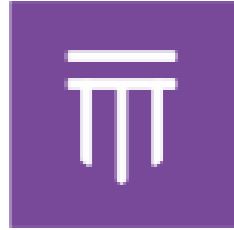
1. What is the freedom to provide services (FPS)?
2. What can be considered a restriction to FPS?
3. How a restriction be justified?
4. How we distinguish FPS from freedom of establishment and freedom of capital?



# Freedom to provide services – General outline

Regulatory strategy (similar to rest of free movements):

- *Negative integration* = prohibition of all discrimination, indistinctly applicable – hinderance of market access – Art 56 TFEU +
- *Positive integration* = Services Directive (Directive 2006/123/EC)  
harmonising national rules



# Who is covered by Art. 56 TFEU?

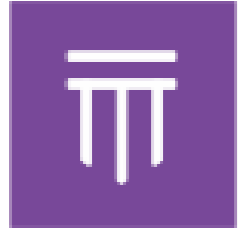
Art 56(1) TFEU:

‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.’

*Who is covered by Art. 56 TFEU?*

- Service provider + all her staff, even TCNs
- The service provider must comply with the double requirement of nationality + establishment in a MS

***Only the service provider – the right to offer services across national borders?***



# Who is covered by Art. 56 TFEU?

## Case 286/82 Luisi and Carbone - 1984

*Facts:* Mr Luisi and Carbone, Italians residents, had taken money out of Italy for stays in France and Germany for tourism and paying private medical services. They were fined by the Italian Treasury Ministry for taking more money out of Italy than the maximum permitted under the currency regulations at the time. The applicants contended that they had exported the currency in order to receive treatment, and that this restriction was fundamentally against the freedom to provide services.

CJEU: Are also service recipients covered by Art 56 TFEU?

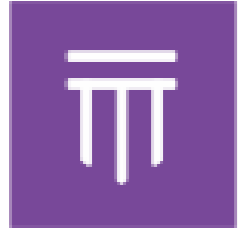


## Case 286/82 Luisi and Carbone



16. It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services.

21. The general scheme of the Treaty shows, and a comparison between Articles 67 and 106 confirms, that current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service. For that reason movements of capital may themselves give rise to current payments, as is implied by Articles 67 (2) and 106 (1).



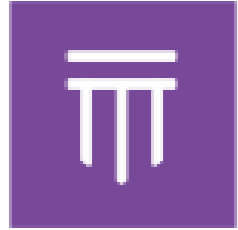
# Case 286/82 Luisi and Carbone – the service recipient?

22 The physical transfer of bank notes may not therefore be classified as a movement of capital where the transfer in question corresponds to an obligation to pay arising from a transaction involving the movement of goods or services.

23 Consequently, payments in connection with tourism or travel for the purposes of business, education or medical treatment cannot be classified as movements of capital, even where they are effected by means of the physical transfer of bank notes.



# What is a 'service' ?



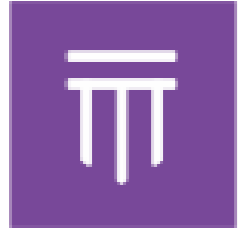
Art. 57 TFEU:

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

*What is/are the key requirement(s)?*

The definition of a service centres on three points:

- 1) what counts as an economic activity for remuneration
- 2) what distinguishes a service from the other freedoms, especially from establishment?
- 3) Cross-border element.



# 1. Remuneration - profit-making ?

No – Similarly to freedom of workers – the level of remuneration does not matter; the service provider does not need to make a profit;

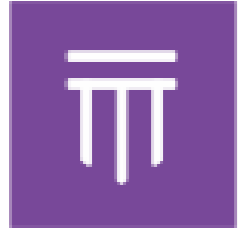
- Does it matter who pays for the service?

The service recipient, or also a third party?

For instance medical treatment (e.g. hospitalisation) is paid directly by sickness insurance funds.

*Example:* Semi-public services – medical care provided by private parties but paid for by the State/public authority falls under freedom to provide for services – *Watts*

Education provided by public schools run by State power – is it a service?



# Does morality and ethics play a role in the qualification of a service?

Is the following service excluded from the ambit of Art. 56 TFEU?

*C-268/99 Jany:*

The applicants – 5 prostitutes applied at the Dutch police for the issue of residence permits to enable them to work as self-employed prostitutes. Those applications were rejected. The applicants in the main proceedings thereupon lodged objections against those decisions before the same authority. Those objections were also declared unfounded, on the ground that prostitution is an unlawful activity or is at least not a socially acceptable form of work and cannot be treated as being either regular work or a liberal profession.



## CJEU on morality (Jany)

CJEU on morality:

50. The activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration and is therefore covered by both those expressions.

56. So far as concerns the question of the immorality of that activity, raised by the referring court, it must also be borne in mind that, as the Court has already held, it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally.

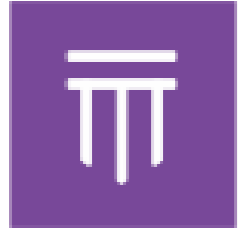
57. Far from being prohibited in all Member States, prostitution is tolerated, even regulated, by most of those States, notably the Member State concerned in the present case.



## CJEU on morality (Jany)

60. Although Community law does not impose on Member States a uniform scale of values as regards the assessment of conduct which may be considered to be contrary to public policy, conduct may not be considered to be of a sufficiently serious nature to justify restrictions on entry to, or residence within, the territory of a Member State of a national of another Member State where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct

70. It is for the national court to determine in each case, in the light of the evidence adduced before it, whether the conditions allowing it to be concluded that prostitution is being carried on by the person concerned in a self-employed capacity are satisfied, that is to say: — outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration; — under that person's own responsibility; and — in return for remuneration paid to that person directly and in full.



# What about services which involve taking a life?

*Example: what about abortion?*

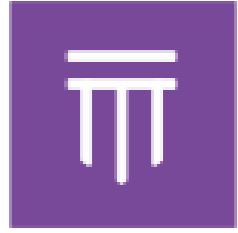
Polish women will travel to the Czech Republic to perform abortions for medical purposes and claim reimbursement of the service from Polish insurance.

Is abortion a service within the meaning of Art. 56 TFEU?

*Reasons for: it cannot be a service?*

*Reasons for: a service under Art. 56 TFEU?*





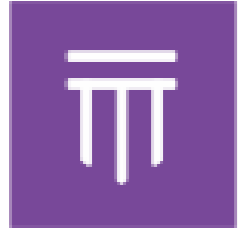
## Examples of services – Art. 57 TFEU

Services shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions

Is this list exhaustive?

No, plurality of services, such as: broadcasting of television signals (Sacchi), tourism (Luisi and Carbone), education, importation of lottery advertisement (C-275/92) to construction, prostitution (Jany) all subject to the same internal market test.



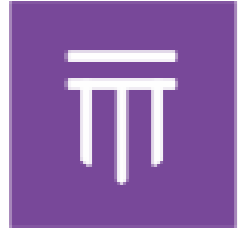
# Healthcare

*Laboratory analysis – C-390/09 CJEU:*

According to settled case-law, medical services supplied for consideration fall within the scope of the provisions on the freedom to provide services (see, in particular, Kohll, paragraph 29, and Elchinov, paragraph 36), there being no need to distinguish between care provided in a hospital environment and care provided outside such an environment.

35. The Court has also held that the freedom to provide services includes the freedom for the recipients of services, including persons in need of medical treatment, to go to another Member State in order to receive those services there (see Joined Cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377, paragraph 16; Watts, paragraph 87; Elchinov, paragraph 37, and Commission v France, paragraph 31).

36. Moreover, the fact that the applicable national rules are social security rules and, more specifically, provide, as regards sickness insurance, for benefits in kind rather than reimbursement does not mean that medical treatment falls outside the scope of that basic freedom (see, to that effect, Müller Fauré and van Riet, paragraph 103; Watts, paragraph 89, and Commission v Spain, paragraph 47).



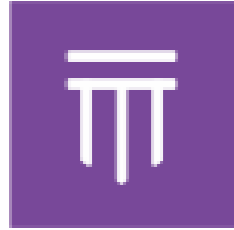
## 2. The residual character of freedom to provide services

Art 57 TFEU: ‘in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.’

Example: *Gebhard* – C55/94

The question was whether the Italian law which prohibits lawyers established in another Member State who provide services in the territory of the Italian Republic from opening in Italy chambers or a principal or branch office compatible with Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services?

CJEU: demarcating establishment from provision of services?

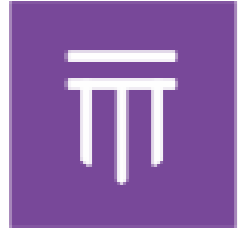


## *Gebhard - CJEU*

On determining whether Gebhard had established himself in Italy or had remained a service provider the CJEU held the following:

23. The right of establishment, provided for in Articles 52 to 58 of the Treaty, is granted both to legal persons within the meaning of Article 58 and to natural persons who are nationals of a Member State of the Community. 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.

24. 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 I 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.

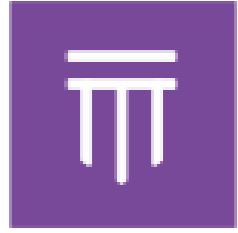


## *Gebhard* - CJEU

25. 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.

26. In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services, in particular the third paragraph of Article 60, envisage that he is to pursue his activity there on a temporary basis.



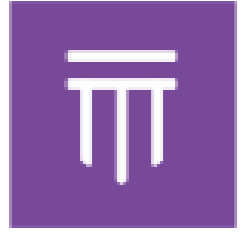


## *Gebhard - CJEU*

27 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.

28. 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





# Demarcating freedom to provide services from rest of free movements?

In short: Services are intended to be temporary and limited in time. Establishment, on the other hand, is intended to be more permanent and open-ended.

## *Example 1:*

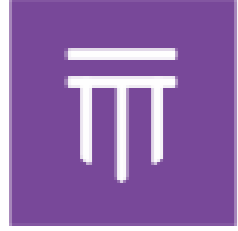
Austrian architect moves to the Czech Republic and for 3 years he assists in a large building project, renting a turn-key office space for the duration of his stay. Is he ‘merely’ a provider of services or has he established himself in Austria?

## *Example 2:*

Freedom of services and freedom of goods – travelling for medical care in another MSs – buying spectacles – which freedom is it?

Does it matter to distinguish between the various freedoms?

## 3 Cross-border element



4 scenarios:

- The service provider travels to another MS;
- recipient of services travel;
- services themselves may cross the border : cold calling advertisement (see *Alpine Investments*);
- Both service provider and provider travel to another MS.



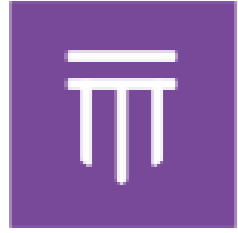
# What restrictions are prohibited?

- *Sager* (C-76/90), para. 12:  
‘the abolition of any restriction even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.’
- *Dassonville* doctrine applies: elimination of double standards, and recognition of mutual recognition

Example: piano teacher who would have to set for exams in 5 different countries

- Does the *Keck* exception apply to FPS? Are selling arrangements not considered as restrictions?
- *DeAgostini*: Swedish ban on television advertising directed at children under 12.

CJEU conclusion: Therefore the difficult part of the test is under the justification and not qualification as restriction as for the FMG



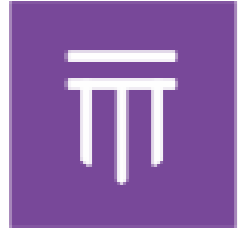
# Justifications for restrictions

**1. Legitimate aim:** are to be found in Art 52 TFEU: public policy, public security and public health +

Judicial complemented by rule of reason exceptions:

consumer protection; cultural policy; preventing abuse of free movement of services; professional rules protecting the recipient of services; or the right to take collective action for the protection of the workers of the host State against possible social dumping; risk of seriously undermining the financial balance of the social security system (Smits and Peerbooms)

purely economic aims, such as safeguarding revenue or protecting a certain economic sector, cannot form legitimate aims under the rule of reason



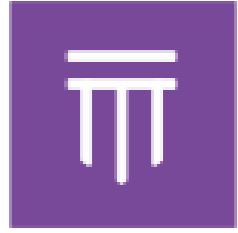
# Justifications for restrictions

2. **Proportionate**: a restriction is both suitable and necessary to achieve its objective.

In practice the proportionality test allows to adjust the test for various types of services:

- Economic ones: MS has to prove there was no less restrictive alternative;
- Sensitive ones: if the national measure is not manifestly inappropriate (C-262/02 Commission v. France (Loi Evin)).



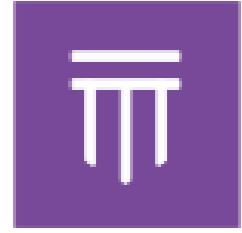


# Positive Regulation – Services Directive

Similarly to the Citizenship Directive – there is a Services Directive.  
Codifies CJEU jurisprudence, example recital 40:

The concept of ‘overriding reasons relating to the public interest’ to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.





# Freedom of companies

Art 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 Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

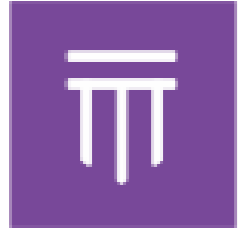
‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.’

Unique issue to freedom of companies: seat of undertakings rules and freedom to change their seat.

*Centros C – 212/97:*

Facts: Two Danes established Centros Ltd under UK company law. The company was trading only in Denmark. The incorporators had established the entity under UK company law to avoid the minimum capitalisation requirement for Danish limited liability companies. The Danish commercial registry considered this to be an unlawful circumvention of the Danish minimum capitalisation rules and so refused to register the company’s branch office in Denmark .

What are the EU law implications?



# Freedom of companies

*Centros C – 212/97, CJEU rules:*

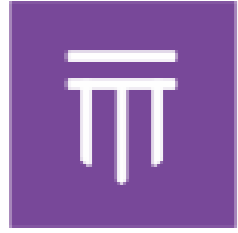
Member States remain free to determine which connecting factor they take into account for determining the initial seat as well as the connecting factor they require for maintaining a seat

**HOWEVER**

where a company exercises its freedom of establishment under the EU Law, the Member States are prohibited from discriminating against this company on the ground that it was formed in accordance with the law of another member state in which it has its registered office but does not carry on any business.

Second, a state is not authorised to restrict freedom of establishment on the ground of protecting creditors or preventing fraud if there are other ways of countering fraud or protecting creditors.

Besides, the Court points to the availability to member states of the option of adopting EC harmonising legislation in this area of company law.



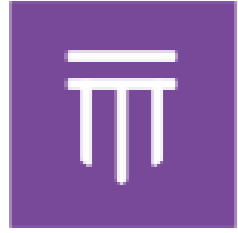
# Freedom of capital – last of the 4 freedoms

Art 63 TFEU:

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

What do you find specific to freedom of capital which does not exist for the other FFs?



# Freedom of capital – last of the 4 freedoms

What is capital?

See for examples Annex 1 of Directive 88/361 – no longer in force, but the annex illustrates concrete still relevant cases: credit cards, financial loans and credits, direct investments.

Positive integration – Economic and monetary union

Read the chapter: Armin Cuyvers, Freedom of Establishment and the Freedom to Provide Services in the EU