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Freedom of Establishment



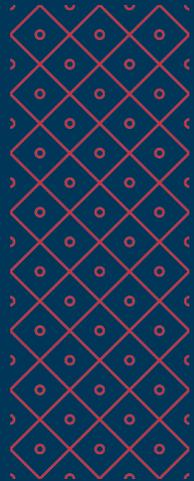
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Content

1. Introductions
2. Legal persons
3. Exemptions
4. Conclusions



Chapter 1

Introduction



Freedom of establishment

Legal source:

- Art. 49-54 TFEU
- Secondary law
- CJEU case law

= Right to set up and pursue an economic activity through a fixed establishment in another Member State for an indefinite period
(*C-221/89 Factortame*)

Article 49 TFEU



“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.

Such prohibition shall also apply 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.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is affected, subject to the provisions of the Chapter relating to capital.”



Freedom of establishment

- Art. 49 TFEU - It includes:
 - 1) The right to take up and pursue activities as self-employed persons
 - 2) The right to set up and manage companies or firms
- Necessity of a link to EU
 - Natural person (EU citizenship)
 - Legal person (connection to EU)



Distinction from free movement of

...employees → business done independently

...services → exercised permanently, regularly (C-55/94 Gebhard)



Exercising right of establishment

1) **Primary establishment**

→ Setting-up an economic activity in another Member State, includes transfer of a company seat

2) **Secondary establishment**

→ Setting-up of agencies, branches or subsidiaries in another Member State

3) **Holding shares** in a company established in another MS

- *C-251/98 Baars*

4) **Cross-border merger** of companies



Direct effect, equal treatment

C-2/74 Reyners

Mr Reyners, a Dutch national, who obtained his legal education in Belgium and was the holder of the legal diploma giving the right to take up the profession of “avocat” in Belgium, was excluded from that profession solely by reason of his nationality as a result of a Belgian royal decree of 1972.

- Art. 49 TFEU has direct effect
- Prohibition of discrimination based on nationality



Recognition of qualifications

C-340/89 Vlassopoulou

Ms Vlassopoulou, a Greek lawyer registered with the Athens Bar, was working with a firm of German lawyers in Germany since July 1983. On 13 May 1988, Mrs Vlassopoulou applied to the Ministry of Justice for admission as a “Rechtsanwältin“. The Ministry refused her application on the ground that she did not have the qualifications laid down by German legislation.

- Member State must compare qualification acquired in another MS with its national requirements
- right to judicial review

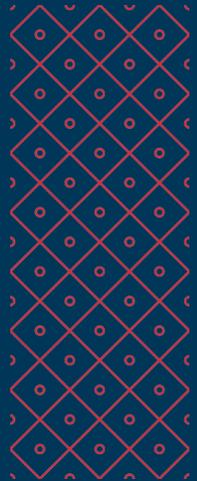


Recognition of qualifications

Directive 2005/36 on the recognition of professional qualification

In some professions automatic recognition:

- Harmonised minimum training – health workers
- Professional experience



Chapter 2

Legal Persons



Companies in the EU – 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.”

- Tie to EU: registered office / central administration / principal place of business
- For profit purpose



Free movement of Companies

1) Transfer of a seat

→ C-210/06 *Cartesio*

Cartesio, a company formed under Hungarian law, sought to transfer its seat to Italy. Hungarian law did not allow Cartesio to transfer its seat abroad while continuing to be subject to Hungarian law.

Member States have a power not to permit a company governed by its law to retain that status when transferring the seat to another MS

MS cannot prevent the company from converting itself into a company governed by the law of another MS



2) Secondary establishment

→ C-212/97 Centros

3) Cross-border merger of companies

→ C-411/03 SEVIC

Sevic, a company established in Germany, sought to merge with Security Vision, a company established in Luxembourg. The application for registration in the national commercial register was rejected by German authorities on the ground that the German law provides only for mergers between companies established in Germany.



Directive 2017/1132

Directive (EU) 2017/1132 relating to certain aspects of company law → harmonisation of corporate law (to certain extent)

- Replaced six existing directives
- The directive concerns limited liability companies: establishment and functioning, conversions (comprising transfer of a seat), mergers and divisions.



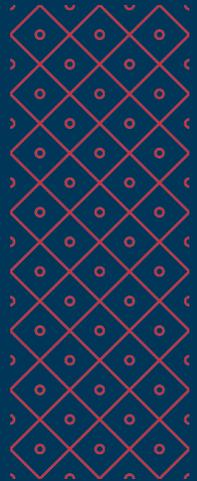
Societas Europaea (SE)

Council Regulation No 2157/2001 on the Statute for a European company (SE)

A European public limited-liability company (*Societas Europaea* or SE) may be set up within the territory of the EU

The capital (minimum 120 000 EUR) shall be divided into shares

The registered office may be transferred to another Member State
More than 2500 SEs have been established



Chapter 3

Exemptions

Exemptions



1) Art. 51 TFEU

“The provisions of this Chapter 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.”
exercise of official authority

- Narrow interpretation
- Only activities which involve a direct and specific connexion with the exercise of official authority

→ *C-53/08 Notaries in Austria*

Under Austrian legislation, only Austrian nationals were entitled to carry out the profession of a notary. Activities of notaries included authentication of documents, activities as a commissioner of the court (“Gerichtskommissär“) under the law of succession, etc. Notarial acts were enforceable, under certain conditions.



2) Art. 52 TFEU

“The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”

- public policy
- public security – ex. terrorism
- public health – ex. diseases

3) Overriding reasons relating to the public interest

→ **CJEU case law**

C-106/16 Polbud - protection of the interests of creditors and minority shareholders, transfer of the registered office of a company

Proportionality

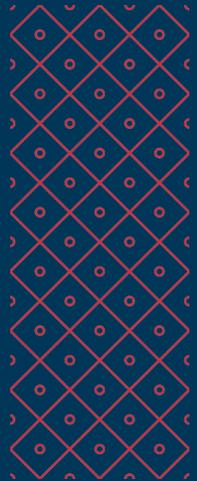


Restrictions must be proportionate

*Appropriate to ensure the achievement of the objective pursued
Does not go beyond what is necessary to achieve it*

Ex. Disproportionality:

- exemption for a whole industry,
- requiring only one place of establishment,...



Chapter 4

Conclusions

Conclusion



Art. 49-54 TFEU, heavily formed by CJEU case law

Distinction – independent work, permanent/regular

Forms – primary/secondary establishment

Natural x legal persons

Exemptions – narrow, TFEU and case law



Literature

Barnard, C. (2025) – The Substantive Law of the EU: The Four Freedoms (8th ed., OUP)

Jaeger, T. (2021) – Introduction to European Union Law: Foundations, Institutions, Enforcement, Internal Market Rules (1st ed., Facultas)

Sufrin, B., Dunne, N., Jones, A. (2023) – EU Competition Law: Text, Cases & Materials (8th ed., OUP)



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