

# Free Movement of Persons, Services and Capital

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# Today's menu

1. Introduction
2. Free movement of persons
  - a) Free movement of workers
  - b) Freedom of establishment (self-employed)
  - c) EU citizenship
    - ✓ Dir. 2004/38/EU
3. Free movement of services
  - ✓ Dir. 2006/123/EC
4. Free movement of capital
5. Assessment

# The four freedoms

1. Goods: art. 30, 34, 35 and 36 TFEU (Title II)

**2. Persons:**

**- Workers: art. 45 TFEU**

**- Establishment: art. 49 and 52 TFEU**

**3. Services: art. 56 and 62 TFEU**

**4. Capital and payments: art. 63 and 65 TFEU**

Persons, services and capital → Title IV

Citizenship → art. 21 TFEU

Area of freedom, security and justice → Title V (asylum and immigration, judicial cooperation in civil and criminal matters)

# Similarities with the free movement of goods

- Broad definition of the freedoms
- Justifications for restrictions in the Treaty
- Rule of reason / mandatory requirements with regard to measures without distinction
- Enforceable before national courts (direct effect)

# Differences with the free movement of goods

- No distinction between tariff barriers and non-tariff barriers
- No selling arrangements
- Less grounds for justification in the TFEU

# Free movement of persons

- 1. Workers
  - 2. Establishment (self-employed)
  - 3. EU citizens
- } Economically active persons

# Free movement of workers

## **Art. 45 TFEU:**

1. Freedom of movement for workers shall be secured within the Union.
  2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
- ➔ Prohibition of discrimination o.g.o. nationality
  - ➔ Broader interpretation: elimination of all restrictions

# Definition of ‘worker’

- EU notion (not national)
- Judgment *Lawrie-Blum*
  - ✓ For a certain period of time
  - ✓ For and under the direction of another person
  - ✓ Remuneration
  - ✓ Effective and genuine (not marginal or ancillary)
- Workers have original rights
- Family members and dependent persons have derived rights



# Rights for workers

## **Art. 45 (3) TFEU:**

- a) to accept offers of employment actually made;
- b) to move freely within the territory of Member States for this purpose;
- c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
- d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

# Includes

1. The right to leave the MS of origin
2. The right to look for a job for a period of 6 months

# Justifications: art. 45 (3) TFEU

1. public policy
  - a) Personal conduct
  - b) Genuine, present and sufficiently serious threat to a fundamental interest of society
2. public security: idem
3. public health
  - a) Epidemic diseases
  - b) Other infectious or contagious diseases

# Justifications: Rule of reason

- Restrictive national measures can be justified by mandatory requirements of general interest
  - ✓ Only measures without distinction to the nationality
  - ✓ Non-economic interests
  - ✓ Suitable, necessary and proportionate to achieve the set goals

# Exception: art. 45 (4) TFEU

“The provisions of this Article shall not apply to employment in the public service.”

- Direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the interests of the State
- Functional approach: not all civil service job but dependent on the actual tasks and responsibilities
- Not excepted: health care, education, public transport, etc.
- Excepted: police, armed forces, diplomats, ...

# Freedom of establishment

## **Art. 49 (1) 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.”

- ✓ Actual pursuit of economic activity through a fixed establishment in another MS for an indefinite period
- ✓ Lasting presence (otherwise services)

# Definition of 'self-employed'

- Natural persons: original rights
  - ✓ Work outside a relationship of subordination
  - ✓ Bear risk for success or failure of their employment
  - ✓ Paid directly and in full
- Family members and dependent persons: derived rights
- Legal persons: original rights

# Rights: art. 49 (1) TFEU

1. The right to take up and pursue activities as self-employed persons
  2. The right to set up and manage undertakings (companies, firms, etc.)
  3. The right to set up agencies, branches or subsidiaries
- And for that purpose the right to leave the MS of origin and to enter, move freely within and reside in another MS



# Justifications

1. Treaty: art. 52 (1) TFEU
  - Public policy
  - Public security
  - Public health
2. Rule of reason
  - Measures without distinction
  - Mandatory requirements of general interest
3. Suitable, necessary and proportionate

# Exception: 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”

→ Judgment *Dutch notaries*

# EU Citizenship

## **Art. 20 (1) VWEU:**

“Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”

# Rights for EU citizens

## **Art. 20 (2) TFEU:**

1. Right to travel to and reside freely in another MS
2. Right to vote and to stand as candidate in elections to the European Parliament and in municipal elections in their MS of residence
3. Protection of the diplomatic and consular authorities of any MS if MS of origin is not represented
4. Communication with EU institutions in native language

# Catch-all clause

## **Art. 21 (1) TFEU:**

“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”

- Only applicable when other provisions are not
- Other provisions hold stronger rights

# Directive 2004/38/EU

- Regulates the free movement of EU citizens and their relatives on the territory of the MS
- Includes not economically active persons, such as pensioners and students
- Residence for max. 3 months: no further requirements
- More than 3 months: sufficient resources and sickness insurance
- After 5 years of legal residence: right to permanent residence, that can only be lost if the citizen resides in another country for more than 2 years

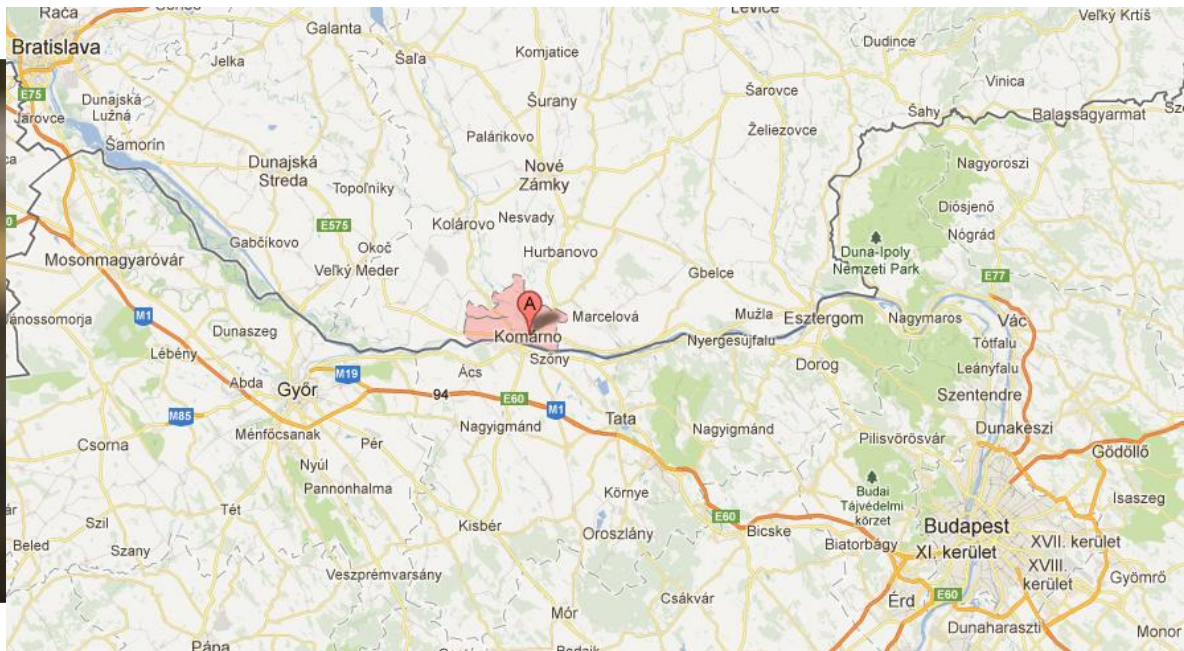
# Dir. 2004/38/EU - restrictions

- Restrictions of the free movement are allowed for reasons of public policy, public security and public health
- cf. Treaty provisions concerning the free movement of persons and the freedom of establishment
- Directive does not hold 'rule of reason' justifications

# Judgment *Hungarian President* (C-364/10)



<http://www.origo.hu>



[maps.google.nl](https://maps.google.nl)



[wikipedia.org](https://wikipedia.org)



# Judgment *Hungarian President* (C-364/10)

- Solyom travelled as a president and not as an 'ordinary' citizen
- This specific situation is regulated by international law
- Falls outside the ambit of EU law
- Unless the aims of the internal market or the coherence of the EU is endangered

# Free movement of services

## **Art. 56 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.”

# Definition of 'service'

## **Art. 57 TFEU:**

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration

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

# Definition of a ‘service’

- Broad categories; also e.g.:
  - Tourism
  - Medical services
  - Financial services
  - Educational services
  - Television
  - Lotteries / gambling
- “normally provided for remuneration” → economic activity
- Irrespective of the one who actually pays (*Watts*)

# Cross border aspect

- Service providers (*Van Binsbergen, 1974*)
- Service receivers (*Luisi and Carbone, 1984*)
- But also applicable when the service itself moves (*Alpine Investments, 1995*), e.g. callcenters, internet services, broadcasting services

# Rights

- Right to leave the MS of origin and enter, move freely within and reside in another MS to provide or receive services
- Right to access the market in services in the host MS

# Justifications

## **Art. 62 TFEU:**

“The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.”

- ✓ Art. 52 (1) TFEU: public policy, public security, public health
- ✓ Rule of reason
  - Without distinction
  - Mandatory requirements of the general interest
  - E.g. consumer protection, workers protection, culture
- ✓ Suitable, necessary and proportionate
- ✓ Art. 51 VWEU: exercise of official authority

# The Services Directive (2006/123/EC)

- About services and establishment
- Aimed at removing the remaining restrictions to the free movement of services and the freedom of establishment
- Many exceptions, such as financial services, health services, transport services, gambling, audio visual services



# Content of the Services Directive

1. Administrative simplification
2. Establishment
3. Services
4. Quality of the services

# Administrative simplification

- Single points of contact for all formalities
- Right to information for service providers (all formalities)
- Electronic process also available

# Establishment

- Authorisation schemes (permits) are prohibited unless:
  - ✓ Non-discriminatory
  - ✓ Mandatory requirements of general interests
  - ✓ Proportionate
- Requirements for authorisation schemes:
  - ✓ Black list (e.g. nationality requirements)
  - ✓ Grey list (e.g. a certain legal form, like Ltd.)

# Services

- Freedom to provide services
- No restrictions unless
  - ✓ Non-discriminatory
  - ✓ Public policy, public security, public health, protection of the environment (not more mandatory requirements listed)
  - ✓ Proportionate
- Black list with restrictions

# Quality of services

- Right to information for consumers
- Consumer protection
- Judicial protection (arbitration)

# Free movement of capital

## **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.

# Definition of 'capital' and 'payment'

- 'Capital' → Dir. 88/361/EEC: non-exhaustive list of capital movements, e.g. investments
- Not: leave a country with a car filled with money (*Sanz de Lera*)
- 'Payments' → transfer of foreign exchange within the context of an underlying transaction (goods, services, capital)

# Justifications - Treaty

## **Art. 65 (1) (b) TFEU:**

- Prevent infringements of national laws, e.g tax laws and prudent supervision of financial institutions
- Information for statutory purposes
- Public policy
- Public security



# Justifications – Rule of reason

- Measures without distinction
- Mandatory requirements of general interest
- Suitable, necessary and proportionate

Judgment *Konle* → spatial planning en prevention of ghost towns during the low season

# How to tackle a free movement case?

1. What kind of freedom?
2. Cross border effect?
3. If yes: is the measure a restriction of the free movement?
4. If yes: can the restriction be justified?
  - a) Treaty (measures with and without distinction)
  - b) Rule of reason (measures without distinction)
5. Suitable, necessary and proportionate