**the EU FUNDAMENTAL FREEDOMS IN THE LIGHT OF cross-border road transport**

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**Last updated in June 2019**





**Recommended citation**

Ratti L., ‘The EU fundamental freedoms in the light of cross-border road transport’, in Bednarowicz B., Zwanenburg A. (Eds), Cross-Border Employment and Social Rights in the EU Road Transport Sector, Eleven, the Hague, 2019.

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# **Introduction to Module 1 on Fundamental Freedoms**

## a. Curriculum outline

This chapter will deal with the European legal framework concerning the four fundamental freedoms put by the founders at the basis of the European internal market. Those freedoms have led to autonomous fields of EU law and have been developed by the crucial contribution of the Court of Justice of the European Union (CJEU). Having constitutional importance, the fundamental freedoms pose themselves delicate questions of internal coherence, boundaries, and balance. To the external (i.e. towards other constitutional values), they inevitably put into question the real nature of the process of European integration as such. This is particularly remarkable when considering social rights in the context of international road transport, for the need to establish a levelling playing field for economic actors within the EU.[[1]](#footnote-1)

## b. Specific learning outcomes

* Identify and apply the four fundamental freedoms of the EU in the road transport sector

# 1. State of the art

## a. Introduction and inventory of the legal instruments at stake

All markets need freedom, but need also rules. Since its foundation, the EU has established rules governing the exercise of some, fundamental freedoms. The term ‘fundamental freedoms’ captures the EU internal market freedoms enshrined in the provisions on free movement of goods, free movement of persons (and workers), services, and capital in Title II and IV of Part Three (‘Union Policies and Internal Actions’) of the **Treaty on the Functioning of the European Union**.[[2]](#footnote-2) In particular, Article 26 TFEU defines the internal market as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’. This must be read in the light of the basic provisions contained in the **Treaty on the European Union**[[3]](#footnote-3), specifically Article 3(2) according to which ‘The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.’, and Article 3(3), where the establishment of the internal market is coupled with ‘sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.’

Since 2009, with the entry into force of the Lisbon Treaty,[[4]](#footnote-4) the **EU Charter of Fundamental Rights**[[5]](#footnote-5) has been given constitutional value equal to that of the Treaties. Particular attention must be given to the interaction of the two sources, involving a dichotomy between those freedoms and the discourse on fundamental rights promoted by the Charter. The dynamics of this dichotomy are all but clear, as some, but not all, fundamental freedoms constitute fundamental rights. In this context significant examples come from Article 15 CFREU (Freedom to choose an occupation and right to engage in work), 16 (Freedom to conduct a business), 21 (Non-discrimination), 45 (Freedom of movement and of residence).

In the TFEU the four freedoms are separately defined and regulated in principle: **Articles 28-37** deal with the **free movement of goods**; **Articles 45-48** with the **free movement of workers**; **Articles 49-55** with **freedom of establishment** and **Articles 56-62** with the **freedom to provide services**); finally, **Articles 63-75** with the **free movement of capital and payments**.

The development of a specific set of rights inherent to the concept of citizenship of the EU (Articles 18-25 TFEU) must be read as an attribute of the right to free movement of persons protected by Article 21 TFEU.

As far as the **transnational transport** sector is concerned, a number of Treaty provisions apply (Title VI Transport, TFEU). Among them, they must be recalled as relevant:

* Article 90: ‘The objectives of the Treaties shall, in matters governed by this Title, be pursued within the framework of a common transport policy’;
* Article 91(1): ‘For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down: (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; (b) the conditions under which non-resident carriers may operate transport services within a Member State; (c) measures to improve transport safety; (d) any other appropriate provisions’.
* Article 92: ‘Until the provisions referred to in Article 91(1) have been laid down, no Member State may, unless the Council has unanimously adopted a measure granting a derogation, make the various provisions governing the subject on 1 January 1958 or, for acceding States, the date of their accession less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State’.
* Article 95 (1): ‘In the case of transport within the Union, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question shall be prohibited’.

The constitutional value of the interaction between fundamental freedoms and transnational transport was made clear by the same Court of Justice, while sanctioning the inaction of the Council in the field. On 22 May 1985, on behalf of the European Parliament against the Council, the CJEU decided that the Council had failed ‘to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a member state’.[[6]](#footnote-6)

In the present context a particular stress will be placed on the free movement of workers, freedom to provide services, and freedom of establishment, whose interplay is crucial to depict a comprehensive legal framework on the rights and guarantees involved in international road transport.

## b. Legal context

The fundamental freedoms constitute the pillars of the European process of mutual integration. The aim of completing the EU internal market through the enhancement of those freedoms has been put at the core of the legislative concern since the Single European Act (SEA) of 1986. With this document the then president of the Commission Jacques Delors wished to introduce new legal bases for the achievement of a common market without barriers (of physical, technical, and economic nature). Through what is now Article 114 TFEU, the approximation of laws became of pivotal importance to pursue the ‘establishment and functioning of the internal market’, thus emphasising that the single market was essentially a law-making project. The SEA made clear the need to distinguish between internal market initiatives directed essentially to harmonize legal systems, and mutual recognition of national regulations and standards. These latter may constitute unjustified barriers to trade whenever they are excessive in relation to the mandatory requirements pursued. The SEA repackaged the four freedoms into the renamed internal or single market and set 1992 as the deadline to finally realize it, a date with more political than legal significance.

As noted by Barnard,[[7]](#footnote-7) the term single market appears to be narrower than common market, being the former defined by reference to the four freedoms while the latter combines them with flanking measures such as agriculture, competition, and social matters. More than a decade later, the Treaty of Amsterdam introduced the concept of ‘area of freedom, security, and justice’, referring to fundamental rights and the different legal systems and traditions of the MSs (Article 67(1) TFEU). In particular, the substantive stress on freedom relates to the absence of internal border controls for persons, thus to an entirely free movement of them within the internal borders. The subsequent treaties of Maastricht and Lisbon have added the centrality of an economic and monetary union, and tried to put the bases for a true political union.

The four freedoms’ economic aim is to optimally allocate resources for the EU, which is facilitated by allowing the factors of production to move to the area where they are most valued. This implies two forms of legal integration: a negative integration for which national rules hindering cross-border trade must be prohibited, and a positive integration based on progressive harmonization of domestic legal systems.[[8]](#footnote-8)

Such dual integration is often described as the interplay between decentralisation, involving the role of national legislation in affirming non-discrimination, market access, and regulatory competition; and centralisation, relying on a top-down approach towards harmonization.

**- Decentralisation**

The principle of *non-discrimination* on the grounds of nationality is to be seen as the cornerstone of the entire architecture: it requires the same treatment of internal and foreign goods, persons, services, and capital, and presupposes that they can be similarly situated throughout Europe, thus treated in the same way. In this model each MS is entirely free to regulate how goods are produced and services provided, but they must adopt the same approach towards goods and services coming from other MSs.

The *market access approach* – based on the idea first spelled in *Cassis de Dijon* that goods lawfully produced in one MS should presumptively have free access in another MS – goes beyond non-discrimination, testing the legislation of each MS in order to check whether it is liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the treaties. Similarly to the non-discrimination test, market access tolerates exceptions/justifications, as it goes a long way towards building a single market by removing any unjustified obstacles to trade. The consequence of the market access approach is that is significantly more intrusive into the legislation of the single MS, asking the MS to take out its rules even though not discriminatory. In constitutional terms, the market access approach gives the CJEU the significant power to outlaw rules made by democratically elected national Parliaments. An illustrative example in this sense for labour law is the introduction of legislation on minimum wages: some have argued that it could be challenged under the market access model because it would prevent migrants from working for less than minimum and discourage them from moving to that state.

*Regulatory competition* relates to the effect of free movement: the legislations of MSs are placed into competition and should make each MS design better rules to attract and retain valuable assets. As put by Deakin, ‘regulatory competition’ refers to a process whereby legal rules are selected (and de-selected) through competition between decentralised, rule-making entities (which could be nation states or other units such as regions or localities). Three justifications are normally given for regulatory competition: firstly, it allows the content of rules to be matched more effectively to the preferences or *wants* of the consumers of laws (citizens and others affected); secondly, it promotes diversity and experimentation in the search for effective legal solutions; and thirdly, by providing mechanisms for preferences to be expressed and alternative solutions compared, it promotes the flow of information on effective law making’.

For regulatory competition to function there must be central authorities laying down and enforcing rules, as well as national authorities left free to regulate their assets. This should lead to a race to the top the legislative process, while promoting diversity and experimentation in the search for effective legal solutions. This approach, in reality, has been balanced by a constant attention to public interest issues, such as social, consumer, health, and environmental policies. These are nothing more than justifying factors for MS legislation, and examples come from the derogations provided for in the same TFEU and from the “mandatory requirements” discussed in *Cassis de Dijon* and the subsequent case-law. The mandatory requirements idea, and its equivalents in the cases of freedom of movement of workers and services and freedom of establishment, allow MS to set a “floor” to the competitive process, subject, however, to the need to satisfy the test of proportionality. The mandatory requirements principle allows a degree of autonomy by MSs and sets some ground rules for regulatory competition, without the need to resort to centralised standard-setting through harmonisation.

**- Centralisation/harmonisation**

Without any central input towards the single MSs, the decentralised approach may lead to excesses and undesirable results. In the labour law field this is particularly true: reducing labour costs would surely result to be an attractive measure for companies to establish in that MS, creating short-term advantages for them and the MS itself. In the long run, this would lead to a race to the bottom, lowering the same concept of highly competitive social market economy enshrined in Article 2 TEU. Therefore the EU has always retained some power to regulate some sensitive issues, adopting Regulations and Directives, within the limits of the principles of competence and subsidiarity.

In the light of the legal issues posed by the position of workers in the transnational transport sector, a particular attention must be drawn on the free movement of workers, freedom to provide services, and freedom of establishment.

1) **Free movement of workers** contained in Article 45 TFEU allows the nationals of any MS to work in another MS under the same conditions as this latter’s nationals.

This freedom entails three different guarantees:

a) the right to participate to the labour market of a MS different from that of origin: the worker can, in fact, freely access a foreign EU labour market, according to the rules contained in the Regulation no. 492/2011 on freedom of movement for workers within the Union and in the Dir. 2004/38/EC on citizenship;

b) the prohibition of discriminations based on nationality/citizenship: this aspect is also regulated by Reg. no. 492/2011 (Articles 5-9);

c) the prohibition of restrictions according to Article 45 TFEU, as barriers to the free movement of workers are banned unless they can be objectively justified.

The justification method deals with the very nature of the four freedoms, and consists in allowing MSs introduce or maintain limitations to free movement, only and insofar as they are justified. Restrictions on free movement of workers must always be proportional – appropriate for securing the attainment of the objective that they pursue and not going beyond what is necessary in order to attain it[[9]](#footnote-9) – and not violate other fundamental rights conferred by EU law.[[10]](#footnote-10)

Article 45 TFEU has direct effect, both in relation to the State[[11]](#footnote-11) and in the horizontal relationship between the worker and her employer[[12]](#footnote-12), as well as in respect to third parties.[[13]](#footnote-13)

2) **Freedom to provide services** entails the carrying out of an economic activity for a temporary period in a MS where either the provider or the recipient of the service is not established (article 56 TFEU). Key norms in this respect are also Articles 61 and 58 TFEU. The former includes in the definition of services all those that ‘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.’ In practice this includes (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions. Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

According to the CJEU, the wide definition of services encounters the only limit of service providers establishing their principal residence, on a permanent or anyway almost indefinite duration, in the territory of another Member state, which in practice turns ‘the Treaty text on the relationship between the two freedoms on its head’.[[14]](#footnote-14)

There are numerous examples of services to be included in the scope of Article 56, such as: the provision of people by an employment agency; medical services including the termination of a pregnancy; education; the provision of a TV signal; the transmission of programmes and ads from broadcasters in one MS to cable networks in another; lotteries; judicial recovery of debts. [[15]](#footnote-15)

Specific rules are applicable to certain sectors. In particular, according to Article 58, (1) freedom to provide services *in the field of transport* shall be governed by the provisions of the Title relating to transport, and (2) the liberalisation of *banking and insurance services* connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

What is essential for the application of the freedom of services is the *temporariness* of the service provision, which element is to be deducted, more than from the mere existence of an office in a MS, from the very nature of the economic activity carried out., so referring to its regularity, periodical nature or continuity.

This rule may give rise to abuses, in the event someone runs most of his activities in the territory of a MS maintaining the place of establishment in another one to evade its professional rules.[[16]](#footnote-16) The CJEU has constantly stated that a MS ‘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 freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State'.[[17]](#footnote-17) Of course, those measures must be proportional to the objective pursued.[[18]](#footnote-18) In fact, ‘any restriction which, without objective justification, is liable to prohibit, impede or render less attractive the provision of those services must be declared incompatible with EU law’.[[19]](#footnote-19)

3) **Freedom of establishment** is guaranteed by Article 49 TFEU, whose objective is to allow nationals of a MS or legal persons established in that MS to set up a secondary establishment in another MS in order to carry on their business there, and thus to promote economic and social interpenetration within the European Union in the sphere of economic activity other than as an employee. To that end, freedom of establishment is intended ‘to allow such nationals or legal persons of the European Union to participate, on a stable and continuing basis, in the economic life of a MS other than their State of origin and to profit therefrom by actually pursuing, in the host MS, an economic activity through a fixed establishment for an indefinite period’.[[20]](#footnote-20) The same concept of establishment includes ‘actual establishment of the company concerned in that State and the pursuit of genuine economic activity there’.[[21]](#footnote-21)

Article 54 stipulates that ‘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.’ It further specifies the meaning of "Companies or firms" including ‘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.’

The crucial features of establishment are the stable and continuous basis on which the economic professional activity is carried on and the fact that there is an established professional base within the host MS. For the provision of services, the temporary nature of the activity is to be determined referring to its periodicity, continuity and regularity, a providers of services will not be deemed to be established simply by virtue of the fact that they equip themselves with some form of infrastructure in the host MS.[[22]](#footnote-22)

Actual exercise of freedom of establishment thus entails, in particular, as a necessary adjunct to that freedom, that ‘the subsidiary, agency or branch set up by a legal person established in another MS must be able, where relevant, and if the activity which it proposes to carry out in the host MS so requires, to take on workers in that MS’.[[23]](#footnote-23) It must be recalled that according to the CJEU, Article 49 entails, in principle, ‘the freedom to determine the nature and extent of the economic activity that will be carried out in the host Member State, in particular the size of the fixed establishments and the number of workers required for that purpose’, as well as ‘the freedom subsequently to scale down that activity or even the freedom to give up, should it so decide, its activity and establishment’.[[24]](#footnote-24)

As for the conceptual overlapping between the two freedoms provided for by Articles 49 and 56, the CJEU repeatedly held that unlike the freedom to provide services set out in Article 56 TFEU, which deals with the pursuit of an economic activity by a person in another MS *without* having the principal or secondary place of business in that State, the freedom of establishment concerns the *permanent* installation in another MS in order to pursue an economic activity. As prudently suggested by AG Jacobs, however, ‘The truth is that the provision of services covers a vast spectrum of different types of activity. At one extreme, it may be necessary for the provider of the service to spend a substantial period of time in the Member State where the service is provided (…); the border-line between services and establishment may be a narrow one, and it is arguable that the Treaty merely requires the abolition of discrimination in such a case.’[[25]](#footnote-25)

The free movement of services, conceived for cross-border performance of the free professionals, has become more markedly an expressive form of enterprise freedom, consisting in companies using their own workers to perform services in foreign countries. Which would make it even more uncertain the fact that the transnational posting of workers, running a service on behalf of the detachable company, may permit their workers to invoke the social rights of the country of destination without incurring any restrictions (prohibited) on the freedom to provide services. This is all the more so where taking into account that a specific feature of the freedom of services, unlike freedom of establishment, is the fact that "contact" with the country where the service is run is only temporary. Therefore, the national treatment that would be extended to the lender of services to reduce dumping, in setting a parameter for legitimizing restrictions on the free movement of services, would not be sufficient to consider the same restrictions as the law of the Union.

## c. Scope

1. **Personal scope**

In principle, each of the fundamental freedom above mentioned has its own scope of application *ratione personae*.

1) The most controversial one is that of Article 45 on **free movement of workers**, for its implications in terms of the extension of labour law protections also to quasi-subordinate workers and self-employed or independent contractors.

EU primary and secondary law had initially avoided any involvement into the definition of the concept of ‘worker’ for the purpose of free movement. This silence of the EC founding treaties, and of the first few directives adopted in the 1960s and 1970s to confer rights to workers,[[26]](#footnote-26) has been considered particularly surprising given that the regulation of the ‘four freedoms’, including of course free movement of workers, was one of the main concerns of the Treaty of Rome. This appears to be in contrast with what in the Treaty is said about the concept of ‘services’ and of natural persons entitled to establish themselves in other MSs.[[27]](#footnote-27)

But since *Hoekstra,*[[28]](#footnote-28) the CJEU decided to advocate the authority to establish a ‘Community meaning’ for the term ‘worker’, at least in respect of the EC/EU provisions shaping the rules on ‘Free movement of workers’. The Court has since refined its jurisprudence on the concept of ‘worker’ in this particular field of EU law, relying on three main criteria, to be employed for the purposes of Article 45 TFEU:

a) *subordination*: As noted in *Lawrie-Blum*, ‘The essential feature of an employment relationship , however , is that performs *for a certain period of time* a person services *for and under the direction of another*’ (emphasis added).[[29]](#footnote-29)

b) *remuneration*: this element requires that work is provided for and under the direction of another, in return for which remuneration is received. The Court has interpreted this requirement broadly in the free movement context, accepting for instance that ‘the sole fact that a person is paid a 'share' and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker’,[[30]](#footnote-30) and even that services and other benefits in kind provided in lieu of a regular salary, ‘may be regarded as being an indirect quid pro quo for their work’.[[31]](#footnote-31) And it may also accept as remuneration payments that do not derive exclusively from the employer but that are ‘largely provided by subsidies from public funds’.[[32]](#footnote-32)

c) *genuinity*: for the CJEU the worker must be engaged in ‘effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary’.[[33]](#footnote-33) The CJEU has further stated that the services provided should not be ‘merely a means of rehabilitation’ but instead form ‘part of the normal labour market’,[[34]](#footnote-34) although it has made allowance for ‘the fact that the productivity of persons employed … is low’ and that person may be employed under public supported schemes.[[35]](#footnote-35)

From the above one can understand that so far the CJEU’s jurisprudence has followed the long-standing binary divide between subordinate employment and autonomous self-employment, deeply rooted in most of MSs’ legal traditions. And even with respect to those systems providing for an intermediate category (quasi-subordination, economically dependent self-employment, etc.), the CJEU has been consistent in asserting that ‘any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity’.[[36]](#footnote-36)

In fact, as the CJEU clarified in the controversial case FNV Kunsten,[[37]](#footnote-37) ‘the status of ‘worker’ within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer’s commercial risks, and, for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.[[38]](#footnote-38)

As for family members, it must be noted that freedom of movement of workers would be seriously undermined if the migrant worker could not be able to bring the family with her to another MS. Directive 2004/38 therefore contains a specific provision affirming the right of family members to be granted a right of entry and residence, as well as that of taking up employment (Articles 2(2), 5, 6, and 23, Directive 2004/38). The same rights are granted to those family members who are not EU citizens (Article 10, Reg. 492/2011).

In principle employment in the public sector is not subject to the free movement of workers, pursuant to Article 45(4) TFEU. The exception based on the expression ‘employment in the public sector’ has a unitary meaning, otherwise having the effect of impairing the efficacy of EU law, and must be interpreted restrictively. Are therefore excluded from the application of this exception post office workers, railways workers, hospital nurses, plumbers, carpenters, and electricians.[[39]](#footnote-39)

2) A **service** may be carried out by a natural person, acting either as a self-employed or as an employee of a service provider, or by legal persons, being that a company or a non-profit organization, or even by a factual group without legal personality. Services must be normally provided for remuneration (article 57).

The temporary nature of the service is to be determined both in view of its concrete duration and on the basis of its regularity, periodicity and continuity.

The most controversial issue regarding the personal scope relates to the fact that Article 56 can be used to challenge rules laid down by the host MS and the home MS which obstruct the provision of services.

3) Article 49 aims at prohibiting domestic MS restrictions on the **freedom of establishment**, including primary establishments such as companies as well as secondary establishments (agencies and branch offices). In so far as they are not governed by the provisions relating to freedom of movement of goods, capital or persons, the services mentioned in Article 49 must be considered to be as such, where they are normally provided for remuneration.

The development of the scope of Article 49 has been controversial in the case law of the CJEU. In *Reyners*,[[40]](#footnote-40) one of the earliest cases in this area, a Dutch national, was prohibited from practicing as an advocate in the Belgian courts, for lack of Belgian nationality. The question before the court was whether such discrimination, prohibited by Article 49 (ex Article 43 TEC) and Article 56 TFEU (ex Article 49 TEC), was actionable on a directly effective basis. In the light of *Van Gend en Loos* – in which, the CJEU stated that a treaty provision is directly effective if it were unconditionally precluding any further MS implementation – in *Reyners* it was held that Article 49 required directives to give effect, which had not been created at the time. In spite of this the Court held Article 49, and particularly its principle of non-discrimination on the grounds of nationality, to be directly effective allowing the claimant to invoke directly the application of freedom of establishment.

1. **Material scope**

Preliminarily it must be recalled that fundamental freedoms are functional to a cross-border situation, that is a situation in which two or more legal systems are involved by the movement: this however must not be understood to mean that a worker may not rely on Article 45 against her home state, as MSs are obliged not to hinder their own citizens from leaving the country in order to take up employment in another Member state (Article 4, Dir. 2004/38). The same applies when citizens return to their country of origin. The cross-border limitation means, on the contrary, that purely domestic cases are not to be covered by the relevant Articles of the TFEU.

As for the economic freedoms, the CJEU stated that whether a provision of services falls or not within the free movement principles depends not just (only) by the cross-border element, but also on the fact that the services must be commercial in nature, in that they must be provided for remuneration, even in the case of non-profit organizations. In its case law, the CJEU went further to include the services provided by athletes in the context of a sports association or federation,[[41]](#footnote-41) as well as cases in which the remuneration did not come from the recipient of the services.[[42]](#footnote-42) The material scope of freedom of services extends also to activities that at national level can be deemed to be immoral or even illegal. This includes gambling, lotteries, prostitution, and other cases, all of which are subject to the proportionality test. A MS remain free to prohibit them, but the ban must be proportionate and not arbitrary on grounds of nationality or place of establishment.[[43]](#footnote-43)

The justified restrictions to free movement of workers provided for by Article 45 have been progressively extended to the other freedoms, in a way that calls into question the same reasoning. Exceptions of public policy, security and health are admissible when: the restriction is adopted in pursuit of a legitimate public interest, non incompatible with EU law; it is equally applicable to persons established within the MS and without discrimination; it is proportionate to the need to observe the legitimate rules in question; and it respects fundamental rights.

As for the material scope of freedom to provide services, Articles 56 and 57 apply to activities of industrial character, of commercial character, of craftsmen, and of the professions. According to Article 57, ‘services’ are those insofar as they are not regulated by other provisions relating to free movement of goods, capitals and persons. To fall within the material scope of application of Article 56, there must be the provision of a service, which needs to have a cross-border element, and is to be provided on a temporary basis for remuneration.

In the specific field of the posting of workers (regulated by Dir. 96/71[[44]](#footnote-44)) the CJEU has held that the aims of preserving the interests of the workers and ensuring good relations on the labour market and to be seen as legitimate aims: therefore, the imposition of a licence requirement is justified so long as it takes into account the relevant evidence and guarantees already furnished by the service provider in the MS of establishment, thus for example making an unjustified restriction the requirement to obtain a work permit for a company working temporarily in another MS.[[45]](#footnote-45)

In 2006 the Commission took the stance and introduced a specific set of rules governing the provision of services within the EU. The so-called service directive (Dir. 2006/123),[[46]](#footnote-46) after a long and consuming political and legal debate, was adopted with the aim of breaking down barriers to cross-border trade in services between countries in the EU, making it easier for service providers, particularly small and medium sized enterprises, to offer their services to customers in other EU countries. To enhance the rights of services recipients and strengthen their confidence in the internal market, MSs have been asked to remove obstacles for recipients of services supplied by providers established in another MS, such as obligations to obtain an authorisation, to abolish discriminatory requirements based on the recipient’s nationality or place of residence, and to make available general information and assistance on the legal requirements, in particular consumer protection rules and redress procedures applicable in other MSs. According to Article 20, all MSs are obliged to ensure that companies do not discriminate against service recipients by denying access to a service or applying higher prices due to the recipient's nationality or country of residence. Differential treatment is only allowed when the differences are duly justified.

In order to help enhancing these provisions, the Directive envisages a strong cooperation between local administrations, to give mutual assistance in the supervision of service providers by means of an exchange of information and the carrying out of transnational inspections and investigations. This ensures the effective supervision of service providers and guarantees that such supervision does not lead to additional and unjustified obstacles. As usual, certain requirements can still be imposed by MSs, but only when they are non-discriminatory, justified for reasons of public policy, public security, public health or the protection of the environment and do not go beyond what is necessary to achieve their objective.

The posting of workers constitutes the most important exception to the freedom of services within the EU; the ultimate goal of the relevant Directives has been to enhance the economic dimension of the European market by protecting persons enjoying their right to freely move. This may give rise to a complex set of legal questions, especially regarding conflicting rights of workers and in particular the right to take collective action, all of which fall outside the scope of this chapter.

## d. General principles

1. **Free movement**

Coming to the substantial guarantees provided by the EU legal framework on free movement, Article 45(3) TFEU grants the worker the right to accept job offers actually made, to move freely within the EU to look for a job, to stay in another MS for the purpose of employment, and to remain in the relevant MS even after the end of the employment relationship. Secondary law is developed on the basis of Article 46 TFEU, which empowers the European Parliament and the Council to ‘issue directives or make regulations setting out the measures required to bring about freedom of movement for workers’. Also Reg. 492/2011 grants workers moving across the EU an unlimited access to the labour market of another MS (Article 1-6). Coupled with the right to work, the worker retains the right to enter and reside in the territory of another MS (Article 45(3)(b), (c), and (d)) TFEU.

The same Article 45(3), in the case of public policy, security, and health reasons, sets out important limitations which, being derogatory from a general rule, must be interpreted restrictively.[[47]](#footnote-47) The public policy exception is furthermore substantiated in secondary legislation, particularly by Directive 2004/38 (Articles 21 et seq.). This means that neither Article 45 nor the relevant secondary legislation preclude MSs from imposing to migrant workers administrative, police measures limiting the worker’s right of residence in a specific territory, provided that the action is justified by reasons of public order or public security, that those reasons could otherwise give rise only to a measure prohibiting him to reside in the entire territory of the MS, and that the conduct is capable to give rise to punitive measures applicable to its own nationals.[[48]](#footnote-48)

1. **Non discrimination**

Freedom of movement entails the elimination of any impair treatment based on the person’s nationality. In primary law this is reflected by Article 2(1) TEU and Article 45(2) TFEU. Reg. 492/2011 prohibits discrimination in its Article 7 (1), stating that ‘A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment’. The aims of the prohibition of discrimination relate to the need for the worker not only to enter and start working in another MS, but also and especially to be treated equally comparably to MS nationals.

All kinds of discrimination, direct and indirect, are prohibited. It is especially the concept of indirect discrimination that has been interpreted broadly in the case law of the CJEU, including cases in which previous periods of employment abroad were not taken into account[[49]](#footnote-49), others in which the payment of tide over allowances were paid only to students having completed their secondary education in that MS[[50]](#footnote-50), and others where language requirements were deemed to be mandatory to get a job not related to it[[51]](#footnote-51).

The prohibition of discrimination addresses both MSs as public authorities and associations (such as in the well-known *Bosman* case[[52]](#footnote-52)); it also renders null and void any clause of a collective agreement or any collective regulation concerning eligibility for employment, remuneration, and other conditions of employment or dismissal, insofar as they lay down discriminatory conditions in respect to workers who are nationals of other MSs. This applies in principle also to collective agreements applicable to the public sector.[[53]](#footnote-53)

1. **Prohibition of restrictions**

The prohibition of restrictions differs substantially from the principle of non-discrimination as it deals with the existence of single provisions restricting the exercise of the right to free movement either factually or legally without an evident connection to nationality. A pedagogic example could be seen in a national legislation providing for an excessive income tax rating, thus dissuading foreigners to circulate. But more in general almost all legal provisions imposing burdens on individuals can be seen as restrictions in the mentioned meaning: being this the case, it is for the national legislation to be assessed by the CJEU applying the proportionality test.

In the settled case law of the CJEU, the concept of ‘restriction’ covers, for example within the meaning of Article 49 TFEU, ‘measures which, even though they are applicable without discrimination on grounds of nationality, are liable to impede the exercise of freedom of establishment or render it less attractive’.[[54]](#footnote-54) In that must be included all those measures taken by a MS ‘which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade’.[[55]](#footnote-55)

In the context of the freedom of establishment, the prohibition of restrictions entails the possibility for the CJEU to outlaw a national provision capable of rendering less attractive for a company to move or remain in a MS different than that of origin. In the words of the CJEU, freedom of establishment, granted by Article 49 TFEU to nationals of the MSs, ‘includes the right for them 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 MS where such establishment is effected, entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a MS and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the MS concerned through a subsidiary, a branch or an agency’.[[56]](#footnote-56) In its case law, the CJEU has gone further and stated that ‘freedom of establishment thus covers, in particular, the situation where a company established in a Member State creates a subsidiary in another Member State. The same is true, in accordance with settled case-law, where such a company or a national of a Member State acquires a holding in the capital of a company established in another Member State allowing it or him to exert a definite influence on the company’s decisions and to determine its activities’. [[57]](#footnote-57)

In the context of freedom to provide services, restrictions are to be interpreted extensively. According to the jurisprudence of the CJEU, Article 59 of the Treaty ‘requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another MS, 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 attractive the activities of a provider of services established in another Member State in which he lawfully provides similar services’.[[58]](#footnote-58) Restrictions are admitted when they comply with the proportionality test, and more precisely: they are applied in a non-discriminatory way, they are justified by imperative reasons relating to the public interest, they are objectively necessary in order to ensure compliance with professional rules, and they do not exceed what is necessary to attain its objectives.[[59]](#footnote-59)

1. **Derogations and justifications**

Once a national rule is qualified as a restriction or an obstacle to one of the freedoms, the TFEU provides for a closed number of justifications that the MS can put forward. Some of them are expressed in the TFEU itself, and relate to: public policy, public security, and public health (Articles 45 (3), 45(4), 52(1), and 62 TFEU).

These derogations must be interpreted strictly, so that their scope cannot be determined unilaterally by the MS without control by the EU; they cannot be misapplied so as to serve purely economic interests or aims; they must give the individual affected the right to redress; and they are subject to the proportionality test. Barnard and Peers[[60]](#footnote-60) list a number of examples relating to imperative reasons of public interest (also referred to as ORRPI by Dir. 2006/123 on freedom of services): combating drug tourism; ensuring road safety; protecting workers; preventing gambling; avoid the risk of crime or fraud; avoid the risk of incitement to spend; preserving press’ pluralism; maintaining fiscal cohesion; combating money laundering; protecting the interests of creditors, minority shareholders and employees.

The test to be met in assessing the admissibility of derogations at national level is centred on four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements of 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. In the *Gebhard* case, for example, the CJEU held that ‘the possibility for a national of a Member State to exercise his right of establishment, and the conditions for his 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’. [[61]](#footnote-61) This results in a demonstration on the appropriateness and the necessity of the norm or practice, and the positive answer to the question whether there could be a different wording of the Member State’s law or if a decision could be adopted by Member States’ authorities that would secure the said interest while having a lower impact in limiting the specific freedom.

1. **Recognition of qualifications and training**

Article 53 TFEU is the constitutional basis for the recognition of qualifications. A different treatment of domestic and foreign qualification would give rise to an infringement of the fundamental freedoms of movement: this applies both in the case of certificates obtained abroad by non nationals and to be used in a MS, and in the case of nationals obtaining their own certificates in another MS.

In the area of the so-called regulated professions, the EU started introducing specific Directives applicable to the various professions: nurses, dentists, veterinarians, pharmacists, doctors, etc. This sectoral harmonization was later abandoned. Since the ‘80s, the Commission started to sum up all the relevant pieces of legislation into a framework instrument (Dir. 89/48), and in the light of the principle of mutual recognition included in the regulation all protected professions, now consolidated in Dir. 2005/36.[[62]](#footnote-62)

The purpose of the Directive is to establish that a MS which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications shall recognise professional qualifications obtained in one or more other MSs, allowing the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

The rules for the recognition of qualifications have been supplemented by a code of conduct approved by the group of coordinators for Directive 2005/36/EC (composed of representatives from the Member States), which contains a list of admitted and not admitted national administrative practices.[[63]](#footnote-63)

1. **Interim conclusions**

From the jurisprudence of the CJEU it can be inferred that a similar approach on the various freedoms enhanced in the Treaties has been taken, so that any national rule implying an impediment to market access falls within the scope of the free movement rules and requires thus to be justified. Sometimes the CJEU does not even intend to distinguish the two freedoms, and jointly applies both of them.[[64]](#footnote-64)

This conclusion cannot lead to deny the differences between the freedom to provide services and that of establishment, being the former more incline to admit objective justification, the boundary being the temporary nature of the service. This led the CJEU to qualify as service within the meaning of Article 56 TFEU the activity of a Portuguese company carrying out plastering in Germany for three years, as ‘‘services’ within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years, where, for example, the services in question are supplied in connection with the construction of a large building. Services within the meaning of the Treaty may likewise be constituted by services which a business established in a Member State sup- plies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States, for example the giving of advice or information for remuneration’ [[65]](#footnote-65)

## e. Applicability and enforcement of fundamental freedoms in the road transport sector

1. **Preamble: Viking as an illustrative case of clash of fundamental rights**

All the above mentioned fundamental freedoms are relevant in the case of transnational road transport, involving this situation the movement of workers, services and the establishment of companies in a MS other than that of origin.

The legal questions arising from that situation can be analysed from many perspectives. In the light of fundamental freedoms, an illustrative case comes from transnational transport by ferry, and involved a Finnish ferry company operating between Estonia and Finland. Seeking to re-flag its ferry Rosella, Viking Line registered it in Estonia with the aim of employing an Estonian crew at local rates and conditions of employment. The Finnish unions opposed the reflagging and involved the ITF (International Transport Workers federation), who called for a refusal to enter any negotiation with Viking, the sanction being the exclusion from the ITF itself. This prevented the Estonian unions and Viking to enter any negotiation. After two years Viking brought a claim asking a British court (where the company was based) to withdraw the ITF circular and ordering them not to interfere with Viking’s freedom to move to Estonia.

In brief, the CJEU ruled that collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article. Article 49 TFEU is to be interpreted to the effect that ‘collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective’. In fact, ‘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’. Further, since the EU has ‘not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour’.[[66]](#footnote-66)

Although the outcome of the Viking case was not favourable to the workers and their unions – which brought harsh criticism from scholarship to the CJEU -, the case very well illustrates the Court’s approach to the market access test and the sequence of arguments systematically employed by thereby.

1. **Special rules: are those on ‘cabotage’ compatible with fundamental freedoms?**

In the sector of international road transport, a preliminary issue is that of promoting fair competition between MSs, in particular fighting illegal practices such as undeclared work or bogus self-employment. As we have seen before, the CJEU is constant in extending the scope of EU labour law and of the fundamental freedoms beyond the binary divide subordinate employees – autonomous self-employed, as well as combating bogus self-employment. A similar anti-abusive move is that of clearly distinguishing freedom of establishment – duly protected and promoted by the treaties – from the illegal practice of the letterbox companies.[[67]](#footnote-67)

A widespread practice is that of *cabotage*, meaning ‘the national carriage of goods for hire or reward carried out by non-resident hauliers on a temporary basis in a host MS’.[[68]](#footnote-68) At EU level, cabotage is regulated by Reg. 1072/2009. Article 8 of the Regulation provides that every haulier is entitled to perform up to three cabotage operations within a seven days period starting the day after the unloading of the international transport. A haulier may decide to carry out one, two or all three cabotage operations in different Member States and not necessarily the Member State in which the international transport was delivered. In this case only one cabotage operation is allowed in a given Member State to be carried out within three days of entering that Member State without cargo. Article 10(1) provides that ‘In the event of serious disturbance of the national transport market in a given geographical area due to, or aggravated by, cabotage, any Member State may refer the matter to the Commission with a view to the adoption of safeguard measures and shall provide the Commission with the necessary information and notify it of the measures it intends to take as regards resident hauliers’.

Cabotage rules are to be seen as restrictions on the fundamental freedoms, as they limit the freedom of companies to provide services wherever they wish across the EU; but they are justified by the aim of protecting the integrity of the internal market by avoiding social dumping among MSs. As companies are required to respect the rules on the posting of workers, the question remains whether the rules introduced or maintained at national level on cabotage may hinder operators’ economic freedoms by imposing them excessive burdens.

In a recent action, the EU Commission referred Denmark before the CJEU[[69]](#footnote-69), for the following reasons:

* The Commission submits that Article 8(2) of Regulation (EC) No 1072/2009 regulates exhaustively how hauliers may to carry out cabotage operations on the terms laid down in that article. The provision does not provide for a maximum number of loading and/or unloading sites within the same cabotage operation. The limit of a maximum of three cabotage operations does not mean that a cabotage operation must include a set number of loading and/or unloading sites.
* Under the Danish rules, cabotage can consist either of a number of loading sites or a number of unloading sites, but not both. The Danish rules preclude non-resident hauliers from carrying out cabotage operations consisting of a number of loading and unloading sites, which constitutes a restriction on how those hauliers may carry out cabotage operations in Denmark as provided for under Regulation (EC) No 1072/2009.

The CJEU held that ‘the Cabotage Guidelines provide that a cabotage operation may have several loading points or several unloading points. Therefore, those measures do not limit the number of consignors or principles for the same cabotage operation and impliedly allow a cabotage operation to have several loading points and one unloading point or several unloading points and one loading point. It follows that, according to the Cabotage Guidelines, only cabotage operations having several loading points and several unloading points are prohibited. Therefore, those measures do not go beyond what is necessary to achieve the objective pursued by Regulation No 1072/2009. Taking account of the foregoing, it must be held that the Cabotage Guidelines are consistent with the principle of proportionality’.[[70]](#footnote-70)

1. **Follows: is the ‘Limosa’ declaration an admissible measure in the light of Article 56 TFEU?**

The Limosa declaration is the first step towards legal work in Belgium in accordance with European rules.[[71]](#footnote-71) It is a legal obligation both for workers who habitually work in a country other than Belgium or have been hired in a country other than Belgium, and for independent workers temporarily working in that capacity in Belgium, without residing there on a permanent basis. The obligation to file a Limosa declaration has been in force since 1 April 2007, and its non-compliance may give rise to criminal or administrative sanctions. Belgian law provides an exception for international transport: workers and self-employed people in the international transport sector for passengers and goods are exempt, with the exception of inland transport in Belgium.

This gave rise to an action of infringement brought by the EU Commission towards Belgium, as the provisions laying down the Limosa obligations were suspected to constitute a discriminatory restriction on the freedom of self-employed workers to provide services, the declaration requirement in question applying only to self-employed service providers established or resident in a Member State other than the Kingdom of Belgium.

In the subsequent case before the CJEU, the Court held that ‘The formalities implied by the declaration requirement at issue are thus such as to impede the supply of services on the territory of the kingdom of Belgium by self-employed service providers established in another Member State. That obligation thus constitutes an obstacle to the freedom to provide services’.[[72]](#footnote-72) Therefore a justification is required. In order to find out such justification, the CJEU noted that ‘the objectives relied on in the present case by the Kingdom of Belgium can be taken into consideration as overriding requirements in the public interest which are capable of justifying a restriction on the freedom to provide services. On that point, it is sufficient to state that the objective of combating fraud, particularly social security fraud, and preventing abuse, in particular detecting ‘bogus self-employed persons’ and combating undeclared work, can form part not only of the objective of the financial balance of social security systems, but also of the objectives of preventing unfair competition and social dumping and protecting workers, including self-employed service providers.’[[73]](#footnote-73) Nevertheless, a general presumption of fraud is not sufficient to justify a measure compromising the objectives spelled by the Treaties, and even if it were accepted that self-employed service providers established in a Member State other than Belgium could be subject, in the latter State, to tax and social security obligations, it is established that the application of the declaration requirement at issue is not restricted to cases where there is cause to ascertain that those tax and social security obligations are met. The CJEU concluded then that the Limosa declaration is capable of infringing freedom to provide services ex Article 56 TFEU.

In a subsequent case, the same Limosa declaration was found to be justified by a different reason of public interest. Interpreting Articles 56 and 57 TFEU, the CJEU held that they not preclude a national legislation ‘under which the recipient of services performed by workers posted by a service provider established in another Member State is required to declare to the competent authorities, before those workers begin to work, the data identifying those workers who are unable to submit proof of the declaration which their employer should have made to the competent authorities of that host Member State prior to the commencement of that provision of services, since such legislation is capable of being justified as safeguarding an overriding ground of public interest, such as the protection of workers or the combating of social security fraud, on condition that it is established that that legislation is appropriate for ensuring the attainment of the legitimate objective or objectives pursued and that it does not go beyond what is necessary to achieve them, these being matters for the referring court to determine.’[[74]](#footnote-74)

# 2. Case law

**List of the most relevant case law of the Court of Justice of the European Union:**

* CJEU, 3 December 1974, Case 33/74, *Van Binsbergen*, ECLI:EU:C:1974:131
* CJEU, 19 March 1974, Case 75/63, *Hoekstra*, ECLI:EU:C:1964:19.
* CJEU, 21 June 1974, Case 2/74, *Reyners*, ECLI:EU:C:1974:68
* CJEU, 4 December 1974, Case 41/74, *Van Duyn v. Home Office*, ECLI:EU:C:1974:133.
* CJEU, 18 March 1980, Case 52/79, *Debauve ,* ECLI:EU:C:1980:83
* CJEU, 17 December 1980, Case 149/79, *Commission v. Belgium*, ECLI:EU:C:1980:297
* CJEU, 23 March 1982, Case C-53/81, *Levin*, ECLI:EU:C:1982:105
* CJEU, 22 May 1985, Case 13/83, *European Parliament v Council*, ECLI:EU:C:1985:220
* CJEU, 3 July 1986, Case 66/85, *Lawrie-Blum*, ECLI:EU:C:1986:284
* CJEU, 10 July 1986, Case 79/85, *Segers,* EU:C:1986:308
* CJEU, 26 April 1988, Case C-352/85, *Bond van Adverteerders*, ECLI:EU:C:1988:196.
* CJEU, 14 December 1989, Case C-3/87, *Agegate,* ECLI: EU:C:1989:650.
* CJEU, 5 October 1988, Case C-196/87, *Steymann*, ECLI:EU:C:1988:475.
* CJEU, 31 May 1989, Case C-344/87 *Bettray*, ECLI:EU:C:1989:226
* CJEU, 27 March 1990, Case C-113/89, *Rush Portuguesa*, ECLI:EU:C:1990:142.
* CJEU, 25 July 1991, Case C-76/90, *Säger*, ECLI:EU:C:1991:331
* CJEU, 23 February 1994, Case C-419/92, *Scholz*, ECLI:EU:C:1994:62
* CJEU, 5 October 1994, Case C-23/93, *TV 10* , ECLI:EU:C:1994:362
* CJEU, 9 August 1994, Case C-43/93 *Vander Elst,* ECLI:EU:C:1994:310.
* CJEU, 15 December 1995, Case C-415/93, *Union Royale Belge de Société de Football Association v. Bosman*, ECLI:EU:C:1995:463
* CJEU, 30 November 1995, Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411.
* CJEU, 28 March 1994, Case C-272/94 *Guiot* , ECLI:EU:C:1996:147.
* CJEU, 12 September 1994, Case C-278/94, *Commission v. Belgium,* ECLI:EU:C:1996:321.
* CJEU, 15 January 1998, Case C-15/96, *Kalliope Schöning-Kougebetopoulo*, ECLI:EU:C:1998:3
* CJEU, 26 November 1998, Case C-1/97, *Birden*, ECLI:EU:C:1998:568.
* CJEU, 8 June 1999, Case C-337/97, *Meeusen* , ECLI:EU:C:1999:284.
* CJEU, 23 November 1999, C-376/96 *Arblade and Others* , ECLI:EU:C:1999:575
* CJEU, 11 April 2000, Cases C-51/96 and 191/97, *Deliège*, ECLI:EU:C:2000:199.
* CJEU, 15 March 2000, Case C-165/98, *Mazzoleni*, ECLI:EU:C:2001:162.
* CJEU, 6 June 2000, Case C-281/98, *Angonese*, ECLI:EU:C:2000:296.
* CJEU, 30 November 2000, Case C-195/98, *Österreicher* *Gewerkschaftsverbund*, ECLI:EU:C:2000:655.
* CJEU, 24 January 2002, Case C- 164/99, *Portugaia Construções*, ECLI:EU:C:2002:40,
* CJEU, 20 November 2001, Case C-268/99, *Jany and Others*, ECLI:EU:C:2001:616.
* CJEU, 14 October 2004, Case C-36/02, *Omega*, ECLI:EU:C:2004:614.
* CJEU, 7 September 2004, C-456/02, *Trojani*, ECLI:EU:C:2004:488
* CJEU, 26 November 2002, Case C-100/01, *Ministre de l’Intérieur v. Olazbal*, ECLI:EU:C:2002:712.
* CJEU, 11 December 2003, Case C-215/01, *Schnitzer*, ECLI:EU:C:2003:662.
* CJEU, 15 December 2005, Joined Cases C-151/04 and C-152/04, *Durré*, ECLI:EU:C:2005:775.
* CJEU, 21 April 2005, Case C‑140/03, *Commission v Greece,* EU:C:2005:242,
* CJEU, 13 December 2005, Case C‑446/03, *Marks & Spencer*, EU:C:2005:763,
* CJEU, 11 December 2007, Case C-438/05, *International Transport Workers’ Federation -Finnish Seamen’s Union v. Viking Line*, ECLI:EU:C:2007:772
* CJEU, 28 April 2009, Case C‑518/06, *Commission v Italy,* EU:C:2009:270,
* CJEU, 16 March 2010, Case C-325/08, *Olympique Lyonnais*, ECLI:EU:C:2010:143.
* CJEU, 21 October 2010, Case C‑81/09, *Idryma Typou,* EU:C:2010:622,
* CJEU 12 July 2012, Case C‑378/10, *VALE,* EU:C:2012:440
* CJEU, 19 December 2012, Case C-577/10, *Commission v. Belgium*, ECLI:EU:C:2012:814
* CJEU, 3 December 2014, Case C-315/13, *De Clercq and others*, ECLI:EU:C:2014:2408.
* CJEU, 23 February 2016, Case C‑179/14, *Commission v Hungary,* EU:C:2016:108,
* CJEU, 21 December 2016, Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972.

# 3. Preselected list of literature

## a. Academic literature

1. C. Barnard, *The Substantive Law in the EU. The Four Freedoms* (Oxford: OUP, 2016)
2. C. Barnard – S. Peers (eds.), *European Union Law* (Oxford: OUP, 2017)
3. C. Barnard – S. Peers (eds.), *European Union Law* (Oxford: OUP, 2014)
4. R. Blanpain, *European Labour Law*, 14th Edition (Kluwer Law International, Alphen aan den Rijn, 2014)
5. G. Thüsing*, European Labour Law* (Munich-Baden-Baden-Oxford: Beck-Hart-Nomos, 2013)
6. S. Weatherill, “Viking and Laval: The EU Internal Market Perspective”, in M.R. Freedland, J. Prassl, *Viking, Laval and Beyond* (Oxford and Portland: Hart, 2014), 23-39.
7. P. Craig, G. De Burca, *EU Law. Text, Cases, and Materials* (Oxford: OUP, 2015).
8. D. Chalmers, G. Davies, G. Monti, *European Union Law* (Cambridge: CUP, 2014).
9. P. Caro De Sousa, The *European Fundamental Freedoms. A Contextual Approach* (Oxford: OUP, 2015).
10. J. Cremers, *Economic freedoms and labour standards in the European Union*, in *Transfer*, ETUI, 2016, Vol. 22(2) 149–162.
11. A. Cuyvers, *Freedom of Establishment and the Freedom to Provide Services in the EU*. In: Ugirashebuja E., Ruhangisa J.E., Ottervanger T., Cuyvers A. (Eds.) *East African Community Law: Institutional, Substantive and Comparative EU Aspects.* (Leiden Boston: Brill Nijhoff, 2017). 376-391.

## b. Other documents

1. “Fundamental rights in the EU”, at: <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.2.html>

“European Union, The Treaty at a Glance”, <http://europa.eu/lisbon_treaty/glance/index_en.htm>

1. Websites with additional information

* Website of the European Commission: <http://ec.europa.eu/social/main.jsp?catId=849>
* Website of the network of legal exports in the field of free movement of workers and social security coordination (FreSsco) (including reports of this network, a regulations database and an e-learning tool): <http://ec.europa.eu/social/main.jsp?catId=1098&langId=en>

1. Due to the partial overlap between this introductory part and single sub-items (concerning in particular free movement of workers in the context of social security, and the freedom of establishment and to provide services in the context of the posting of workers), this chapter will provide the student general knowledge on the fundamental freedoms at EU level, leaving the detailed analysis of each of them to the subsequent sub-units. [↑](#footnote-ref-1)
2. Consolidated Version of the Treaty on the Functioning of the European Union, pt. 3, tit. II and IV, Mar. 30, 2010, OJ 2010 C 83/47 [hereinafter TFEU]. [↑](#footnote-ref-2)
3. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2012 C 326/01 [hereinafter TEU]. [↑](#footnote-ref-3)
4. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007 C 306/1 [↑](#footnote-ref-4)
5. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, OJ 2000 C 364/ 1 [hereinafter CFREU]. [↑](#footnote-ref-5)
6. CJEU, 22 May 1985, Case 13/83, *European Parliament v Council*, ECLI:EU:C:1985:220. [↑](#footnote-ref-6)
7. C. Barnard, *The Substantive Law in the EU. The Four Freedoms*, OUP, 2016, 8 ff. [↑](#footnote-ref-7)
8. P. Craig – G. De Burca, *EU Law : Texts, Cases, and Materials*, OUP, 2015, 608. [↑](#footnote-ref-8)
9. CJEU, 30 November 1995, Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411, para. 37. [↑](#footnote-ref-9)
10. CJEU, 26 November 2002, Case C-100/01, *Ministre de l’Intérieur v. Olazbal*, ECLI:EU:C:2002:712, para. 43. [↑](#footnote-ref-10)
11. CJEU, 4 December 1974, Case 41/74, *Van Duyn v. Home Office*, ECLI:EU:C:1974:133. [↑](#footnote-ref-11)
12. CJEU, 6 June 2000, Case C-281/98, *Angonese*, ECLI:EU:C:2000:296. [↑](#footnote-ref-12)
13. CJEU, 16 March 2010, Case C-325/08, *Olympique Lyonnais*, ECLI:EU:C:2010:143. [↑](#footnote-ref-13)
14. R. Schütze, *European Union Law*, Cambridge, 2018, 664. [↑](#footnote-ref-14)
15. C. Barnard, J. Snell, *Free movement of legal persons and the provision of services*, in C. Barnard – S. Peers (eds.), *European Union Law*, OUP, 2017, ch. 14. [↑](#footnote-ref-15)
16. CJEU, Case 33/74, *Van Binsbergen*, ECLI:EU:C:1974:131; CJEU, Case C-376/96, *Arblade*, ECLI:EU:C:1999:575, para 32. [↑](#footnote-ref-16)
17. CJEU, Case C-23/93, *TV 10* , ECLI:EU:C:1994:362. [↑](#footnote-ref-17)
18. CJEU, Case 52/79, *Debauve* , ECLI:EU:C:1980:83. [↑](#footnote-ref-18)
19. CJEU, 8 July 2014, Case C-83/13, *Fonnship*, ECLI:EU:C:2014:2053. [↑](#footnote-ref-19)
20. CJEU, 23 February 2016, Case C‑179/14, *Commission v Hungary,* EU:C:2016:108, para. 48. [↑](#footnote-ref-20)
21. CJEU 12 July 2012, Case C‑378/10, *VALE,* EU:C:2012:440, para. 34. [↑](#footnote-ref-21)
22. CJEU, 11 December 2003, Case C-215/01, *Schnitzer*, ECLI:EU:C:2003:662. [↑](#footnote-ref-22)
23. CJEU, 10 July 1986, Case 79/85, *Segers,* EU:C:1986:308, para. 15. [↑](#footnote-ref-23)
24. CJEU, 21 December 2016, Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972. [↑](#footnote-ref-24)
25. Opinion of the AG Jacobs, 21 February 1991, Case 76/90, *Säger*, ECLI:EU:C:1991:72, para. 25. [↑](#footnote-ref-25)
26. Free movement Directive and Reg. 492/2011. [↑](#footnote-ref-26)
27. Article 60 of the Treaty of Rome, specifying that ‘“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. [↑](#footnote-ref-27)
28. CJEU, 19 March 1974, Case 75/63, *Hoekstra*, ECLI:EU:C:1964:19. [↑](#footnote-ref-28)
29. Case 66/85, *Lawrie-Blum*, para 17 [↑](#footnote-ref-29)
30. Case C-3/87, *Agegate*, para 36. [↑](#footnote-ref-30)
31. Case 196/87, *Steymann*, para 12. [↑](#footnote-ref-31)
32. Case C- 344/87, *Bettray v Staatssecretaris van Justitie*, para 15. [↑](#footnote-ref-32)
33. Case C-53/81, *Levin*, ECLI:EU:C:1982:105, para 17; Case C-337/97, *Meeusen*, ECLI:EU:C:1999:284, para 13. [↑](#footnote-ref-33)
34. Case C-344/87, *Bettray*, ECLI:EU:C:1989:226; C-456/02 *Trojani*, ECLI:EU:C:2004:488. [↑](#footnote-ref-34)
35. Case C-344/87 *Bettray*, cit., para 15; Case C-1/97, *Birden*, ECLI:EU:C:1998:568, paras 23-32. [↑](#footnote-ref-35)
36. Joined Cases C-151/04 and C-152/04, *Durré*, para 31. See also Case C-268/99, *Jany and Others,* ECLI:EU:C:2001:616, para 34 and the decisions cited there. [↑](#footnote-ref-36)
37. Case C-413-13, *FNV Kunsten*, ECLI:EU:C:2014:2411, para 36. [↑](#footnote-ref-37)
38. Case C‑22/98, *Becu and Others*, EU:C:1999:419, para 26. [↑](#footnote-ref-38)
39. CJEU, 17 December 1980, Case C-149/79, *Commission v. Belgium*, ECLI:EU:C:1982:195. [↑](#footnote-ref-39)
40. CJEU, 21 June 1974, Case 2/74, *Reyners*, ECLI:EU:C:1974:68. [↑](#footnote-ref-40)
41. CJEU, Cases C-51/96 and 191/97, *Deliège*, para 59. [↑](#footnote-ref-41)
42. CJEU, Case C-352/85, *Bond van Adverteerders*. [↑](#footnote-ref-42)
43. CJEU, Case C-36/02, *Omega*. [↑](#footnote-ref-43)
44. Directive 96/71/Ec of the European Parliament and of the Council of 16 December 1996, concerning the posting of workers in the framework of the provision of services, OJ L 18/01. [↑](#footnote-ref-44)
45. CJEU, Case C-113/89, *Rush Portuguesa*. [↑](#footnote-ref-45)
46. Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376, p. 36. [↑](#footnote-ref-46)
47. CJEU, 4 December 1974, Case 41/74, *Van Duyn v. Home Office*, ECLI:EU:C:1974:133, para. 18. [↑](#footnote-ref-47)
48. CJEU, 26 November 2002, Case C-100/01, *Ministre de l’Intérieur v. Aitor Oteiza Olazabal.* [↑](#footnote-ref-48)
49. CJEU, Case C-419/92, *Scholz*; CJEU, 30 November 2000, Case C-195/98, *Österreicher* *Gewerkschaftsverbund*. [↑](#footnote-ref-49)
50. CJEU, Case C-278/94, *Commission v. Belgium*. [↑](#footnote-ref-50)
51. CJEU, 6 June 2000, Case C-281/98, *Angonese*, ECLI:EU:C:2000:296. [↑](#footnote-ref-51)
52. CJEU, Case C-415/93, *Union Royale Belge de Société de Football Association v. Bosman*. [↑](#footnote-ref-52)
53. CJEU, 15 January 1998, Case C-15/96, *Kalliope Schöning-Kougebetopoulo*. [↑](#footnote-ref-53)
54. CJEU, 21 April 2005, Case C‑140/03, *Commission v Greece,* EU:C:2005:242, para. 27. [↑](#footnote-ref-54)
55. CJEU, 28 April 2009, Case C‑518/06, *Commission v Italy,* EU:C:2009:270, para. 64. [↑](#footnote-ref-55)
56. CJEU, 13 December 2005, Case C‑446/03, *Marks & Spencer*, EU:C:2005:763, para. 30. [↑](#footnote-ref-56)
57. CJEU, 21 October 2010, Case C‑81/09, *Idryma Typou,* EU:C:2010:622, para. 47. [↑](#footnote-ref-57)
58. CJEU, 24 January 2002, Case C- 164/99, *Portugaia Construções*, ECLI:EU:C:2002:40, para. 16, citing also CJEU, Case C-76/90 *Säger* , CJEU, Case C-43/93 *Vander Elst*; CJEU, Case C-272/94 *Guiot* , and more importantly both CJEU, Joined Cases C-369/96 and C-376/96 *Arblade and Others* and CJEU, Case C-165/98 *Mazzoleni*. [↑](#footnote-ref-58)
59. CJEU, 25 July 1991, Case C-76/90, *Säger*, ECLI:EU:C:1991:331. [↑](#footnote-ref-59)
60. C. Barnard – S. Peers (eds.), *European Union Law* (Oxford: OUP, 2014), Ch. 12. [↑](#footnote-ref-60)
61. CJEU, 30 November 1995, Case C-55/94, *Gebhard*, ECLI:EU:C:1995:411, para. 37. [↑](#footnote-ref-61)
62. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255/22. [↑](#footnote-ref-62)
63. A useful tool can be found at: <https://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition_en> [↑](#footnote-ref-63)
64. Case C-334/02, *Commission v. France*, ECLI:EU:C:2004:129. [↑](#footnote-ref-64)
65. Case C-215/01, *Schnitzer*, ECLI:EU:C:2003:662, para 30. [↑](#footnote-ref-65)
66. CJEU, 11 December 2007, Case C-438/05, *International Transport Workers’ Federation -Finnish Seamen’s Union v. Viking Line*, ECLI:EU:C:2007:772. [↑](#footnote-ref-66)
67. See Chapter XX on the posting of workers. [↑](#footnote-ref-67)
68. <https://ec.europa.eu/transport/modes/road/haulage/cabotage_en> [↑](#footnote-ref-68)
69. Action brought on 25 October 2016, Case C-541/16, *European Commission v Kingdom of Denmark*. [↑](#footnote-ref-69)
70. CJEU, 12 April 2018, C-541/16, *European Commission v Kingdom of Denmark,* ECLI:EU:C:2018:251, paras 58-61. [↑](#footnote-ref-70)
71. For more details see Chapter XX on social security. [↑](#footnote-ref-71)
72. CJEU, 19 December 2012, Case C-577/10, *Commission v. Belgium*, ECLI:EU:C:2012:814, para. 40. [↑](#footnote-ref-72)
73. CJEU, 19 December 2012, Case C-577/10, *Commission v. Belgium*, cit., para. 45. [↑](#footnote-ref-73)
74. CJEU, 3 December 2014, Case C-315/13, *De Clercq and others*, ECLI:EU:C:2014:2408. [↑](#footnote-ref-74)