



Law of Internal Market Update

LAW OF THE INTERNAL MARKET

NOVEMBER 2018 UPDATE





CHAPTER 2

FREE MOVEMENT OF GOODS

Section 6 Reimbursement of improperly levied charges

2.56. Extent of reimbursement

The right to reimbursement covers all the sums paid from the implementation of the national measure unlawfully applied. The debtor Member State may however rely on the principle of legal certainty in order to limit its obligation to repay the sums paid from the judgment deciding that the measure is unlawful¹. Interest granted on repayment of a tax cannot however be limited to that accruing from the day following the date of the claim for repayment of that tax².

According to the theory of unjust enrichment, the Member State may also be exempted from its obligation to repay where the cost of the tax has been passed on to another operator, whether the end consumer or an operator located downstream³. Passing on the amount of taxes to the end consumer through the selling price thus limits the right to repayment of the trader who would otherwise receive the repayment of a tax eventually borne by its own customers. However, the passing on of a tax in whole to the consumer, as a result of the tax being incorporated in the price of goods, does not necessarily neutralize the economic effects of taxation on the taxpayer who may suffer damage as a result of a price increase and correlative fall in the volume of his sales⁴. National legislation which opposes the repayment of a tax on the sole ground that such tax has been integrated in the selling retail price charged and therefore passed on to third parties, is therefore incompatible with European law⁵. **Additionally, the possible infringement of the obligation, stemming from national legislation, to pass on the charge onto the final price of the product concerned, which has its basis in EU law, is irrelevant and cannot therefore be refused for a reason based on national law: the taxpayer, who in fact pays the**

¹ See for an example regarding dock dues: Case C-163/90 *Administration des douanes et droits indirects v Legros and others* [1992] ECR I-4625, LawLex09643.

² Case C-565/11 *Mariana Irimie*, LawLex131555.

³ See Case 68/79 *Just* [1980] ECR 501, LawLex092032 (on discriminatory internal taxation); Case 199/82 *Amministrazione delle finanze dello Stato v San Giorgio* [1983] ECR 3595, LawLex091643 (on taxes having an effect equivalent to customs duties); See, also, Case C-147/01 *Weber's Wine World and others* [2003] ECR I-11365, LawLex09576: which indicates that the State remains bound to repay the amount not passed on where the tax has been passed on only in part.

⁴ Case C-441/98 *Michailidis* [2000] ECR I-7145, LawLex092190.

⁵ Case C-147/01 *Weber's Wine World and others* [2003] ECR I-11365, LawLex09576.



charge having an equivalent effect, must be able to obtain reimbursement of the sums which it has paid by way of that charge, even in a situation where the payment mechanism for the charge has been designed in national legislation so that the charge is passed on to the consumer⁶.

Evidence that the tax unduly received was not passed on to other operators cannot be placed on the person who claims his right to repayment. National legislation which makes the action for repayment subject to the proof that the tax was not passed on is contrary to the principle of effectiveness⁷. Lastly, the fact that there is a legal obligation for the taxpayer to incorporate the charge in the cost price does not mean that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty. The question whether a tax has or has not been passed on, in part or in whole, is a question of fact which falls within the jurisdiction of the national court which may freely assess the evidence⁸.

CHAPTER 3

FREE MOVEMENT OF PERSONS AND SERVICES

Section 1 Scope

I. Persons

B. Legal persons

3.08. Registered office within the Union

Under Article 54 TFEU, companies or firms formed in accordance with the law of a Member State and having their registered office⁹, central administration or principal place of business within the EU

⁶ Case C-76/17 SC Petrotel-Lukoil SA, Judgment of 1 March 2018, LawLex18352.

⁷ Case C-343/96, Dilexport v Administration des finances italienne [1999] ECR I-579, LawLex071900.

⁸ Case C-192/95 Comateb and others v Directeur général des douanes et droits indirects [1997] ECR I-165, LawLex11436.

⁹ Since the registered office was not adopted by the first signatories of the Rome Treaty, the Council set out in its general programme an additional condition - effective economic link with the Member State concerned - for enjoying the right of setting up a secondary establishment. The courts now considers that the connecting factor between a company and a State results solely from the compliance with the law of incorporation, see Case C-208/00 Überseering [2002] ECR I-9919, LawLex091113.



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are treated in the same way as natural persons who are nationals of Member States¹⁰. Since it is the registered office of companies that serves as the connecting factor with the legal system of a particular State - like nationality in the case of natural persons - a Member State in which a company establishes itself cannot apply different treatment to that company solely by reason of the fact that its registered office is situated in another Member State¹¹. Thus, a host Member State cannot refuse to recognize the legal status of a company formed in accordance with the law of another Member State in which it has its registered office on the ground that the company moved its actual registered office to its territory, unless it is reincorporated under the law of the host Member State¹², or make the recognition of the civil or legal personality of an association subject to the presence of a member holding the nationality of that State in the administration of that structure or a minimum and majority presence of members of that nationality¹³.

Unlike natural persons who may have a personal residence distinct from their establishment, legal persons only have a professional residence: their registered office. Therefore, a company which transfers its central management and control to another Member State cannot claim that it retains the form of establishment of the State of origin¹⁴. In effect, companies are created pursuant to a national legal system. They exist only through the various national laws which determine the incorporation and operation. In the absence of perfect harmonization of national legislation on corporate law, in particular concerning the connecting factor to the national territory, the possibility for a company to transfer its registered office or its actual head office to a Member State other than that of incorporation without losing its legal personality under the law of that State and, in certain circumstances, the rules relating to that transfer are determined by the national legislation of the Member State of incorporation, who may impose restrictions to the transfer outside its territory of the actual head office in order for it to retain its legal personality¹⁵. In the absence of a uniform European definition of companies able to benefit from the right of establishment according to a unique connecting factor which determines the national law applicable to a company¹⁶, a Member State has

¹⁰ Paragraph 2 indicates that '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.

¹¹ Case 270/83 *Commission v France* [1986] ECR 273, LawLex091801.

¹² With the result that the company cannot, in the host Member State, bring legal proceedings to defend its rights, Case C-208/00 *Überseering* [2002] ECR I-9919, LawLex091113.

¹³ Case C-172/98 *Commission v Belgium* [1999] ECR I-3999, LawLex071800.

¹⁴ Case 81/87 *The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1988] ECR 5483, LawLex092331; Case C-58-98 *Corsten* [2000] ECR I-7919, LawLex071595.

¹⁵ Case C-208/00 *Überseering* [2002] ECR I-9919, LawLex091113.

¹⁶ Case 81/87 *The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1988] ECR 5483, LawLex092331; Case C-58/98 *Corsten* [2000] ECR I-7919, LawLex071595.



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the power to define the connecting factor required of a company if it is to be regarded as incorporated under the national law of that Member State and the possibility not to permit a company governed by its national law to retain that status if the company intends to reorganize itself in another Member State by moving its seat to the territory of the latter¹⁷. A Member State cannot however either adopt or maintain a regulation which provides for the taxing of added values not realized at the transfer of a company or at the transfer of the registered or actual head office of a company to another Member State without contravening its obligations under Article 49 TFEU¹⁸. **Likewise, Articles 49 and 54 TFEU preclude legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company¹⁹.**

The freedom of establishment does not concern only the registered office of an undertaking; it is applicable to the transfer of activities of a company from the territory of a Member State to another Member State, irrespective of whether the company in question transfers its registered office and its effective management outside that territory or whether it transfers assets at the time of that transfer²⁰.

On the other hand, the provisions on the freedom of establishment cannot be relied on by a company established in a non-Member State²¹.

III. Purely internal situations

3.12. Concept

The principle of citizenship of the Union which according to Article 21 TFEU includes the right for every citizen of the Union to move and reside freely within the territory of the Member States, is not designed to extend the material scope of application of the Treaty to purely internal situations quite unconnected to European law²².

¹⁷ Case C-210/06 *Cartesio* [2008] ECR I-9641, LawLex091115.

¹⁸ Case C-301/11 *Commission v Netherlands* [2013], not available in English.

¹⁹ Case C-106/16 *Polbud - Wykonawstwo*, Judgment of 25 October 2017, LawLex171725.

²⁰ Case C-657/13 *Verder LabTec GmbH & Co*, Judgment of 21 May 2015, LawLex15648.

²¹ Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, LawLex09885; Case C-415/06 *Stahlwerk Ergste Westig* [2007] ECR I-151*, Summ. pub.

²² Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, LawLex091200; Case C-60/91 *Criminal proceedings against Batista Morais* [1992] ECR I-2085, LawLex091083; Case 35/82 *Morson and Jhanjan v Netherlands State* [1982] ECR 3723, LawLex092175.



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Article 49 provides for the elimination of restrictions to the freedom of establishment only in favor of European nationals who wish to establish themselves 'in another Member State'. Article 56 prohibits restrictions on freedom to provide services "within the Union [...] in respect of nationals who are established in a Member State other than that of the person for whom the services are rendered".

Literal interpretation means that those texts do not apply to activities where all the elements are situated within only one Member State, i.e. purely internal situations²³. Thus, the provision of services by operators established in Gibraltar to persons established in the United Kingdom constitutes, under EU law, a situation confined in all respects within a single Member State²⁴.

Section 3 Exceptions to the prohibition

I. Rule of reason

3.28. Indistinctly applicable measures

The principle laid down by the Cassis de Dijon judgment - according to which a non-discriminatory national measure avoids the prohibition where it meets mandatory requirements - has been extended by the European courts to the free movement of persons and services²⁵. Restrictions to the freedom of establishment and the freedom to provide services that the States impose irrespective of nationality are

²³ Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833, LawLex092034; See, also, Case C-54/88 *Criminal proceedings against Nino, Prandini and others* [1990] ECR I-3537, LawLex09518, on a purely internal situation where all the accused are Italian nationals, residing in Italy and qualified as professionals in Italy and who have been charged on the basis of provisions of the Italian Criminal Code as a result of treatment administered within the Italian territory; Case C-108/98 *RI.SAN.* [1999] ECR I-5219, LawLex071788, which indicates that Article 51 TFEU, as an exemption to the provisions of the Treaty on the freedom of establishment, does not apply in a situation in which all the facts are confined to within a single Member State; Case C-134/94 *Esso Española v Comunidad Autónoma de Canarias* [1995] ECR I-4223, LawLex09530, for a purely internal situation relating to the extension within the territory of a Member State of the activities of a company having its head office in that State and pursuing its activities there; Case 204/87 *Criminal proceedings against Bekaert* [1988] ECR 2029, LawLex091655, on a national of a Member State who has never resided or worked in any other Member State; Case C-152/94 *Openbaar Ministerie v Van Buynder* [1995] ECR I-3981, LawLex09609, on a procedure which concerns a Belgian national residing in Belgium who wishes to engage in a self-employed activity within Belgium and who does not claim to have obtained in another Member State the professional qualifications required for the exercise of that activity; Case C-379/92 *Criminal proceedings against Peralta* [1994] ECR I-3453, LawLex055056, on technical rules imposed by a Member State to marine transport undertakings established in its territory and operating vessels flying its flag; Case 20/87 *Ministère public v Gauchard* [1987] ECR 4879, LawLex091640, for a French undertaking operating a supermarket established in France and the accused manager of which is of French nationality and resides in France; Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, LawLex091200, on legislation of a federated entity of a Member State limiting affiliation to a care insurance scheme to persons residing in the territory coming within that entity's competence, excluding the other residents of the same State; Case C-112/91 *Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-429, LawLex09385, for tax legislation of a Member State which makes its nationals, who work in its territory and receive all or almost all their income there or hold all or most of their assets there, bear a heavier tax burden if they do not reside in that State than if they do; Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, LawLex042917, indicating that a dispute between recruitment consultants of a Member State and an undertaking of the same State, concerning the recruitment of a national of that State, cannot be assessed having regard to Article 56 TFEU even if the contract concluded between the recruitment consultants and the undertaking concerned includes the theoretical possibility of seeking nationals of other Member States.

²⁴ Case C-591/15 *The Gibraltar Betting and Gaming Association Limited*, Judgment of 13 June 2017, LawLex171048.

²⁵ Where they are discriminatory, only the exceptions in Articles 52 and 62 TFEU are applicable, Case 352/85 *Commission v France* [1988] ECR 2243, LawLex056886; Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, LawLex092067.



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therefore not necessarily contrary to the Treaty and must be assessed in the light of a rule of reason. To be accepted, "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it"²⁶.

Given that the justifications are put forward as part of a rule of reason, they must satisfy the conditions of causal link, necessity and proportionality inherent to that rule. Only 'reasonable' derogations are tolerated.

The measure must be objectively necessary. It must take into account the obligations to which the national is already subject in the Member State where he is established²⁷ and not duplicate controls which have already been carried out in the same State or in another Member State²⁸. A real need must be demonstrated²⁹. The fact that a Member State has chosen a protection system which is different from that adopted by another Member State has no impact on the assessment of the necessary and proportionate character of the provisions concerned, which must only be examined in view of the objectives pursued by the national authorities of the Member State in question and the level of protection they intend to ensure³⁰. National legislation which lays down, as an essential criterion for determining whether a need for the establishment of a new pharmacy exists, a rigid limit on the "people remaining to be served", where the competent authorities cannot depart from that limit to take account of particular local geographical conditions violates Article 49 TFEU³¹.

Only national measures appropriate for securing the attainment of the objective which they pursue may be justified³². A causal link between the restrictive measure and the alleged overriding reason must therefore exist³³. This is the case for national legislation which:

²⁶ See, also Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, LawLex092067; Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, LawLex09770; Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, LawLex091056; Case C-177/94 *Criminal proceedings against Perfili* [1996] ECR I-161, LawLex09734; Case C-67/98 *Zenatti* [1999] ECR I-7289, LawLex057632; Case C-424/97 *Haim* [2000] ECR I-5123, LawLex071648; Case C-244/04 *Commission v Germany* [2006] ECR I-885, LawLex09915.

²⁷ Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, LawLex071630.

²⁸ Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, LawLex09649.

²⁹ Case C-205/99 *Analir and others* [2001] ECR I-1271, LawLex091110, for a public service.

³⁰ Case C-67/98 *Zenatti* [1999] ECR I-7289, LawLex057632.

³¹ Case C-367/12 *Sokoll-Seebacher*, Judgment of 13 February 2014, LawLex14256.

³² Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, LawLex091056.

³³ Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, LawLex09459, which underlines that to safeguard the freedom of expression of the various (in particular social, cultural, religious or philosophical) components, it is not necessary to require broadcasting



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- is intended to protect the recipients of legal services against the harm which they could suffer as a result of legal advice given to them by persons without the necessary professional and personal qualifications³⁴;
- makes the issue of licences for new pharmacies in the same geographical area subject to the number of pharmacies per inhabitant³⁵ to ensure that the population as a whole has adequate access to pharmaceutical services and to improve the reliability and the quality of the provision of medicinal products;
- imposes payment of a charge for vessel traffic service only to vessels who benefit from that service in order to maintain public security in the coastal waters as well as in ports³⁶;
- fixes a minimum level of fees for lawyers in order to ensure a high qualitative standard of professional services, given the very large number of lawyers who are enrolled and practising, where price competition could deteriorate the quality of the services provided³⁷.

Lastly, even when objectively necessary, the measure must not be disproportionate in relation to the objective pursued. The proportionality criterion involves checking that the public interest could not have been protected by measures that are less restrictive of the freedom of establishment or the freedom to provide services. A national rule may thus prohibit an undertaking established in another Member State from engaging in a judicial recovery of debts owed to other persons because such an activity carried out professionally, is reserved for lawyers, even if less strict measures are adopted by other Member States³⁸. The legislation of a Member State which, for all lawyers providing services on its territory, applies maximum tariffs to their fees is lawful insofar as, by making it possible to go beyond them in numerous situations, it is characterized by a flexibility which gives lawyers of other Member States the opportunity of gaining access to the national market under conditions of normal and effective competition³⁹. An operator can be required to have both a license and a police

bodies to have all or some of their programmes produced by a national undertaking; Case C-79/01 Payroll and others [2002] ECR I-8923, LawLex091177, which rejects the existence of a causal link between the protection of workers and a law which reserves the outside data-processing of pay slips for undertakings with less than 250 employees to data-processing centres exclusively staffed by persons registered in the associations of certain professions, where those administrative tasks do not require any specific qualification.

³⁴ Case C-76/90 Säger v Dennemeyer [1991] ECR I-4221, LawLex091170.

³⁵ Cases C-570/07 and C-571/07 Blanco Pérez [2010] ECR I-4629, LawLex11287, provided that this quota does not prevent the establishment of a sufficient number of pharmacies to ensure adequate pharmaceutical services in any geographical area which has special demographic features.

³⁶ Case C-430/99 Sea-Land Service and Nedlloyd Lijnen [2002] ECR I-5235, LawLex09792.

³⁷ Case C-94/04 Cipolla [2006] ECR I-11421, LawLex07410.

³⁸ Case C-3/95 Reisebüro Broede v Sandker [1996] ECR I-6511, LawLex092151.

³⁹ Case C-565/08 Commission v Italy [2011] ECR I-2101 LawLex11887.



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authorization in order to access the betting and gaming market insofar as this requirement is not in itself disproportionate in the light of the objective pursued, which is to combat criminality linked to that sector⁴⁰ or the controlled expansion of games of chance⁴¹. A Member State having a federal structure may, by legislation common to the majority of the federal entities, in principle prohibit the organization and facilitation of games of chance via the internet, even if, for a limited period, a single federal entity has maintained in force more liberal legislation⁴². By contrast, checking the background of a person or an undertaking may be made by a less restrictive measure than the obligation of residence⁴³. Likewise, the prohibition for credit institutions to remunerate sight accounts is disproportionate in relation to the objective of protection of consumers against an increase in the cost of basic banking services or a charge for cheques⁴⁴. The fight against criminality also does not justify reserving games of chance to operators having their head office on the national territory⁴⁵. **In a review of proportionality of restrictive legislation, the approach taken by the national court must be dynamic rather than static in the sense that it must take account of the way in which circumstances have developed following the adoption of the legislation concerned⁴⁶.**

Section 4 Liberalization directives

I. Services Directive

3.34. Scope of application

The Services Directive applies to a wide range of services but there are some exceptions (Art. 2)⁴⁷. The handbook on the implementation of the directive, published by the Commission in 2007, states that the directive applies to all services which are not explicitly excluded from it⁴⁸.

The concepts of "establishment", "service", "provider" or "recipient" are defined in Article 4. The concept of 'services' is defined as at the very least "any self-employed economic activity, normally

⁴⁰ Case C-660/11 *Biasci*, Judgment of 12 September 2013, LawLex131284.

⁴¹ Case C-3/17 *Sporting Odds Ltd*, Judgment of 28 February 2018, LawLex18343.

⁴² Case C-156/13 *Digibet Ltd*, Judgment of 12 June 2014, LawLex142076.

⁴³ Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, LawLex071630. See, also, Case C-158/03 *Commission v Spain* (Unpublished).

⁴⁴ Case C-442/02 *CaixaBank France* [2004] ECR I-8961, LawLex09834.

⁴⁵ Case C-64/08 *Engelmann* [2010], ECR I-8219, LawLex11291; Case C-186/11 *Stanleybet International Ltd and others*, Judgment of 24 January 2013, LawLex13247.

⁴⁶ Case C-685/15 *Online Games Handels GmbH*, Judgment of 14 June 2016, LawLex171047.

⁴⁷ Financial services, transport, temporary work, healthcare services, audiovisual, gambling, social services are excluded.

⁴⁸ Pt 21.1.



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provided for remuneration", as referred to in Article 57 TFEU⁴⁹. The directive does not cover non-economic services of general interest⁵⁰, or areas governed by a European provision relating to the aspects of access to an activity of services or its performance in areas or for specific professions (Art. 2)⁵¹.

Requirements relating to access or provision of a service activity or its completion on the territory of the Member State are subject to the same legal regime and establishment is clearly distinguished from the provision of cross-border services⁵². In line with the case law of the Court of Justice, the Services Directive defines establishment as "the actual pursuit of an economic activity, as referred to in Article 43 [49 TFEU] of the Treaty by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out"⁵³, "provider" as any natural person who is a national of a Member State or any legal person as referred to in Article 54 of the Treaty and established in a Member State, who offers or provides a service and "recipient" as any natural person who is a national of a Member State or who benefits from rights conferred upon him by EU acts, or any legal person as referred to in Article 54 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service⁵⁴. The service activities may involve services requiring the proximity of provider and recipient, services requiring travel by the recipient or the provider and services which may be provided at a distance, including via the Internet⁵⁵. The Services Directive only applies to "services supplied by providers established in a Member State" (Art. 2). **The EU court interprets the notion of provision of service broadly. National legislation which makes the storage of pyrotechnic articles intended for the retail trade subject to dual authorization therefore falls within the scope of the directive even though it does not relate to access to the activity of retail trade in those articles, insofar as the storage of pyrotechnic articles to be sold constitutes, for the "operators", a prerequisite to that activity of retail trade, which itself constitutes a service⁵⁶.**

⁴⁹ Directive No 2006/123, Art. 4(1).

⁵⁰ The handbook on the implementation underlines that these are services which are not provided for economic consideration and must not be mixed up with services of general economic interest which are provided for a consideration and thus, in principle, fall within the scope of application of the directive.

⁵¹ The directive does not apply to the areas governed by specific EU provisions: financial services, transport, audiovisual services.

⁵² Handbook on implementation of the Services Directive, pt 7.1.1.

⁵³ Directive No 2006/123 of 12 December 2006, Article 4(5).

⁵⁴ Directive No 2006/123 of 12 December 2006, Article 4(2) and (3).

⁵⁵ Directive No 2006/123, recital 33.

⁵⁶ Case C-137/17 Van Gennip BVBA, Judgment of 26 September 2018, LawLex181407.



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In response to a question regarding the scope of application of the directive, the Court of Justice clarified the extent of the exclusions set out in Article 2. Social services thus cover any activity intended to assess, maintain or restore the state of health of patients, where that activity is carried out by healthcare professionals recognized as such by the Member State concerned and any activity relating to the care and assistance of elderly persons, where that activity is carried out by a private service provider which has been mandated by the State by means of an act conferring, in a clear and transparent manner, a genuine obligation to provide such services under specific conditions⁵⁷. According to the Court of Justice⁵⁸, the concept of services in the field of transport covers roadworthiness tests for motor vehicles which are ancillary to the transport service and take place as a pre-condition, indispensable to the exercise of the main activity of transport. On the other hand, an activity which consists in providing, for payment, a service of carrying passengers on a boat for a waterway tour of a city for event-related purposes is excluded from the scope of the Services Directive, insofar as it is intended to provide the recipients of that service with the pleasant context of a celebration rather than point-to-point transport in the city in question⁵⁹. **This is also the case for an intermediation service, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys⁶⁰.**

The directive entered into force on 28 December 2006 and had to be transposed by 28 December 2009⁶¹, with the Member States having to remove discriminations prohibited per se and send a report to the Commission - and to the other Member States - concerning the requirements subject to evaluation they wish to safeguard. Through this cooperation mechanism, the Commission should be able to propose additional harmonization provisions.

⁵⁷ Case C-57/12 Fédération des maisons de repos privées de Belgique, Judgment of 11 July 2013, LawLex131135.

⁵⁸ Case C-168/14 Grupo Itevelesa SL, Applus Iteuve Technology, Certio ITV SL, Asistencia Técnica Industrial SAE v OCA Inspección Técnica de Vehículos SA, Generalidad de Cataluña, Judgment of 15 October 2015, LawLex151273.

⁵⁹ Cases C-340/14 and C-341/14 Trijber, J. Harmsen v Burgemeester van Amsterdam, College van burgemeester en wethouders van Amsterdam, Judgment of 1 October 2015, LawLex151178.

⁶⁰ Case C-434/15 Asociación Profesional Elite Taxi, Judgment of 20 December 2017, LawLex1832.

⁶¹ On 1 December 2010, 15 out of 27 States had transposed the directive: Germany, Austria, Belgium, Bulgaria, Cyprus, Denmark, Spain, Ireland, Italy, the Netherlands, Poland, Romania, Sweden, the Czech Republic, United Kingdom. To facilitate transposition, the Commission used the comitology procedure to adopt certain implementation measures. On 16 October 2009 it took a decision aimed at facilitating the cross-border use by undertakings of points of single contact, which obliges Member States to establish, update and publish "trusted lists" containing essential information on providers of certification services issuing Qualified Certificates to the public. On 2 October 2009, it issued a decision on the internal market information system (IMI) to be used for the purposes of cooperation between the Member States.



II. Sectoral directives

A. Financial services

1° Banking

3.48. Prudential supervision

According to Article 49 of Directive No 2013/36, the prudential supervision of a credit institution is the responsibility of the competent authorities of the home Member State both in respect of activities carried out on its own territory and those carried out on the territory of another Member State under freedom of establishment or freedom to provide services. Nevertheless, pending further coordination, Member States retain responsibility, in cooperation with the competent authorities of the home Member State, for the supervision of the liquidity of the branches of credit institutions (Art. 50). Where the supervision relates to the activities of credit institutions operating, in particular through a branch, in Member States other than that in which their head offices are situated, the competent authorities of the Member States concerned collaborate closely and supply one another with all information concerning the management and ownership of those institutions that is likely to facilitate their supervision and the examination of the conditions for their authorization, and all information likely to facilitate the monitoring of such institutions, in particular with regard to liquidity, solvency, deposit guarantees, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms. The competent authorities and their staff are bound by the obligation of professional secrecy (Art. 53 et seq.). **However, Article 53(1) of Directive No 2013/36 does not preclude the competent authorities of the Member States from disclosing confidential information to a person who so requests in order to be able to institute civil or commercial proceedings with a view to protecting proprietary interests which were prejudiced as a result of the compulsory liquidation of a credit institution, bearing in mind that it is for the competent authorities and courts to weigh up the interest of the applicant in having the information in question and the interests connected with maintaining the confidentiality of the information covered by the obligation of professional secrecy, before disclosing each piece of confidential information requested⁶².**

The credit institution must have sufficient own funds to cover the risks related to the activity of banking. The object of prudential supervision is to ensure that that requirement is met. The amount of own funds, the constituent elements of which are defined in Article 92 of Regulation No 575/2013, is

⁶² Case C-594/16 Enzo Buccioli, Judgment of 13 September 2018, LawLex181289.



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calculated on an individual basis or where appropriate, consolidated. Taking its inspiration from the ratio devised by the Basel Committee⁶³, recital 40 of the regulation sets out the minimum own fund requirements balancing the assets and off balance sheet elements depending on the degree of risk incurred⁶⁴. Thus, for credit risk, the credit institution's own risk must be permanently equal to or more than 8% of the total of their risk-weighted asset or off balance sheet items. A credit institution's exposure to a client or group of connected clients is considered a large exposure to risk where its value is equal to or exceeds 10% of its own funds (Regulation No 575/2013, Art. 392) and must be notified to the competent authorities (Art. 394). A credit institution may not incur an exposure to a client or group of connected clients the value of which exceed 25% of its own funds and in no circumstance may it incur large exposures which in total exceed 100% of its own funds (Art. 395). Apart from the prudential supervision of the competent authorities of the home Member State, the credit institutions must themselves have in place sound, effective and complete strategies and processes to assess and maintain on an ongoing basis the amounts, types and distribution of internal capital that they consider adequate to cover the nature and level of the risks to which they are or might be exposed (Directive No 2013/36, Art. 73). Where the competent authorities find that a credit institution does not meet the requirements of the directive, they can, by virtue of Article 104 of the directive, not only require the institutions to take the necessary actions or steps to address the situation, but also oblige them to hold own funds in excess of the minimum level laid down in Article 128 et seq. and in Regulation No 575/2013; require the reinforcement of the arrangements, processes, mechanisms and strategies implemented to comply with Articles 73 and 74; require credit institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements; restrict or limit the business, operations or network of credit institutions; and require the reduction of the risk inherent in the activities, products and systems of credit institutions.

2° Investment services

3.51. Scope of application and definitions

Directive No 2014/65 applies to investment firms and regulated markets and credit institutions when providing one or more investment services and/or performing investment activities (Art. 1). An

⁶³ Committee for regulation and best practice in banking and supervision of transaction founded in 1974 by the central bank Governors of the G10 nations. It is a permanent forum for international cooperation in the field of banking supervision, whose work has led, inter alia, to the establishment at EU level of a solvency ratio and the setting up of a mechanism to combat money laundering.

⁶⁴ The risks incurred in the context of banking activities are credit risk, position risk, settlement and counter-party risk, large exposures, foreign exchange risk, commodities risk and operational risk.



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investment firm is any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis (Art. 4(1)(1)). Natural persons may also be considered as an investment firm if their legal status ensures a level of protection for third parties' interests equivalent to that afforded by legal persons and they are subject to equivalent prudential supervision appropriate to their legal form (Art. 4(1)(1)(a) and (b)). Reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, dealing on own account, portfolio management, investment advice⁶⁵, underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis, placing of financial instruments without a firm commitment basis and the operation of a Multilateral Trading Facility (MTF) or an organized trading facility (OTF) are considered as investment services and activities⁶⁶. On the other hand, the conversion of amounts expressed in a foreign currency into the domestic currency by a credit institution for the purpose of calculating the amount of a loan and repayment instalments cannot be classified as an investment service in the absence of trading resulting in the conclusion of transactions in one or more financial instruments⁶⁷. **The same applies for brokering with a view to concluding a contract covering portfolio management services⁶⁸.** Article 2 lists those persons or undertakings not falling within the scope of application of the directive which include, inter alia, insurance undertakings, persons which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, persons providing an investment service where that service is provided in an incidental manner and persons who do not provide any investment services or activities other than dealing on own account.

The directive regulates three methods of negotiation. Governed by the provisions of Title III, the regulated market is defined as a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments - in the system and in accordance with its non-discretionary rules - in a way that results in a contract, in respect of the financial instruments admitted to trading under its

⁶⁵ Case C-604/11 Genil 48 SL, Judgment of 30 May 2013, LawLex13877, which classifies as investment advice the offering of a swap agreement to a client in order to cover the risk of variation of interest rates on a financial product for which that client has subscribed, provided that the recommendation to subscribe to such a swap agreement is made to that client in his capacity as an investor, it is presented as suitable for that person or based on a consideration of the circumstances of that person and it is not made solely through distribution channels or intended for the general public.

⁶⁶ See section A of Annex I of Directive No 2014/65, which refers to Art. 4(1)(2).

⁶⁷ Case C-312/14 Banif Plus Bank Zrt., Judgment of 3 December 2015, LawLex151636.

⁶⁸ Case C-678/15 Khorassani v Planz, Judgment of 14 June, LawLex171045.



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rules and/or systems, and which is authorized (Art. 4(1)(21)). **A trading system in which multiple fund agents and brokers represent, respectively, "open end" investment funds and investors, the sole purpose of which is to facilitate those investment funds in their obligation to execute the purchase and selling orders for shares placed by those investors, constitutes a regulated market within the meaning of the directive on markets in financial instruments⁶⁹.** A multilateral trading facility (MTF) is a multilateral system and can be operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments - within the system and in accordance with non-discretionary rules - in a way that results in a contract according to the rules set out in Title II of the directive (Art. 4(1)(22)).

An OTF (Organized trading facility) is a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract (Article 4(1)(23)). The directive also refers to a form of bilateral trading, systematic internalizers which are investment firms which, on an organized, frequent and systematic basis, deal on own account by executing client orders outside a regulated market or an MTF or an OTF without operating a multilateral system (Art. 4(1)(20)). **The enshrining of this mode of negotiation has put an end to the French order concentration rule on regulated markets.**

C. Lawyers

3.77. Freedom to provide services

Directive No 77/249 of 22 March 1977 which is limited to activities of the provision of services restricts itself to laying down the principle of mutual recognition of lawyers as defined in the various Member States. A person entitled to pursue his professional activities as a "lawyer" in one Member State may thus exercise that activity in another Member State (Art. 2)⁷⁰, adopting the professional title used in the Member State from which he comes with an indication of the professional organization by which he is authorized to practice or the court of law before which he is entitled to practice (Art. 3).

⁶⁹ Case C-658/15 Robeco Hollands Bezit NV e.a., Judgment of 16 November 2017, LawLex171864.

⁷⁰ For an example of its application, see Case 292/86 Gullung [1988] ECR I 111, LawLex091823, confirming that a person who is a national of two Member States and who is admitted to the legal profession in one of those states may rely on the provisions of Directive No 77/249 to facilitate the effective exercise by lawyers of freedom to provide services in the territory of the other Member State.



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The directive's aim is specifically to facilitate the exercise of the profession of lawyer with regard to the rules of professional conduct by subjecting the activities of the lawyer to different regimes depending on whether they are of a judicial or extrajudicial nature.

Judicial activities (representation of clients in legal proceedings) must be exercised in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State (Art. 4(1)). Thus, the refusal, on the part of the competent authorities of a Member State, to issue a router for access to the private virtual network for lawyers to a lawyer duly registered at a Bar of another Member State, for the sole reason that that lawyer is not registered at a Bar of the first Member State, in which he wishes to practise his profession as a free provider of services, in situations where the obligation to work in conjunction with another lawyer is not imposed by law, constitutes a restriction on the freedom to provide services⁷¹. Required to submit to a dual set of rules, a lawyer pursuing these activities must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes (Art. 4(2)). Thus, a lawyer bound to observe the rules of professional conduct in force in the host Member State under Articles 4 and 7 of Directive No 77/249 of 22 March 1977 may not rely on the provisions of this Directive where he has been barred from access to the legal profession by the latter Member State for reasons relating to dignity, good repute and integrity⁷². The host Member State may require lawyers to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in that State and to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an "avoué" or "procuratore" practising before it (Art. 5). A national law may not however require the lawyer providing the service to be accompanied by a resident lawyer for judicial actions for which mandatory assistance by a lawyer is not required⁷³. Likewise, where recourse to a lawyer established in the place of the court before which the proceedings have been brought is required, a national law which excludes the costs associated with the appointment of a European

⁷¹ Case C-99/16 Lahorgue, Judgment of 18 May 2018, LawLex181470.

⁷² Case 292/86 Gullung [1988] ECR I11, LawLex091823.

⁷³ Case 427/85 Commission v Federal Republic of Germany [1988] ECR I123, LawLex11627, holding that a national law that requires, without any possible exception, that the lawyer providing services is to be accompanied by a national lawyer if he visits a person held in custody and is not to correspond with that person except through the said lawyer is also in violation of Directive No 77/249. See also Case C-294/89 Commission v France [1991] ECR I-3591, LawLex11473, holding that the rule of territorial exclusivity which reserves the right to plead to lawyers before a court within whose area of jurisdiction they are established, cannot be applied to activities of a temporary nature pursued by lawyers established in other Member States, since the conditions of law and fact which apply to those lawyers are not in that respect comparable to those applicable to lawyers established on the host territory.



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lawyer from the amount to be paid by an unsuccessful party to a dispute, obstructs the freedom to provide services. Parties to legal proceedings would in effect be strongly discouraged from having recourse to lawyers established in other Member States if they had to bear their costs regardless of the outcome of the dispute⁷⁴. Lastly, a Member State may only exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing activities relating to the representation of that undertaking in legal proceedings if lawyers established in that State are not permitted to pursue those activities (Art. 6).

For the pursuit of activities not relating to the representation of a client in legal proceedings or before public authorities, the lawyer is subject to the conditions and rules of professional conduct of the home Member State and must also observe the rules governing the profession in the host Member State⁷⁵, where they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility (Art. 4(4)).

Finally, in conformity with Article 51 TFEU, which excludes from the scope of application of the right to establishment and by referral from Article 62, the freedom to provide services, "activities which in that State are connected, even occasionally, with the exercise of official authority"⁷⁶, the directive allows Member States to "reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land" (Art. 1(1))⁷⁷.

⁷⁴ Case C-289/02 *AMOK Verlags v A & R Gastronomie* [2003] ECR I-15059, LawLex091411.

⁷⁵ Especially those concerning the incompatibility between exercising the activity of lawyer and that of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity.

⁷⁶ See esp. Case 2/74 *Reyners v Belgian State* [1974] ECR 631, LawLex091650, holding that the most typical activities of the profession of lawyer such as consultation and legal assistance and also representation and the defense of parties in court cannot be considered as connected with the exercise of official authority.

⁷⁷ This provision would appear to take into account the aptitude recognized for solicitors in the UK and Ireland to prepare formal documents and therefore gives the possibility to the other Member States not to allow them to prepare for such documents on their territory.