

THE EUROPEAN UNION

Free Movement of Persons

WHAT IS THE FREE MOVEMENT OF PERSONS?



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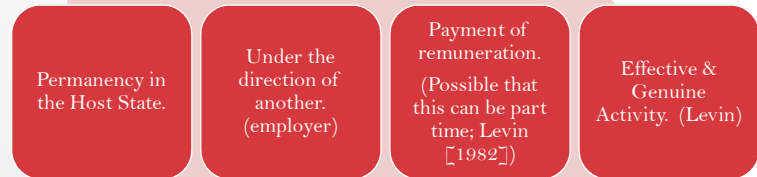
- [Article 21\(1\) TFEU](#); grants every citizen of the European Union the right to move and reside freely within the territories of member states.
- [Article 45 & 49 of TFEU](#) prohibits restrictions upon this right so long as the disputed restriction is not purely internal in nature. ([Case 175/78 The Queen vs. Saunders \[1979\]](#))
- Can be separated into free movement of;
 1. Workers & the Self-Employed
 2. Family members
 3. Legal persons (companies)
- Free movement of persons is a complex area due to special harmonisation competencies and the existence of both negative and positive harmonisation.

WHO IS A WORKER?

- [Article 45 TFEU](#) protects the free movement of workers.
- [Article 45](#) has direct effect (*Van Duyn* [1974]).
- The personal scope of Article 45 needs to be considered in determining whether an individual can be deemed to be a worker.
- The definition of “a worker” is a European construct; it cannot be modified by national law. (*Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964])

***Lawrie-Blum* [1986]**
 “that for a **certain period of time**, a person performs services **for and under the direction of another person** in return for which he receives **remuneration.**”

Key Criteria



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FORMER WORKERS & JOB SEEKERS

- Broad personal scope of [Article 45 TFEU](#).
- Quasi-Workers form part of the personal scope of the Article; formal employees are protected. ([Article 45\(3\)\(d\)](#))
- This was confirmed in *Lair v Universitat Hannover* [1988].
“the rights guaranteed under Article 45 do not depend on the actual or continued employment relationship and that non-employed persons will enjoy certain rights so long as there was a form of continuity in order to prevent the abuse of the Host States social welfare system.”
- *Antonissen* [1991] expanded the personal scope of [Article 45](#) to Job-seekers.
- Member States can impose temporal limitations upon job-seekers and material limitations such as that examined in *Lebon* [1987] that equal treatment is only available with regards to access to employment.
- This was softened in *Collins* [2004].



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FAMILY MEMBERS

- A worker moving to another State for employment will be entitled to bring their family. (*Commission vs. Germany* [1989])
- Family member rights are indirect rights that derive from the primary right granted to the worker. (*Lebon* [1987])
- This dependency on the worker within the family was softened in *Baumbast* [2002] which established that the rights granted under [Regulation 492/2011](#) are still granted to the family members of a worker even after employment has ended.
- [Citizenship Directive 2004/38 Article 12 & 13](#) each deal with the rights of family members.



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MATERIAL SCOPE OF ARTICLE 45

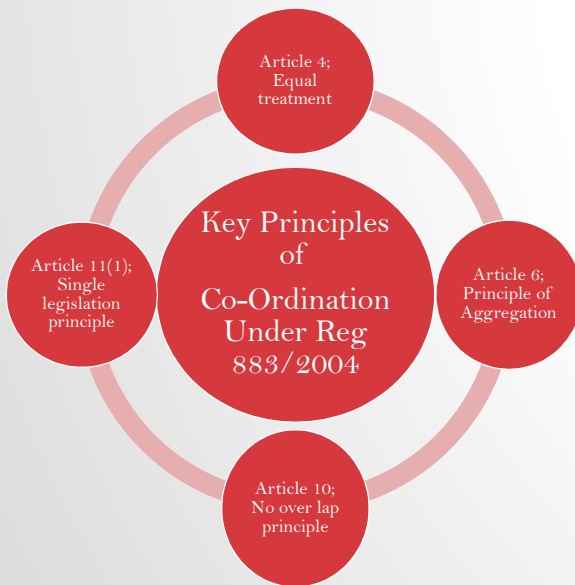
The Scope of [Article 45](#) is fleshed out by [Directive 2004/38](#) and [Regulation 492/2011](#).

[Regulation 492/2011](#)

- Outlaws restrictions to the labour market of the host State. ([Article 4\(1\)](#))
- Principle of equal treatment during an employment relationship. ([Article 7](#))
- Article 7(1) covers both direct and indirect discrimination.
- Indirect discrimination can occur through [two situations](#):
 1. National laws that predominantly affect migrant workers (*O'Flynn* [1996])
 2. National laws that are indistinctly applicable but more easily satisfied by national workers than migrants. (*O'Flynn*)
- Article 7(2); positive expression of equal treatment; foreign migrants are granted the same social and tax advantages as nationals. (*Lebon* [1987])
- These are given a wide teleological meaning as established in *Cristini* [1975] and the concept of social advantage was broadened also in *Lair* [1998].
- Differential treatment needs to be objectively justified in order for national legislation to not breach [Article 7\(1\)](#). (*Collins* [2004])
- Non-discriminatory restrictions to free movement of workers can fall within the scope of [Article 45](#).
- This is established in *Bosman* [1995] in which the transfer fee required to be paid was deemed to have the effect of preventing or deterring free movement as it directly affected players access to the employment market in other Member States.

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POSITIVE INTEGRATION



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National Social Security Systems

- Social insurance and assistance mechanisms often used to guarantee social protection of workers within a State.
- Systems tend to require that to gain benefit the worker must be based within the State itself.
- [Article 48 TFEU](#) establishes a legislative competence of the Union to coordinate NSSS across the Union. Is a co-ordinating competence rather than a harmonisation one. (*Cornelissen, 1996*)
- [Regulation 883/2004](#) is designed to co-ordinate NSSS in order to remove complications for individuals moving within Member States.

NATURAL PERSONS; (FREEDOM OF ESTABLISHMENT)

- Guarantee of free movement of persons to self-employed persons (and companies.)
- Prohibits illegal national barriers via [Article 49 TFEU](#).
- Provisions of freedom of establishment has direct effect. (*Reyners vs. Belgium [1974]*)
- [Article 50 TFEU](#) allows the Union to have the legislative competence to adopt legislative measures and [Article 53](#) grants the Union a competence to adopt directives for the mutual recognition of formal qualifications and coordination of regulatory measures concerning the activities of self employed persons.
- These articles are designed to promote the positive integration of [Article 49](#) into National legislation.



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NEGATIVE INTEGRATION UNDER ARTICLE 49



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Personal Scope

- Self-employed individuals do not work under the direction of another and will not receive a salary.
- The personal scope of [Article 49](#) differs from [Article 45](#) due to this.
- [Article 49](#) also needs to be differentiated from [Article 56](#) that provides for free movement of services.
- The applicability of [Article 49](#) is determined by the duration, regularity and continuity of the service provided. (*Gebhard [1995]*)
- A stable and continuous basis for a service provider will trigger the personal scope of [Article 49](#).

NEGATIVE INTEGRATION UNDER ARTICLE 49

- [Article 49](#) prohibits restrictions on freedom of establishment.
- Prohibition expressly covers primary and secondary establishment.
- Right to establishment includes, “*freedom to set up and maintain...more than one place of work within the [Union.]*” (*Klopp [1984]*)
- Primary establishment; person establishes themselves for first time.
- Secondary establishment; setting up subsidiaries etc.
- Article 49 also prohibits restrictions placed upon a State’s own nationals. (*Knoors [1979]*)
- It prohibits direct discrimination (*Factortame II [1991]*) as well as indirect discrimination. (*Klopp [1984]*)
- Non-discriminatory measures are also covered by [Article 49](#) as established in *Vlassopoulou [1991]* and confirmed in *Gebhard [1995]* although limited to measures that hinder access to foreign establishments. (*Commission vs. Spain [2011]*)

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POSITIVE INTEGRATION

- Union enjoys a special competence for the adoption of directives on mutual recognition of formal qualifications and co-ordinating provisions that concern the taking up of professional activities. ([Article 53\(1\) and \(2\)](#))
- Horizontal approach is recognised in the adoption of [Directive 2005/36](#).



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Directive 2005/36

- Allows movement of professionals.
- Provides for coordination in recognising Professional certification.
- This is established in three ways:

Chapter I: Recognition of evidence of training.

Chapter II: Recognition of Professional experience.

Chapter III: Recognition of minimum training conditions (automatic).

- [Article 13](#): Member States need to mutually recognise a formal qualification issued by another state.
- [Article 14](#): provides for limitations such as an aptitude test or an adaptation period if the professional training differs in the State certification was gained.

HORIZONTAL RULES

Legislative competence via [Article 21\(2\)](#); used to establish the Citizenship Directive.

[Article 21\(1\)](#) was found to have direct effect in [Baumbast \[2002\]](#) and that it granted general movement rights.

Personal scope is not dependent on economic status and is a residual provision. ([Baumbast \[2002\]](#))

Any limitation on citizenship rights is possible but subject to judicial review and can be struck down. ([Baumbast \[2002\]](#))

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Citizenship

- The complexity within free movement stems from the introduction of Union citizenship via [Part II of the Maastricht Treaty](#).
- Union citizenship is additional to member state citizenship and grants citizens free movement via [Article 21](#).
- [Prinz \[2013\]](#); genuine link test for residency needs to be proportionate.

Directive 2004/38; Citizenship Directive

- [Article 6](#): short term right to reside in the territory of another Member State. (3 months)
- [Article 7](#): Strengthened class of residency rights
- [Article 16](#): Right of permanent residency (after 5 years.)

EQUAL TREATMENT

- Once a person is legally resident in a Member State [Article 24](#) (under [Dir 2004/38](#)) grants them right to equal treatment.
- [Bidar \[2005\]](#) has established that legal residency = equal treatment
- The provision of this is subject to specific provisions & derogations can occur as seen by the derogation from [Article 24\(2\)](#) in relation to social assistance and maintenance aid for studies.
- This derogation causes confusion as can be examined in the judgements of [Brey \[2013\]](#), [Collins \[2004\]](#) and [Vatsouras & Koupatantze \[2009\]](#) as the applicability of [Article 24\(2\)](#) as a legislative exclusion interferes with [Article 45\(2\)](#) which is a constitutional right.
- This has hindered the clarity and consistency of the secondary legislation.

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HORIZONTAL LIMITATIONS

Public Policy Justifications

- Restrictions can be expressed on the basis of legitimate public interests.
- The Citizenship Directive has extended the derogations under [Article 45\(3\)](#) and [Article 52](#) horizontally to all union citizens falling within the personal scope of the directive.
- [Article 27 of the Directive](#) provides the grounds for restrictions.
- These grounds each have various requirements for the restriction to be just. See these cases for details of these;
 - [Van Duyn \[1974\]](#)
 - [Pierre Bouchereau \[1977\]](#)
- Discriminatory measures can be justified. ([Engelmann \[2010\]](#))
- Existence of imperative requirements accepted in [Gebhard \[1965\]](#) when used to justify non-discriminatory restrictions.

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THE PUBLIC SERVICE EXCEPTION



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- Public Service restriction on free movement of persons is accepted.
- [Article 45\(4\) TFEU](#) provides for it in relation to workers.
- For the freedom of establishment the limitation is found in [Article 51](#).
- What is a public service? [Commission Vs. Belgium \[1980\]](#) established a **functional definition** (paragraph 11)
- Entire professions are generally not provided for under the public service exclusions ([Reyners \[1974\]](#)) unless the posts in question are typical of public service. ([Commission vs. Belgium](#))
- Public service functional test has strict conditions.
- Work must involve a special relationship of allegiance to the State. ([Commission vs. Belgium](#))
- Exception is only available in relation to access rather than within a position. ([Ankers \[2003\]](#))

COMPANIES

What are considered 'companies'?

A company for the purposes of the EU is [a legal person formed to undertake a business activity](#).

- Separate legal personality. ([Salomon v. A. Saloman & Co. Ltd \[1897\]](#))
- Article 54 allows the companies protected to be formed and given status in accordance with national laws. (See [Daily Mail \[1988\]](#))
- A company's 'nationality' would depend on whether the MS adopts [the incorporation theory or the real seat theory](#).
- National states have complete freedom in defining the status of companies within their borders.



- Free movement of companies as a legal person exists in the EU.
- [Article 49 TFEU](#) expressly covers companies.
- [Article 50 TFEU](#) provides the Union with the special legislative competence in relation to company mobility.
- [Article 54 TFEU](#) extends the personal scope of the freedom of establishment from natural persons to legal persons.

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HOST STATE RESTRICTIONS ON COMPANIES

- Does Article 54's deference to national company law cover home State as well as the host State?
- It was clarified that this reference to national company law refers to where the company was first incorporated. (First formation principle as established in *Centros* [1999])
- [Article 54 TFEU](#) entitles the Member States to determine the personal scope of [Article 49 TFEU](#).
- Any national restrictions that does not affect the status of a company incorporated under national law will not benefit from Article 54 but will however be examined under [Article 49](#).



MATERIAL SCOPE FOR COMPANIES

- [Article 49 TFEU](#) guarantees primary establishment of a company (set up and management,) and it prohibits restrictions to the setting up of agencies subsidiaries by nationals of Member States also. (secondary establishment.)
- Captures restrictions on emigration or immigration of a company (*Daily Mail* [1988])
- Captures regulatory as well as fiscal measures. (*Daily Mail* [1988])

Primary Establishment

- National measures dealing with primary establishment can fall within the scope of [Article 49](#).
- *Factortame II* [1991] conveys the discrimination test applied. Indirect and direct discrimination both prohibited by [Article 49](#).
- Requiring a company to be liquidated before reincorporating in a different host state is a restriction prohibited by [Article 49](#). (*Cartesio* [2008])
- No guaranteed right to corporate conversion. (*Cartesio* [2008])
- National measures limiting primary establishment are subject to a discrimination test. (*Sevic Systems* [2005])

Secondary Establishment

- Concerns setting up subsidiaries of a company.
- Any permanent presence in another Member State may be covered. (*Commission vs. Germany* [1986])
- Member State cannot give preference to a particular form of secondary establishment. (*Avoir Fiscal* [1986])
- Discrimination rationale applied as well.
- Non-discriminatory measures come within the material scope of Article 49 TFEU as well. (*Centros* [1999] and also see *Inspire Art* [2003])

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THE DOCTRINE OF ABUSE OF RIGHTS

- Individuals ability to freely select a particular company law regime has led to a regulatory competition between national legal orders.
- Race to the bottom is a massive danger for national company laws.
- Development of “letter-box companies”; the only physical presence of the company in the state is the title.
- Difficulty in prohibiting this behaviour due to prohibition of restrictions as seen in *Centros* [1999]
- Special justification exists via the abuse of right doctrine. (*van Binsbergen* [1974])
- Very tight parameters of when this doctrine can be applied as seen in *Centros* [1999] then loosened somewhat via *Cadbury Schweppes* [2006].
- If there is no genuine economic activity, an abuse of rights can be found if the company derived an artificial advantage from the arrangement (**subjective element**), that is not covered by the objective of free movement (**objective element**). (*Cadbury Schweppes* [2006])

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POSITIVE INTEGRATION

- [Article 50\(2\)\(g\)](#) is the foundation for European Company law.
- The Article isn't a coordinating competence; it allows harmonisation.
- *Daihatsu* [1997] suggests that the Article is interpreted broadly.
- EU company law directives harmonise central issues such as the compulsory disclosure of certain documents, regulation of annual financial statements etc.
- The competence to harmonise national law does not allow the Union to create European companies. (This was clarified in *Parliament vs. Council* [2006])
- Supranational corporate forms can be created under [Article 352 TFEU](#) and this has been done to create a number of European Companies.
- These are designed for **cross-border business** and follow the **real seat doctrine**.



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CONCLUSION

- As we have already seen, free movement of persons is a complex fundamental freedom.
- Distinct constitutional sources are each complimented by horizontal and vertical secondary law.
- Union legal order distinguishes between categories of persons and the genuine link test also establishes the necessary basis for reliance on the freedom.
- Justifications are necessary and concern the limitations a State can place upon the freedom.



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