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THE SUBSTANTIVE LAW OF THE EUROPEAN COMMUNITY

The Fundamental Freedoms of: Free Movement of Workers, Right of Establishment of Self-Employed Persons & the Right to Provide and Receive Services.

Free Movement of Workers

Aim:

To provide a clear outline of Treaty provisions and secondary legislation relating to the free movement, within the EC, of those economically active persons categorized as workers.

Objectives.

After carefully studying the following notes and other prescribed readings for this lecture you should be able to:

1. Discuss the provisions of Art 39 EC and secondary legislation made under Arts.39 and 40 EC detailing the free movement of workers within the EC;
2. Discuss the derogations from the principle of free movement of workers as provided for in Art.39(3) EC and Directive 64/221; and
3. Discuss the derogations from the principle of free movement of persons as provided for in Art.39(4) EC, 'employment in the public service.'

Introduction.

The basis of the fundamental freedom of an economically active person who is a citizen of the European Union to move freely within the territory of the Member States for the purposes of seeking and accepting offers of employment is in ***Art.2 EC*** which ('post-Amsterdam') provides that:

> The Community shall have as its task, by establishing a common market [and EMU] and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, ***a high level of employment and of social protection, equality between men and women***... a high degree of competitiveness and convergence of economic performance … ***the raising of the standard of living and quality of life***, and social cohesion and solidarity among Member States.

Under ***Art.3EC***, arguably some of the most important activities of the Community are those specified in paragraph (c), i.e. ***Art.3(c)***, which provides for:

> an *internal* market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, ***persons, services*** and capital.

Fundamental Freedoms Promote Negative Integration

The free movement of goods, persons, services and capital are generally referred to as the 'four fundamental freedoms' of Community law. The removal of the obstacles that would prevent the fundamental freedoms being achieved promotes *negative integration* of the Member States of the European Union. (In contrast, the harmonising of economic policies and the definition and conduct of the single monetary policy promotes positive integration).

Prohibition of Discrimination on Grounds of Nationality Underpins the Free Movement of Persons who are Citizens of the European Union

Art.17(1) EC provides that 'Every person holding the nationality of a Member State shall be a citizen of the ***Union***.' That 'Citizens of the Union shall enjoy the rights conferred by this Treaty' [i.e., the EC Treaty] is a provision of ***Art.17(2) EC***. In order to ensure that all such citizens are treated equally, ***Article 12 EC***, prohibits discrimination on the grounds of nationality and, so, gives substance to Art.17: that is, ***Art.12*** underpins the free movement of persons within the Community – whether they be employed or self-employed persons - a point that was decided in *Case 48/75*, **Royer**.

The abolition, as between Member States, of obstacles to the free movement of persons, as provided for in Art.3(c) EC, is elaborated in ***Title III of the EC Treaty***: Chapter 1, i.e. ***Arts.39-42*** refers to Workers; Ch.2, i.e. ***Arts.43-48***, deals with the Right of Establishment; and Ch.3, i.e. ***Arts-49-55***, deals with the provision of Services. That is, whereas Arts.39-42 relate to employed persons, i.e., 'the workers,' Arts.43-48 and 49-55 cover the self-employed and legal persons. Notwithstanding the separate provisions, however, *Case 48/75*,

Royer, decided that the free movement of workers, the freedom of establishment of the self-employed and the freedom to provide services are all underpinned by the prohibition of discrimination on the basis of nationality as provided for in ***Arts.12*** [***ex.Art.6***] and 39EC. *Royer* said that such freedoms were: "based on the same principles in so far as they concern the *entry* into and the *residence* in the territory of Member States of persons covered by Community law and the *prohibition of all discrimination between them on grounds of nationality*".

Whereas ***Arts.39, 43 and 49*** are amongst the provisions relating to the Free Movement of Persons that are *directly effective*, workers' rights, and the rights of the self-employed to establish themselves in another Member State and/or to provide services in another Member State are confined to the right to be treated in the same manner as those who are nationals of that Member State.

Schengen *acquis* and the Free Movement of Persons

The ***Schengen acquis*** was an international legal agreement - having no basis in EC law - on the gradual abolition of border checks in respect both of EC Citizens and nationals of non-EC Member States. The ***Treaty of Amsterdam*** incorporated some elements into the EC Treaty but confined others to the revamped third pillar of the TEU, ***Provisions on Police and Judicial Cooperation in Criminal Matters***. Within the ***EC Treaty, Title IV*** [***i.e., Arts.61-69EC***] now provides for '*Visas, Asylum, Immigration and other Policies Related to the Free Movement of Persons*'. The provisions of this Title don't, at present, apply to the UK or Ireland (see Art.69); they are distinct from Arts.39-55; and, in specified circumstances, the application of ***Art.234*** to this Title is 'mandatory': (see Art.68).

Categorising Legal Provisions Relating to the Free Movement of Persons Referred to in Title III

The free movement of persons referred to in ***Title III*** may be discussed under several subdivisions. Primarily, the division is into economically active persons and non-economically active. The former sub-division is far more significant; and, in turn, provisions of the Treaty of Rome (as amended), and secondary legislation made under it, sub-divide the economically active into: (i) salaried or wage-earning 'workers' (the focus of this lecture); and (ii) self-employed and/or legal persons having rights of establishment and/or freedom to provide services. (See the next lecture).

1a. Economically Active Persons.

(I) Workers.

Art.39 EC contains the principal provisions relating to workers. They include:

2. .. freedom of movement [for workers] shall entail the abolition of any discrimination based on nationality between workers of the Member State as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
   (a) to accept offers of employment actually made;
   (b) to move freely within the territory of Member States for this purpose;
   (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
   (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Concept of a Worker

No definition of 'worker' is contained in Art.39 EC. Nor is there a definition in ***Regulation 1612/68*** on the *Freedom of Movement for Workers Within the Community*, ***Art.1*** of which refers to the right to 'take up an activity as an employed person'. The central feature of an employment relationship, however, was judicially defined by the ECJ in *Case 66/85*, ***Lawrie-Blum v. Land Baden-Wurttemberg*** [1986] ECR 2121 where it was said that the concept of a 'worker' had to be defined in accordance with objective criteria and the status was accorded to a person who:

> ' ... for a certain period of time ... performs services for and under the direction of another person in return for which he receives remuneration.'

The fundamental importance attached by the ECJ to the concept of 'worker' has led to a wide interpretation of the term: see *Case C-344/95*, ***Commission v. Belgium*****.** Indeed, 'worker' may encompass being a part-time worker for the purposes of Art.39: *Case 53/81*, ***Levin v. Staatsecretaris van Justitie*** [1982] ECR 1035. However, this is subject to the person who claims to be a worker proving that (s)he is pursuing an effective and genuine activity which is not marginal or ancillary, and that the activity is an economic one. *It is a matter for the national courts of the Member State in question to determine whether the plaintiff has satisfied these requirements*.

The decision in ***Levin*** was extended to include a part-time worker whose income was supplemented from public funds: *Case 139/85*, ***Kempf v. Staatsecretaris van Justitie*** [1986] ECR 1741. ***Kempf*** was a part-time music teacher, giving twelve lessons per week, whose below-subsistence income was supplemented by public funds. The referring court (a Dutch court) had already decided that the *Levin* test had been satisfied. Unsurprisingly, then, the ***ECJ Held*** that it was irrelevant whether his income was supplemented out of a private income or from public funds. Accordingly, *Kempf* was a worker entitled to benefit from Community law since:

> ' ... a national of a Member State [who] pursues within the territory of another Member State by way of employment activities which may in themselves be regarded as effective and genuine work, [and who] claims financial assistance payable out of the public funds of the latter Member state in order to supplement the income he receives from those activities [is not excluded] from the provisions of Community law relating to freedom of movement for workers.'

Moreover, in ***Lawrie-Blum*** (*supra*) the plaintiff (a trainee teacher, teaching for a few hours per week) succeeded in her claim to be classed as a worker because she met all the necessary requirements specified in *Levin* for the status of worker to be accorded and she was pursuing an economic activity.

The status of worker has also been accorded to a person who 'having left his job is capable of taking another': *Case 75/63*, *Hoekstra*, [1964] ECR 177. This decision gives substance to the provision of ***Art.39(3)(d)*** enabling a person 'to remain in the territory of a Member State after being employed in that State ...'; and also to a person who carried out some plumbing work and general household duties for a religious community in exchange for food, shelter and some pocket-money: *Case 196/87*, *Steymann*, [1988] ECR 6159.

However, as ***Lasok***[1] notes, 'work which does not entail an economic activity but merely an activity leading to rehabilitation or reintegration into normal employment, for example in the case of a drug addict, may not qualify:' *Case 344/87*, ***Bettray v. Staatsecrataris van Justitie*** [1989] ECR 1621. Apart from this qualification, ***Bettray*** reiterated the importance of giving a broad interpretation to the term 'worker' and affirmed the "essential feature of an employment relationship" as expressed in ***Lawrie-Blum***, viz; "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".

In practice, the definition of 'worker' has not proved to be crucial because an economically active person not satisfying the provisions of ***Art.39*** is likely to be self-employed - in which case ***Arts.43*** or ***49*** would be applicable. According to ***Mathijsen***[2]: "There is, however, a basic condition in order to be recognised as a 'worker': the person in question must be covered by social security. There is a definite link between 'worker' and social security and a definition of worker is to be found in the Regulation on the application of social security schemes to employed persons and their families moving within the Community.[3]"

To reiterate, the principles relating to entry, residence and non-discrimination on the grounds of nationality are the same for the economic activities provided for in Arts.39, 43 and 49: *Case 36/74*, ***Walrave and Koch***; *Case 48/75*, ***Royer***. Each of these Articles is directly effective.

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[1] ***Lasok, D***. *Law & Institutions of the European Union*, 6/e. London: Butterworths, 1994

[2] ***Mathijsen, P.S.R.F***. *A Guide to European Union Law*, 7/e. London: Sweet & Maxwell, 1999, p215

[3] ***Regulation 1408/71***, as amended.

Further analysis of Art.39(3)EC

Art.39(3) contains four rights of workers, viz;

(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member states for this purpose;
(c) to stay in a Member State for the purpose of employment ... ; and
(d) to remain in the territory of a Member State after being employed in that State, ...

With regard to (a), freedom to accept offers, *neither* ***Art.39*** *nor* ***Directive 68/360*** [on the rights of entry and residence] makes any reference to a right to move freely in search of employment. The Directive does grant workers the right to leave their own Member States as well as the right to enter other Member States, but the right to reside in the new Member State for the purposes of seeking employment was decided by the ***ECJ*** in *Case 48/75*, ***Procureur du Roi v. Royer***.

Freedom of movement extends to those who "seriously wish to pursue activities as an employed person", *Case 53/81*, *Levin*, and an individual *seeking employment* in a host Member State is to be allowed *a sufficient period* in which to determine the likelihood of gaining employment: *Case C-292/89*, ***Antonissen***. The U.K. permits a stay of six months, initially; though, in accordance with dicta in ***Antonissen***, an individual who is able to demonstrate that he has a genuine chance of being engaged in remunerative employment would not be required to leave the U.K. at the end of the six month period.

That ***Jean-Marc Bosman***, a Belgian national and a professional footballer playing for a Belgian club, was denied a transfer, unless a fee was paid, even though he was out of contract with that club, - a rule approved by the Belgian FA and, indeed, UEFA (the governing body of European football) - meant that his right as a worker to free movement and to be in a position to accept an offer of employment within another Member State of the EC was denied. Accordingly, not only did this rule have to be jettisoned but so did the rule which precluded more than three EC 'foreigners' from playing in European competition matches. No limit could be placed on the number of nationals of other Member States representing a club from one Member State: *Case C-415/93*, *URBSFA v. Bosman*; *and UEFA v. Bosman*.

(**N.B.**:

1. A Belgian court had referred the *Bosman* case to the ECJ under ***Art.234* [*ex.Art.177*] *EC***.
2. Whereas it was submitted that sport in general had points of similarity with culture and that the Community should respect the national and regional diversity of the cultures of Member States, the ECJ pointed out that the question referred to them related only to the free movement of workers.
3. The ECJ rejected, *inter alia*, arguments relating to the difficulty of severing the economic aspects from the sporting aspects of football and the principle of subsidiarity.
4. The ECJ affirmed the view that sport was subject to Community law only in so far as it constituted an economic activity within the meaning of ***Art.2EC***: *Case 36/74*, *Walrave*, para.4).

Details on the derogations from the rights enshrined in ***Art.39(3)*** are contained in ***Directive 64/221***:

Further Analysis of Art.39(4)

Art.39(4) EC provides that 'The provisions of this Article shall not apply to employment in the public service.' The notion of public service employment is not defined in the Treaty. Accordingly, it must be given a Community definition based on factual criteria concerning the details of the post in question.

Case 149/79, ***Commission v. Belgium***, decided that it concerns only posts safeguarding the general interests of the State. In that case, it was said that whether the post in question constitutes employment in the public service depends on whether:

> the post[] in question [is] typical of the specific activities of the public service in so far as the exercise of powers conferred by public law and responsibilities for safeguarding the general interests of the State are vested in it.

Weatherill and Beaumont[4] conclude that: "The ***Article 39(4)*** exception demands a special relationship of allegiance to the state. Judicial appointments would doubtless satisfy the test. It is probable that the higher echelons of the civil service, the police, and the army, navy and air force can also be confined to nationals. However, more mundane tasks do not fall within the notion of the public service simply because the state happens to be the employer."

Secondary Legislation and the Free Movement of Workers.

Of more importance, perhaps, than the primary legislation, is the scope and interpretation of the secondary legislation applicable to workers and their families.

Secondary legislation passed under ***Art.39(3)(d)*** and ***Art.40*** implementing the provisions of Art.39 includes:

- ***Directive 68/360*** on rights of entry and residence;
- ***Regulation 1612/68*** on access to and conditions of employment;
- ***Regulation 1251/70*** on rights to remain in the territory of a Member State after having been employed there;
- ***Directive 64/221*** on Member States' right to derogate from the free movement provisions on the grounds of public policy, public security or public health.

The significance of this secondary legislation is that it determines the scope and detailed rules for the exercise of the rights conferred directly by the Treaty of Rome as amended: *Case 48/75*, ***Procureur du Roi v. Royer*****.**

Directive 68/360 on the abolition of restrictions on movement and residence for workers of the Member States and their families.

With regard to this secondary legislation**,** ***Art.4*** of ***Directive 68/360*** provides that a right of residence shall be granted to those [who are covered by Regulation 1612/68 - see *infra* - and] who produce a passport or identity card. The right of residence is independent of the issue of a residence permit: a worker can be engaged prior to the completion of the formalities for obtaining a permit: ***Art.5.***

Art.6 provides that a residence permit must be valid for at least five years and be renewable. Under ***Art.8***, seasonal workers, those who return to their own Member States daily or weekly (frontier workers), and those who employed for less than three months are not required to apply for residence permits.

An individual who cannot find work or who voluntarily relinquishes a job is not entitled to be issued with or have a residence permit renewed: *Williams v. Dutch Secretary of State* (1977).

Basic rights of workers and their families: the provision of Regulation 1612/68

The Preamble of Regulation 1612/68 provides that:

> The freedom of movement constitutes a fundamental right of workers *and their families*; mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economy of the Member States.

Specific provisions of the Regulation include the right of the worker to: take employment with the same priority, as nationals of the Member State in question: ***Art.1*****(*1*)** and **(*2*)** ; and to enjoy the same social and tax advantages as nationals of the Member State: ***Art.7*****(*2*)**; [and see Regulation 1408/71 which extends the application of social security schemes to, *inter alia*, self-employed persons and their families moving within the Community]:

Art.10 provides that the following members of a worker's family are entitled to install themselves with the worker in the host State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependant relatives in the ascending line of the worker and his spouse.

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[4] ***Weatherill, S and Beaumont, P***. *EC Law*, 2/e. London: Penguin, 1995, p568**.**

With regard to the meaning of 'spouse', in *Case 59/85*, ***Netherlands State v. Reed***, it was decided that spouse did not encompass 'cohabitee'. In this case, Ms Reed, a British national, was cohabiting with W, another British national, who was working in the Netherlands. Ms Reed was not working. Her application for a residence permit was refused on the basis that she was neither a worker nor a person seeking work. However, under Dutch law an alien who had a stable relationship with a Netherlands national could, under certain circumstances, be permitted to reside in the Netherlands. In particular, the persons concerned had to live together as one household or have lived together as such before arriving in the Netherlands, be unmarried and possess adequate means of support for the foreign partner. Whereas the ECJ took a strict meaning of the word 'spouse' and said that it 'refers to a marital relationship only', it held that ***Art.7(2)*** of ***Regulation 1612/68*** had to be interpreted as meaning that a Member State which permits the unmarried companion of one of its nationals, who is not herself a national of that Member State, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other Member States. Accordingly, Ms Reed had the right to enjoy the same social advantages as a Dutch national and should not be discriminated against.[5]

As for dependant relatives who are not nationals of any Member State, they have no right of entry and residence in a Member State of which their children are nationals and who have never been employed in another Member State, i.e. where no freedom of movement has ever been exercised no Community right arises: *Cases 35 & 36/82*, *Morson and Jhanjan v. Netherlands* [1982] ECR 3723.

The right to remain in residence after retirement or incapacity: Regulation 1251/70.

Whereas freedom of movement of workers is provided for in Regulation 1612/68 and Directive 68/360, the right of the worker and his/her family to *remain* in the host Member State on the occasion of the individual's retirement or where he/she ceases to be employed as a result of permanent incapacity is provided for under ***Commission Regulation 1251/70.*** The principal provisions of this Regulation are:

Art.2(1)(a) of the Regulation which provides that a worker acquires a right of residence on retirement if: he has reached the age laid down by the law of the host State for entitlement to an old-age pension; he has been employed in the host State for at least 12 months; and he has resided in the host State for more than three years.

With reference to the cessation of employment as a result of permanent incapacity, ***Art.2(1)(b)*** provides that a worker acquires a right to remain in the host State if he has resided there for at least two years. However, if the incapacity is the result of an accident at work, or an occupational disease entitling him to a pension for which an institution of the host State is entirely or partially responsible, he is entitled to remain regardless of the length of his previous residence.

Where a retiring or incapacitated worker has acquired a right of residence in a Member State, ***Art.3(1)*** provides that the members of his family to whom the Regulation applies are entitled to remain in the host State after his death. If, however, a worker dies during his working life and before having acquired the right to remain in the territory of the State concerned, ***Art.3(2)*** provides that members of his family shall be entitled to remain there permanently on condition that:

(a) the worker, on the date of his decease, had resided continuously in the territory of that Member State for at least two years; or
(b) his death resulted from an accident at work or an occupational disease; or
(c) the surviving spouse is a national of the State of residence or lost the nationality of that State by marriage to that worker.

Derogations from the Principle of Free Movement of Workers: Directive 64/221.

Derogations from the principle of free movement of workers are provided for in ***Art.39(3)*** and ***(4)EC***. Art.39(3) permits limitations on the rights which also are contained in Art.39(3) providing they are justified on the grounds of *public policy*, *public security* and *public health*. The meaning of public policy and the discretion left to the courts of Member States was discussed in *Case 41/74*, *Van Duyn v. Home Office*[6].

[5] See also: *R v. Secretary of State* (*ex parte Sandhu*): *Case 13/80*; and: *R v. Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department*: *Case 370/90*].

[6] See the subsequent narrowing of prohibited conduct in *Cases 115 & 116/81*, *Adoui and Cornuaille v. Belgian State* . See also *Case C-268/99*, *Jany*, in which it was said that prostitution pursued in a self-employed capacity could be regarded as a service and so come within ***Art.43EC***.

More detail on the limitations is contained in ***Directive 64/221***, a Directive that is directly effective: *Case 36/75*, *Rutili*. First, however, ***Art.1(1)*** of the Directive provides that: "The provisions of this Directive shall apply to *any national of a Member State* who resides in or travels to another Member State of the Community … ". Then, with specific reference to the limitations, ***Art.2(2)*** declares that the limitations may ***not*** be imposed to serve economic ends; and ***Art.3*** provides that measures taken on grounds of public policy or public security shall be based *exclusively on the personal conduct of the individual concerned*. ***Art.6*** provides that the person to be excluded is entitled to know on which ground - public policy or public security - the decision is based, unless disclosure of this information contravenes State security. [See also ***Articles 8 & 9*** of ***Directive 64/221***].

Previous criminal convictions probably do not, *in themselves*, constitute grounds for exercising the limitations: *Case 67/74*, *Bonsignore*: it is a matter requiring invocation of the proportionality principle. Thus, in the absence of compelling reasons, a Greek law requiring that a person, who was a national of another Member State, be expelled from Greece for life was disproportionate, and thus precluded by, *inter alia*, ***Art.3*** of ***Directive 64/221***, when the offence was merely that she was convicted in Greece of the charge of obtaining and being in possession of prohibited drugs for her own use: *Case C-348/96*, *Criminal proceedings against Calfa*.

What has to be shown before the derogation from the free movement principles can be applied, except in the most serious of previous convictions, is the likelihood of the individual re-offending: *Case 30/77*, *R v. Bouchereau*.

Indeed, an EC national who was a former terrorist in one Member State but who had since reformed and who would not constitute a present threat to public security would be allowed to enter another Member State as a worker: ***Astrid Proll***[7] (1988).

If the individual is not excluded from the territory of the host Member State then he cannot be restricted to certain areas of it: *Case 36/75*, *Rutili*.

Where a national of a Member State has been refused entry into another Member State, he had an adequate remedy against the refusal if it was the same remedy as was available to nationals of the State refusing entry providing that nationals of all other Member States also had the same remedy, *even if different remedies were also available to nationals of the first Member State*. This was a consequence of the reservations in Arts.39 and 43 applying only to the nationals of other Member States given that a Member State in question had no authority to expel its own nationals or to deny them access to their own Member State: *Joined Cases C-65/95* and *111/95*, *Shingara and Radiom*.

1b. Non-Economically Active Persons. In essence, three 1990 Directives (one of which has been amended) contain the provisions relating to this wide class of persons. They are: **90/364,** which extends the right of residence to those who do not qualify for it under any other EC provision. A qualification here is that a residence permit is granted only to those who can prove they have sufficient resources so as not to be reliant on the social security system of the host Member State; **90/365** which applies to former employees and self-employed persons who have ceased their professional activity as a result of retirement or incapacity; and **90/366** (as amended by Directive **93/96**) which provides for the right of residence for students. Directive 90/366 was annulled by the ECJ for being adopted on the wrong legal basis (***ex***. ***Art.235 EEC***). However, all the principal provisions of 90/366/EEC are now contained in the new Directive which was based on 'old' ***Art.7(2)EC***. A residence permit for the student, his/her spouse and any children will be granted for the duration of the student's course, though it is to be renewed annually and be conditional on the student continuing to hold a place at university/third level educational establishment.

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[7] A former member of the German Baader-Meinhoff terrorist group.