

Chapter 14 Freedom of Establishment and Free Movement of Services

Context for this chapter

UP A GREEK CREEK

Evan Cooper, *The Reporter Online*, 19 January 2018

Sitting behind the desk in her home office, she looks calm—but that’s only because months of ridiculous treatment by the Greek administration has made her almost unflappable.

‘Of course, when the rejection letters first came in, I was outraged, and dejected. But there’s something about an administrative process that manages to just wear you out,’ Allison Mead tells me, pointing at a stack of letters on her desk that would make an onlooker think she was very behind on her taxes.

Nothing could be further from the truth. Allison is a chef from Milton Keynes who was looking for a change, and when her partner Mina got a job offer in Greece, she thought that opportunity for change had presented itself.

‘It’s true we’re not exactly internationally recognised for our cooking—but I’ve run a food stall here for the better part of six years now, where I combine Mina’s Portuguese heritage with some English classics, and I think there’s a market for that abroad. There’s nothing quite like it anywhere, including in Greece.’

It’s said with a small smile, but that smile quickly fades.

‘So... I tried to open up a bistro in Athens. Which was easier said than done. The first thing they stopped was me using my title. I’ve got several diplomas from the British Culinary Institute, which allow me to say that I’m a Professional Chef in the UK. They’ve got a similar title in Greece, but the Greek Food Institute said that my diplomas are too different and won’t be recognised here. So I had to find another way to draw crowds to my restaurant, if it couldn’t be my expertise.’

And she had another way in mind, in offering a unique dining experience in Greece: not just food, but food and live entertainment, all organised around a theme celebrating Portugal.

‘It took a lot of planning, and a lot of reaching out, but I’d say it went smoothly until I had to start applying for the licenses for the key element of what I had planned: live music.’ She fishes the first letter from the stack. ‘Here’s the original rejection of the live entertainment request. When they read that I was planning on having Portuguese artists over for tasting menu events, they wrote back citing ... what is it, the (*fictional*) Greek Public Order Regulations 1996, which allow local councils to reject applications for any licenses on “cultural” grounds.’

... what does *that* mean?

‘Basically, the council told me that unless I played music that really showed off Greek culture, I was not getting this license. When I objected, they told me in person that, they were also refusing my license application because I was asking for too many live entertainment events, and so my venue and its planned activities were going to cause public disorder, which was also banned under the Public Order Regulations.’

Public disorder? What kind of music events was she planning on having?

‘Tasting menus accompanied by thematic *Fado*,’ Allison says, rolling her eyes. The traditional Portuguese music style, on acoustic guitar, may be *passionate* but is hardly known for instigating mosh pits and violence. ‘Yeah. In Greece, *Fado* apparently is a threat to public safety.’

But that wasn’t the end of Allison’s dream. Failing to get permission for *live* music, she investigated installing a large screen in the bistro that would allow her to stream concerts from Portugal instead. She *then* found out that *streaming* was also illegal without a license, under the Greek Audio-Visual Services Regulations 2013.

‘Yep, and I didn’t apply for a license beforehand, because I didn’t know. So they took away the screen and the projector, and disconnected my internet for a month as well. When I then did apply for the license, they said that they would respond to my application within 12 months, as they need to thoroughly investigate the source of the stream and what kind of content may be played in Greece if it is permitted. Until then, I am not allowed to stream anything.’

She looks out the window, out on the city where she’s chosen to make a life for herself, but that seems to want to stop her at every turn.

‘It just isn’t going to be the same, you know, without the music. The atmosphere is missing, and the whole affair with closures and equipment being seized has made the locals kind of wary of the restaurant, so ... I’m really struggling to get it off the ground, at this point.’ She takes a deep breath and shrugs. ‘Surely the whole point of the EU is that we *can* just move abroad and start a business and do things like this? But apparently that’s not how it actually works.’

The Athens City Council and the Greek Food Institute were not available for comment.

Discussing the scenario

Use the material in this chapter in order to explain to Allison whether she had any rights under EU law that have been violated by the Athens City Council and the Greek Food Institute. Treat each of the decisions taken as setting out a specific scenario, and explain how EU law applies to that scenario.

Approaching the scenario

This scenario takes the form of a fairly standard law exam question at university: it describes a factual scenario that has legal repercussions, and in your answer, you are expected to explain to Allison whether the legal decisions taken by the two Greek bodies are permissible under EU law.

What the scenario requires you to do is go through, paragraph by paragraph, and see what *facts* occur there and what *law* applies to those facts. Assessing that combination of *law* and *facts* will enable you to demonstrate that you not only understand how the law works in the abstract, from having read Chapter 14 in the book, but you are able to apply it to a particular situation that you have not seen before.

The majority of the work you need to do in order to accurately comment on the actions taken by the Athens City Council and the Greek Food Institute will have been done as you worked through the ‘**Discussing the scenario**’ boxes throughout Chapter 14. They are addressed here in turn—with a small conclusion at the end on how to summarize the justifiability of the Greek authorities’ actions.

Note: one aspect of free movement of services and freedom of establishment that the chapter does not address in detail is that only EU nationals are direct beneficiaries of these ‘freedoms’. This is not because knowing who the relevant EU citizens are in the scenario is unimportant, but because Chapter 12 already had you investigating how to distinguish between beneficiaries of free movement rights and their third-country national family members. In the current scenario, Allison is implied to be a UK national (in 2018, prior to Brexit), and her partner Mina is Portuguese, so they are both EU nationals.

Discussing the scenario

Is Allison wanting to set up a bistro a form of ‘establishment’? Why or why not?

Determining if the facts describe *establishment* or *service provision/reception* is where students tend to go off-piste in problem questions on freedom of establishment and free movement of services. This question therefore has you dwell on the meaning of ‘establishment’ as set out in the CJEU’s case law.

The opening section of Chapter 14 discusses the relevant criteria, including defining key terms that will be helpful to understand before working through this scenario. *Jany* thus established that ‘establishment’ requires there to be ‘no relationship of subordination’, meaning that work is carried out under the person’s own responsibility, and that there needs to be remuneration. These conditions appear to be met easily: Allison is setting up her *own* bistro, and will be charging for food there.

The other key aspect of ‘establishment’ is temporality. Here, *Gebhard* is again key: it makes clear that to qualify as ‘establishment’ in another Member State, the presence in that Member State’s economic life has to be on a ‘stable and continuous basis’. Again, in the case of opening a bistro, this is not controversial: the bistro is going to be in the same location over time. (Contrast it with, for example, Allison having a food truck that moves to different Member States—this is more likely to be ‘service provision’.)

Discussing the scenario

Consider the CJEU's case law on mutual recognition of qualifications. Can you think of some reasons why it might have been possible for the Greek Food Institute to reject the British Culinary Institute qualification?

A logical starting point here is *Thieffry*, which specifically addressed the issue of mutual recognition of qualifications. Key to the requirement of mutual recognition is that foreign qualifications have to be accepted when they are *equivalent* to domestic ones. As such, Greece needs to have set up systems by which to check if the British Culinary Institute's 'Professional Chef' qualification (achieved through 'several diplomas', per the facts) is *equivalent* to the Greek Food Institute's 'Professional Chef' qualification.

Vlassopoulou sets out what 'equivalent' means in more detail: Greece needs to be able to objectively confirm that the knowledge and qualifications certified by the UK diplomas fulfil the same requirements as those existing in Greece for the title of 'Professional Chef'. Where they only partially overlap, there has to be a way for Allison to demonstrate that she either *does* hold the relevant knowledge and qualifications—or she might be required to 'top up' her knowledge in order to be granted the full Greek qualification.

Reasons why the Greek Food Institute rejected the UK qualifications are, of course, entirely speculative, and we do not expect you to have a thorough understanding of what makes someone a 'qualified chef'. Nevertheless, you are invited here to speculate that perhaps the UK qualifications require fewer training hours as a chef than the Greek ones do, or that to use the title in Greece, a certain proficiency in cooking Greek food had to be certified by a diploma. Key is that the reasons for refusal have to be **objective** (and that, in any event, Allison should have been instructed on what was missing in her UK qualifications so she could 'top up' and use the 'Professional Chef' title).

Discussing the scenario

For each of the following aspects of the scenario at the start of the chapter, decide if they are: a) directly discriminatory; b) indirectly discriminatory; or c) non-discriminatory.

- Rejecting Allison's qualification from the BCI.
- Refusing her the licence for live music on the 'culture' ground.
- Refusing her the licence for live music on the public disorder ground.

Rejection of Allison's qualification should not be confused with direct discrimination. The qualification was not rejected because it was from the UK, but because the Greek Food Institute did not deem it to be equivalent to the relevant Greek qualification. This is **indirect discrimination**, because it is much easier for Greek nationals to obtain the Greek qualification, and more likely that Greek nationals hold that qualification, than it is for UK nationals.

You might think that refusal of the licence for live music on the 'culture' ground is a form of **direct discrimination**, in line with *FDC*. Here, Allison has been informed that the license is going to be granted only on the condition that she 'promote Greek culture'. The

difference with *FDC*, however, is that in *FDC* the condition for the distribution license was expressly distributing *Spanish* films. That is a nationality condition. In theory, Allison could ‘promote Greek culture’ exactly as much as Greek nationals do—she is not being denied the licence because she is not having *Greek live bands*, but because wherever her live bands are from, they are not ‘promoting Greek culture’.

It is therefore much more likely that the CJEU would also think *this* is **indirect discrimination**—because, *in practice*, it affects non-Greek nationals more: the Portuguese artists that Allison wants to use are much less likely to be able to ‘promote Greek culture’ even if they could *in theory*.

The ‘public disorder’ license refusal, on the other hand, is **non-discriminatory**: the prohibition on *any activity* that may cause public disorder is not targeted specifically at foreign nationals or Greek nationals and applies across the board with equivalent impact on anyone wanting to open a restaurant. (Remember, whether it is justifiable is a separate matter!)

Discussing the scenario

Can Directive 2005/36/EC help Allison? If so, how?

Having read Chapter 14, you will see that Directive 2005/36/EC codified the CJEU’s case law on mutual recognition, and so makes it clear that, rather than issue an outright rejection of Allison’s qualification, the Greek Food Institute should have made it possible for her to ‘transition’ to the Greek title of ‘Professional Chef’ through an ‘adaptation period’ of a maximum of three years, or an aptitude test that would certify her knowledge and practical experience. Having this codified will arguably make Allison’s appeal to this decision easier. Be careful, however, to not imply that her qualifications will now be automatically recognized—automatic recognition is a very limited benefit and mostly applies to medical practice!

Discussing the scenario

Which, if any, of the activities Allison discusses in the interview fall under the free movement of services? What makes you think so?

Here, again, we are focusing on the difference between service provision/reception and ‘establishment’, as this is the primary point on which student exam answers tend to go wrong. We discussed what ‘establishment’ is already. Here, we are looking for the opposite: presence in another Member State for economic purposes that is *not* stable and continuous.

The Portuguese musicians that Allison was planning to use for live music are likely to have been service providers *if* they were travelling from Portugal to play music in Allison’s Greek bistro, and were not formally ‘employed’ by Allison (which they are unlikely to be—you also do not ‘employ’ a plumber when they come to fix your clogged drain). They would have been present in Greece on a temporary basis (e.g. when the ‘tasting menu’ ended, they would have returned to Portugal) and they would not have set up a ‘stable and continuous’ presence there.

The ‘live streaming’ of music that Allison wishes to use *from Portugal* is likely to be a service that Allison is in receipt of, in light of the CJEU’s findings in cases like *Alpine Investment*. The Portuguese music streamers will provide temporary cross-border music for remuneration to Allison’s bistro in Greece.

Discussing the scenario

Is the refusal to let Allison stream live concerts from Portugal a directly discriminatory, indirectly discriminatory, or non-discriminatory measure?

The original refusal related to Allison failing to hold the appropriate license to stream the music is a **non-discriminatory** measure. National authorities are allowed to require licensing for activities, and *needing* the license appears to hold for anyone streaming content in Greece.

If, on the other hand, they refuse to grant the license after investigating ‘the source of the stream’ and ‘what kind of content may be played’, this is likely to be an **indirectly discriminatory** measure: the ‘source’ of the stream is a different Member State, after all. The fact that they are also examining the ‘content’ of the stream once again suggests that a refusal is likely to be **indirectly discriminatory**. Unless all music streams are refused licenses under the (fictional) Greek Audio-Visual Regulations 2013, they would be specifically rejecting streams of Portuguese music, which are again more likely to be provided by non-Greek nationals. This, however, is speculative—and the facts do not make it clear that this 12-month period of ‘investigation’ has passed. (And whether that 12-month period is justifiable is, again, a separate matter.)

Discussing the scenario

Do you think any of the measures taken by the Athens City Council can be justified under Article 52 TFEU? On what grounds? And do you think they would be found to be proportionate?

Note that this question is only asking after the measures taken by the Athens City Council. We are therefore interested in:

- The refusal of a licence for ‘live music’ on ‘cultural’ grounds;
- The refusal of a licence for ‘live music’ on ‘public order’ grounds;
- The requirement of a license to ‘stream’ any content.

On the ‘cultural’ grounds, Greece would likely argue that these represent a form of **public policy**. On this front, the case *can* be compared directly to *FDC*. As such, Greece might be arguing that it was acting to preserve or protect the Greek musical heritage. The CJEU, in *FDC*, appears to have suggested that these kinds of ‘cultural’ actions were not grounds under Article 52 TFEU, but of course, in *FDC*, there was **direct discrimination**. You could thus make a strong case that, here, rather than just trying to protect current Greek artists from competition, there is a genuine public policy interest in ensuring that, in restaurants in Greece, *Greek* culture is celebrated through music. (If you think back to Chapter 12, you could compare this to the reasoning put forward by Ireland in *Groener*.) Is the measure proportionate? You could argue this either way. It might be more proportionate if the Athens City Council set out clearer conditions—e.g. once a month Greek music had to be

performed. Alternatively, because *anyone* could play Greek music, in principle, you might think this measure proportionate. What matters is that you consider proportionality and put forward an assessment—there is no ‘correct’ answer.

On the ‘public order’ grounds, Greece would likely argue that these present a form of **public policy** or **public security**. *Omega* established that Member States have a wide margin of discretion in determining what their public policy concerns are—but also established that concerns rooted in fundamental rights were particularly likely to succeed. How do we compare this case law to Allison’s situation? Does playing live music threaten any fundamental rights, in your view?

Even if you can come up with a justification for the measure, the facts make clear that the primary reason for rejection was the number of ‘live music’ events planned—in which case, you should be able to argue that a more **proportionate** measure would grant Allison the license, but with a limit to how many live music events she could hold per week or month. This would be more realistic than arguing that the measure *is* proportionate, but as long as you pause to think about proportionality, markers are likely to reward you.

Finally, requiring a license to ‘stream’ content would also be captured by **public policy**. The Greeks would likely argue that ensuring that no ‘inappropriate’ materials are streamed was a matter of public policy. In light of the margin of discretion offered to Member States when determining their public policy concerns, this is likely to be a justifiable restriction on the free movement of services. The license *can* be applied for, but is the process for applying for a license **proportionate**? Be sure to address not only *how* Greece would justify its measures—but also if it would *succeed* in doing so. Your actual findings are less important here than the fact that you are following all relevant steps in considering when restrictions on free movement of services can be justified.

Discussing the scenario

Consider the Athens City Council’s decision to not grant the live music license because it may incite public disorder, or the 12-month ‘investigation period’ for the applications for licenses to stream concerts. Can they be justified using imperative requirements? If so, which ones? And are they proportionate?

One of the earlier ‘**Discussing the scenario**’ boxes already had us consider these two actions by the Athens City Council, and concluded that both were either **indirectly discriminatory** or **non-discriminatory**. They are thus justifiable in principle, using imperative requirements, as we know from cases like *Van Binsbergen*, *Kraus*, and *Carpenter*. (**Note** that the rejection of the live music licence on ‘cultural’ grounds could also be justified under imperative requirements, though the question is not asking after that.)

What kinds of imperative requirements might be persuasive in these two cases? The ‘public order’ measure can fall into **public policy**, as noted, but might more specifically be used to justify measures that ensure appropriate residential living conditions—e.g. ensuring that people living in the neighbourhood the bistro is in are not constantly hearing loud music at all hours of the day. Is the measure taken appropriate for that? While precluding ‘live music’ is not discriminatory, measures taken to ensure that residents have appropriate amounts of silence in their neighbourhood could also include time limits on

licenses (preventing late-night or early-morning music), or limiting the number of live music events that could take place on given days, or in given weeks. Many more **proportionate** measures could achieve such a goal, and as mentioned, while you could argue this was a proportionate measure and not lose *all* possible marks on this question, it would be less persuasive, as other measures here are easy to identify without being an expert on live music or public order.

In terms of investigating what material will be ‘streamed’ in public spaces, again, Greece can make a **public policy** argument, but more specifically could argue that this is for the sake of consumer protection, or the protection of children, or the adherence to moral decency standards—all of which would be **imperative requirements**. An investigation into the content of streams would be an appropriate means of ensuring that children are protected from inappropriate streaming content in a bistro, or that national moral decency standards are being upheld, so it appears an **appropriate** measure to investigate the streams before licensing them. That said, it seems unlikely that the 12-month investigative period would be seen as **proportionate**. You can therefore argue that perhaps a temporary license could be granted, or a faster investigation would need to be conducted, and only then would this streaming license be a justifiable violation of Article 56 TFEU. (If, on the other hand, you think 12 months is a suitable amount of investigative time, you would argue that this measure is proportionate—but, again, the more persuasive analysis here would probably conclude that 12 months is an excessively long period!)

Summary

Explaining to Allison whether she had any rights that were violated by the Athens City Council and the Greek Food Institute:

- Regarding the Greek Food Institute: The CJEU established, in cases like *Thieffry* and *Vlassopoulou*, that EU law requires that equivalent qualifications in the Member States benefit from mutual recognition. Rejecting ‘equivalent’ qualifications is directly discriminatory and a restriction on the freedom of establishment in Article 49 TFEU. Mutual recognition has now been codified in Directive 2005/36/EC, and so Allison should have had her UK qualifications examined, and should have been informed in what ways she was lacking knowledge or experience—and be given an opportunity to either ‘top up’ that knowledge through training, or to sit an aptitude test, in order to use the Greek ‘Professional Chef’ title.
- Regarding the Athens City Council’s rejection of the ‘live music’ license on ‘cultural’ grounds: under the free movement of services in Article 56 TFEU, Portuguese musicians should be entitled to come and play music in a bistro in Greece. Requiring a license for this activity is a restriction on the free movement of services, but one that can be justifiable in principle. However, Allison’s license application was rejected via an indirectly discriminatory decision-making measure, much more likely to be satisfied by Greek nationals than other EU nationals. The specific justification given—‘promoting Greek culture’—is likely to fall within ‘public policy’ considerations, and may or may not be proportionate. (You decide!)
- Regarding the Athens City Council’s rejection of the ‘live music’ license on ‘public order’ grounds: again, requiring a license for ‘live music’ is a restriction on the free movement of services in Article 56 TFEU, but one that can be justified in principle. The rejection of the license application on ‘public order’ grounds is non-

discriminatory, in that it appears to be targeting the *number* of live music events, rather than *what type* of live music is played. It can be justified on public policy grounds or on an imperative requirement like protecting residential areas from noise pollution. However, it is likely to be disproportionate, as the license could have limited the volume of live music events rather than ban them outright. Allison, in short, should therefore have been granted a license to play live music in her bistro under EU law.

- Regarding the Athens City Council's requirement of a license for 'streaming': this is a non-discriminatory measure that restricts Article 56 TFEU rights, but can be justified on public policy grounds or using imperative requirements such as ensuring the protection of children or upholding moral decency standards in Greek public spaces. The requirement for the license itself seems an appropriate measure to take to achieve that goal, as is investigating the contents of the stream—but a 12-month investigation is likely to be seen as disproportionate to achieving that goal, and so under EU law, Allison is entitled to either a temporary license or a quicker decision on her license application.