Exceptions from EU Free Movement Law

Derogation, Justification and Proportionality

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Foreword

This book on exceptions from free movement rights will be a welcome contribution to a field which does not easily lend itself to clear-cut or well-structured answers. In fact, the articles bring out the difficulties in obtaining a structured overview of the case law of the European Court of Justice and in seeing great coherence in that case law. The same might perhaps also be said of the articles themselves … Different approaches and explanations seem to emerge.

Is this a great sin? I do not think so. The terrain and material are simply so broad and diverse that an overall and clear picture may be difficult, if not impossible, to attain. Let me mention a few considerations which, from the perspective of a judge, seem to play a role when assessing whether a restriction on free movement may be justified or not.

It may be useful to start by noting that not all free movement rights will necessarily play out in the same way. This is because the relevant texts differ in terms of both status and content. To take an obvious example, Article 21(1) TEU, unlike the other relevant provisions, makes the right to move and reside freely within the territory of the Member States subject to the limitations and conditions laid down not only in the Treaties but also 'by the measures adopted to give them effect'. And with respect to all the free movement rights, the scope and content of such secondary law may vary greatly. It may come as a surprise to some but the judges of the Court of Justice do take legal texts seriously and the wording and context of a provision are often decisive whilst the importance of the teleological method is sometimes exaggerated in doctrinal commentaries.

Apart from the text of the applicable provisions, obvious factors to take into account are the gravity of the restriction on free movement that the national measures imply, including whether they are discriminatory or not, and the importance that the Court attaches to the public interest invoked. Serious environmental or health concerns, for instance, may more easily justify restrictions than some other concerns (but here, again, the wording of the relevant provisions of primary law attests to the importance attached to environment and health). And economic considerations will not suffice as a justification unless it can be reasonably argued that there is a serious threat to public finances so that preserving a certain national system (such as a national health care system) would be jeopardised if the restriction were to be discarded.

Moreover, as judges are there to resolve cases rather than to construe doctrine, the facts of each case, the applicable national rules as well as the arguments of the interested parties are of crucial importance. This also applies to the preliminary ruling procedure, even if it is not the task of the Court of Justice to establish the facts or to interpret national law. When dealing with requests for preliminary

rulings, the Court often devotes some time and energy to obtaining as accurate a picture as possible of the factual situation and the national legal context.

As to the arguments of the interested parties, it goes without saying that the Court pays much attention to the arguments presented by the Member State that applies an alleged restriction in order to deny the existence of a restriction and/or to justify it on the basis of an explicit derogatory clause or a so-called mandatory requirement. If such arguments are based on objectively verifiable facts such as the *travaux préparatoires* of the relevant national legislation, the chances of success may be greater than if it becomes obvious that a certain public interest has been invoked at a later stage, for the purposes of the litigation in question. Arguments which remain at a general and abstract level will as a rule not turn out to be very successful. The invocation of several public interests at the same time may convey the perception of a 'shopping list' while one single public interest consideration backed up by solid and as concrete as possible information and plausible arguments as to the negative effects which would follow were the restriction to be lifted may well do the trick. And the chances of success are further enhanced if it is shown that alternatives which may be less restrictive have been considered and that the solution finally opted for has been chosen after careful reflection, taking into account the principle of proportionality.

As to this principle, the Court should probably somewhat streamline the way it is formulated, referred to and used in the reasoning of judgments. That said, the actual outcome will probably not depend on such factors. Here is an example where the result of reconciling, or as the case may be, balancing of different interests will not depend so much on the actual formulation used in the judgment but rather on perceptions among the sitting judges of what is fair and reasonable, based on an overall assessment of all relevant factors and whether the problem for the proper functioning of the internal market is deemed to be minor or more serious. It almost goes without saying that the final outcome could be different had the case been decided by another chamber of the Court than the one to which the case has been referred.

It is my impression that, since the 1990s, the Court has in some areas become somewhat more understanding of national rules which may be susceptible to restrict free movement rights. On the other hand, it is equally my impression that the Court remains vigilant vis-à-vis restrictions which could erode the free movement principles and would not hesitate to strike such restriction down, including in the area of free movement of citizens.

And let me in this context end by refuting the claim that the Court would be focusing solely on the economic aspects of the internal market, to the detriment of a 'social Europe'. Let me take the example of the famous, for some infamous, judgment in *Laval un Partneri* (Case C-341/05). The Court here took a critical eye at what it perceived as Swedish protectionism (hindering posted Latvian workers from working on a building project) and in fact upheld the interests of these workers to earn more than they would have in their home State (whilst the action of the Swedish trade unions caused the bankruptcy of the Latvian company).

A social Europe should mean just that, rather than simply a bundle of national social markets.

And what about Ms Dano (Case C-333/13) and her son, Romanian nationals who, according to the Court, could be denied certain 'special non-contributory benefits' in Germany although those benefits were granted to German nationals? Here the outcome is explained by the link which is made in Directive 2004/38 on the free movement of EU citizens between the requirement for persons not seeking employment to have sufficient resources as a condition of residence and the concern not to create a burden on the social assistance system of the host State. As Ms Dano did not work or seek work, nor did she have sufficient resources, she could not claim a right of residence. She was accordingly not residing in Germany on the basis of the Directive and could not claim the benefits in question. To decide otherwise would have rendered the condition of sufficient resources more or less meaningless (economically inactive non-nationals would in that case be able first to obtain full social assistance and then, on that basis, claim that they have sufficient resources). We may deplore this requirement established in the Directive but the Court is not empowered to remove it, unless it was held that it is in violation of Article 21 TFEU. Given the wording of that Article, such a result would be far from obvious, to say the least.

So we are back to my starting point: The text of applicable primary and secondary law does matter. This does not, of course, mean that judges should be blind to context and objectives, or that they should forget about considerations of fairness and reasonableness. And we may also remember what a friend of mine, the late Finnish Permanent Representative to the EU, Ambassador Satuli, used to say: 'Even in the EU, the use of common sense is not prohibited.'

Allan Rosas
Judge at the European Court of Justice