

PUBLIC ORDER IN EUROPEAN LAW

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Abstract

Anyone who has read the Treaty instituting the European Community has noticed that member states are allowed to prevent the application of European Community law by arguing that the rule at stake contradicts their public policy or public order. Although these provisions – mainly in the ambit of the internal market rules, which is the focus of this article – have remained unchanged since 1957, the European Court of Justice case law, and later secondary law, shows that the member states are closely controlled in the use they make of their public policy. The purpose of this article is to verify whether in practice anything remains of that exception, knowing that the court and secondary law have not only defined the content of what might constitute a member state's public policy but also its concrete process of application.

1 Introduction

From the outset it must be clear that the focus of our short study will be the following question: to what extent can member states' public order stand in the way of the construction of a European legal order?¹

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¹ We see immediately the limits of this paper. We are not concerned here with the Community public order, i.e. mandatory rules that are created by the European Union and that must be applied compulsorily in all member states. A good example of this category of public order is found in the *Ingmar* case (C-381/98, *Ingmar* 2000[ECR] I-0930). In that case, the ECJ is confronted with a contract concluded between a United States (US) company and an agent located in the United Kingdom. The contract is governed by California law, chosen by the parties. The contract is

Before we address the question as such, we need to clarify the content of the concept of 'public order'.² Indeed, our starting point is the French expression '*ordre public*'. It is translated into English as either 'public policy' or 'public order'. To this date it is unclear to me whether there is a difference in content or method between the concepts in French law and in English law or common law. In order for the reader to be aware of our basic premise, we offer the following clarification: by either of the often used expressions, we mean to cover in substance all mandatory rules, whatever name they take in French (*lois de police*, *lois d'application immédiate*, *règles d'ordre public*): namely, rules from which parties have no freedom to derogate. These mandatory rules have different sources. They are either created by the states unilaterally to protect the fundamental values of their society,³ or they are created at the regional level, or even at an international/multilateral level. If created within the international legal order, they may qualify as *jus cogens* rules.⁴ As far as method is concerned, the difference between a *loi de police* and a *règle d'ordre public* lies in the moment when they intervene. A *loi de police* curtails the conflict of laws analysis. Indeed, when a *loi de police* is deemed applicable, there is no need and in fact no power to look for a foreign law that may be applicable to the situation at stake. This is why they are sometimes called *lois d'application immédiate*. In contrast, the public policy rules intervene after the conflict of laws analysis is conducted and a foreign law is deemed applicable. The person in charge of applying that law must conduct a comparative analysis of the results potentially reached by the application of the foreign law and that of the mandatory rule. If the result is unacceptable, then the portion of the foreign law deemed to be contrary to the mandatory rule is evicted and the mandatory rule is applied. Usually, both *lois de police* and mandatory rules or public policy rules under consideration are those of the forum state.

terminated by the US company and the agent fights to receive compensation, although California law does not provide for any compensation in such a case. The court looks at directive 86/653 of 18 December 1986 (JOCE L382, 17) on independent agents, and decides that European public policy imposes payment of compensation upon termination of an agency contract, unless the agent has committed a fault. Consequently, on that particular point California law is evicted, to be replaced by a Community mandatory rule.

² The difficulties in translating these concepts are exemplified by the Rome Convention on the law applicable to contractual obligations (which is in the process of being transformed into a Regulation) when comparing the different linguistic versions of articles 3(3) and 7.

³ The values can be cultural, human, sociological, economic or political.

⁴ The highly controversial concept of 'transnational public policy' is not mentioned here. For a recent article on this, see C. Kessedjian, 'Transnational Public policy', ICCA Montreal 2006, forthcoming in *ICCA Proceedings 2006*.

However, notably in Europe, taking a foreign mandatory norm into consideration is allowed.⁵

Since its origin, the Treaty instituting the European Community (EC Treaty) has included a few provisions, unchanged until now, whereby member states could use their public policy rules to block the application of a European rule. This is particularly true for internal market purposes and we will limit our analysis to this area of European Community (EC) law. The typical provision reads as follows:

The provisions in articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security...'.⁶

Firstly, one should note that the EC Treaty applies three concepts that must be treated as having separate and distinct content and that are not interchangeable as per decisions of the European Court of Justice (ECJ)⁷. Hence, we are only concerned here with the public policy exception. Secondly, it is possible that two or all three of the concepts used in article 30 are at stake in a single case.⁸ If that is so in the cases we review below, we will identify the reasoning of the ECJ as related to the public policy exception. Thirdly, the public policy exception cannot be used to cover other areas of protection such as consumer protection,⁹ nor can it be used to reserve some areas to the exclusive jurisdiction/competence of the member states.¹⁰ The general rule of interpretation is therefore a restrictive one. The provision quoted pertains to the freedom of circulation of goods, but similar provisions are included in all other freedoms.¹¹ Our point is that the public

⁵ This is what is provided for by article 7 of the Rome Convention of 1980 on the law applicable to contractual obligations. Article 7(1) has been controversial from the outset, to the extent that, contrary to the usual practice in European treaty law, member states have been allowed to make a reservation to prevent application of that provision in their country. Such a reservation has indeed been made by Germany, Luxembourg and the United Kingdom. This provision is also the focus of controversy during the ongoing negotiations for the replacement of the Rome Convention by a regulation.

⁶ This is the beginning of article 30 of the EC Treaty.

⁷ Case C-36/02, *Omega* [2004] ECR, I-09609.

⁸ Case C-54/09, *Eglise de Scientologie* [2000] ECR I-01335.

⁹ Case 177/83, *Kohl* [1984] ECR, Rec.3651.

¹⁰ Case 153/78, *Commission of the European Communities v. Germany* [1979] ECR, 02555. In other words, the allocation of competence between the member states and the Community is defined in the EC Treaty, by specific provisions, and the public policy exception must not be used to change or alter these provisions.

¹¹ Article 46 for the freedom of establishment and by reference for the free circulation of services; article 58 for the free circulation of capital.

policy exception, as interpreted by the ECJ, is similar in all internal market areas, whatever the freedom at stake and whatever the specific area of the law. We will try to demonstrate this by taking into consideration the case law of the court and a few of the most recent directives. There are two aspects to the question, which must be differentiated: firstly, the content of the term ‘public order’ (section 2); secondly, how it works in practice (section 3).

2 The content of ‘public policy’

The story of the member states’ public policy exception in European law set off in the right direction. The Founding Fathers knew that member states had different ways of structuring their societies, and they realised that member states may wish to enhance different values and differentiate in the way they deal with certain activities. As a consequence, as is usual in treaty-making, member states were allowed to use their own public policy rules whenever they were contradicted by the internal market rules. It was clear in the mind of the Founding Fathers that the content of those public policy rules should be left to each member state for its own needs. Hence, the EC Treaty did not provide a definition of the concept or a method for its application. The first time the ECJ had to decide a case dealing with such an exception, it rendered a decision that confirmed that the member states had a unique responsibility in defining their public policy.¹² The court followed a traditional viewpoint by stating that public policy was a territorial concept (i.e. a specific public order for each member state) that may evolve over time. The ECJ thus recognised that member states could change the content of their public policy as may be necessary with the evolution of the members of their societies and their activities. This is why we usually say that public policy is not only a territorial concept (proper to each member state) but also a time-sensitive one. No one knows what tomorrow’s public policy will be.¹³

However, in that decision the ECJ had already provided a few hints about what a later constant line of reasoning would be. If the member states were free to define their public policy, the exact impact of that policy on the application of European rules was a matter for the court to control, as it must

¹² Case 41/74, *Yvonne van Duyn v. Home Office* [1974] ECR, 01337 at 01351.

¹³ This has a consequence in private international law: a court, confronted with a public policy exception, must apply the public policy as defined at the time it has to make a decision and not at the time the facts occurred. One may question whether this is still true in European private international law, considering our findings in this paper. But we will refrain from passing judgment on this issue here, since it is marginal to our analysis.

not unnecessarily undermine the European construction. This fairly well-balanced decision did not stand long. Already in 1977, the court started to interfere with the very content of the member states' public policy. In the *Bouchereau* case,¹⁴ the ECJ explains:

La notion suppose, en dehors du trouble à l'ordre social que constitue toute infraction à la loi, une menace réelle et suffisamment grave affectant un intérêt fondamental de la société (emphasis added).

By way of this decision, the court began to curtail the freedom of the member states to define the content of their public order. Two uniform criteria are now necessary for any rule to be characterised as *public policy*: firstly, it must address a *real and severe enough* danger, and not just any violation of a rule; secondly, the goal of the public policy rule must be to protect a *fundamental interest* of the society concerned.

The first application of this new line of reasoning took place one year later when the ECJ was confronted with a national rule forbidding the commercialisation and destruction of currency (essentially coins) that was no longer legal tender.¹⁵ The court considered these coins to be goods to which the rules on the free circulation of goods applied. However, the court accepted that a state has sovereign powers with respect to its currency and hence is free to organise trade in currency as it deems fit, even if the currency in question is not legal tender. This case, however, is not of great interest to our topic, as it clearly deals with traditional sovereign activities of a state. The court disposed of the public policy issue in one small paragraph with no additional explanation.

The line of cases that is much more controversial concerns the secondment of employees within the exercise of the free circulation of services. The typical case is as follows: a company registered in state A (state-of-origin) is contracted to build a plant in state B (host state or state of destination). In state A, labour laws are more flexible and the level of compensation lower, so the company decides to use its own labour force to perform the contract in state B. The employees are temporarily displaced for as long as they are needed, usually for a period of no more than one or two years. State B wants to apply its labour laws to the employees in question. Very often, state B claims that its labour law is part of its public policy or are mandatory rules or *lois de police* and thus wants to place itself under the public policy exception of the EC Treaty. The first time the ECJ was confronted with such a case, it held that state B did not have the power to prevent the state A company from using its labour force to perform services

¹⁴ Case 30/77, *Regina v. Pierre Bouchereau* [1977] ECR, 1999.

¹⁵ Case 7/78, *Thompson* [1978] ECR, 02247.

in state B under the free circulation of services.¹⁶ Member states, alarmed by this decision, proceeded to negotiate a directive in order to provide clearly that a number of mandatory rules of the state of destination could be applied to employees seconded in the context of the free circulation of services.¹⁷ However, this directive did not stop parties from suing in comparable employment law cases, with the result that a long line of cases has already been decided by the court and more are still pending.¹⁸

We will not analyse all of these cases in detail. Instead, for our purpose we will highlight the main lessons to be learned. Firstly, the ECJ no longer hesitates, if it ever did, to look over the shoulder of the member states and to decide whether a rule that a member state considers to be mandatory and covered by the public policy exception does indeed qualify to be characterised as such.¹⁹ Indeed, in *Arblade*, the court went as far as to define what a *loi de police* is for the purposes of the public policy exception.²⁰ In doing so, the court used a definition that is quite familiar to private international law specialists, as the concept was invented by Franciscakis in

¹⁶ Case C-113/89, *Rush Portuguesa* [1990] ECR, 01417.

¹⁷ Directive 96/71/CE of 16 December 1996.

¹⁸ Cases C-369/96, C-376/96, *Arblade* [1999] ECR, I-08453 ; C-165/98, *Mazzoleni*, [2001] ECR, I-02189 ; C-49/98, C-50/98, C-52 to 54/98, C-68 to C-71/98 *Finalarte* [2001] ECR, I-0783; C-60/03, *Wolff & Müller* [2004] ECR, I-09553; C-445/03, *Commission v. Luxembourg* [2004] ECR; C-341/02, *Commission v. Germany*, [2005] ECR, I-02733; C-168/04, *Commission v. Austria* [2006] ECR, I-10191; C-208/05, *Innovative Technology Center* [2007] ECR. Cases still pending: C-341/05, *Laval un Partneri*, opinion of 21 March 2007; C-490/04, *Commission v. Germany* opinion of 14 November 2006.

¹⁹ There are numerous cases in different fields. Case C-60/00, *Carpenter* [2002] ECR, I-06279, point 44, where the court finds that the fact that a foreigner who stays on the territory of a member state in violation of immigration rules is not a menace for public policy without more elements. Case C-167/02, *Inspire Art*, [2003] ECR, I-10155, where the court refuses the characterisation as public policy of rules concerning the formation of legal persons. Case C-38/98, *Renault v. Maxicar* [2000] ECR, I-02973, in application of the Brussels Convention of 1968 (now transformed into Regulation 44/2001) in which Italy was prevented from using its public policy exception not to enforce a French judgment, where the French decision had condemned an Italian company for violation of French rules on intellectual property, although Italian law considered the activity at stake as perfectly legal.

²⁰ At point 30 of the decision the court finds: 'As regards the second question referred in each of the two cases, concerning the classification of the provisions at issue as public-order legislation under Belgian law, that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.'

his seminal article on *lois de police*.²¹ Even if the content of the definition itself was no surprise, the court surprised everyone when it decided that for the purpose of the public policy exception a common and uniform definition is required. As a consequence, the freedom of the member states to define what they consider to be their *lois de police* has considerably diminished. If one combines *Bouchereau* cited above, *Arblade* and another case rendered on the freedom of circulation of persons,²² it is clear that the member states can only protect their most fundamental values, which are at the very core of their system, to be understood in a highly restrictive matter. The second lesson entails that the state of destination must constantly compare the content of its own rules with the content of the rules of the state of origin, within their context and with all their components. As a result, only the smallest possible number of the state-of-origin rules can be blocked under the public policy exception by the state of destination. This result has been criticised as being too complicated and leading to uncertain results²³, but the court thus far has not departed from this line of reasoning.

The most recent trend comes from secondary EC Law. It was inaugurated with the Electronic Commerce Directive²⁴. The directive is complex, but its main purpose is to organise the free circulation of services in the information society. Its fundamental provision is article 3, which is divided into several sections; the most important ones for our purpose are

²¹ Ph. Franceskakis, 'Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois'(1966) 55 *Revue critique de droit international privé* 1.

²² Case C-100/01, *Olazabal* [2002] ECR, I-10981. In that case, M. Olazabal, convicted of being a member of ETA (the Basque violent defence group) was prevented from staying on French territory because his presence was considered to be a menace for the public order. The court accepts this idea but curtails the rules France imposed upon Mr. Olazabal and only accepts some of them, the others being considered as encroaching too much on his fundamental right of freedom of circulation as a European citizen.

²³ See in particular Laurence Idot's comment under *Mazzoleni*, in (May 2001) *Review Europe*, comm. n° 174.

²⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). We have not made an exhaustive analysis of all secondary law and there could be some prior directives that have the same structure as the electronic commerce directive. However, it is noteworthy that Directive 89/552/EEC, on television without borders, defines precisely the areas of public policy (protection of human rights, minors, etc.) without leaving that to the member states. The member states are allowed to be stricter than what the directive provides in a number of areas (e.g. the protection of language).

sections 1, 2 and 4(a)(i). Article 3(1) provides the duties of the state of origin:

Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

Article 3(2) defines the duties of the state of destination: 'Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State'. However, a number of exceptions are provided by Article 3(4). The exception that is pertinent for our purpose reads as follows:

Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled: (a) the measures shall be: (i) necessary for one of the following reasons: - public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex religion or nationality, and violations of human dignity concerning individual persons.

For the first time, the public policy exception is complemented by examples that clarify which situations may qualify as such. While it is true that the list is open-ended and serves to provide examples only, it is well known that, when it comes to the interpretation of a textual provision, the examples provided therein serve as landmarks that help shape the limits of the provision. Hence, when a court is asked to assess whether a measure adopted by a member state may indeed fall under the public policy exception, it will compare the measure to the examples provided in the list, which in that comparison represent the maximum amount of freedom allowed to member states. In other words, for the first time the member states, by providing these examples, have allowed Community secondary law to curtail their freedom to define their public policy. This development will have an impact on, for instance, a member state's capacity to block information society services with the aim of protecting its fundamental values. The trend may have found a limit with the political uproar that was triggered in some member states by the Service Directive.²⁵ Indeed, article 16(1)(b) of the Service Directive does not provide examples of what constitute public policy requirements for the working of this directive. However, other provisions may be more ambiguous.²⁶ In consequence, we need to keep an eye on the

²⁵ Directive 2006/123, 12 December 2006, OJ L376, 27 December 2006, 36.

²⁶ For example, article 1(5) provides that the directive does not affect member states' rules of criminal law. But immediately afterwards the same text provides: 'Member

development of secondary law because occasionally it may include examples of what member states are allowed to consider as public policy.

Not only the definition of the content of member states' public policy is severely controlled by the ECJ and secondary law; the working of the exception itself is also almost entirely framed by EC law.

3 The concrete working of the public policy exception

Very early in the development of European secondary law, the freedom of member states to use public policy measures was considered to be non-existent when the directive was a complete one and included all necessary measures to protect that public policy. This was the case for Directives 64/221, 68/360 and 73/148 dealing with measures concerning the right of citizens of one member state to enter and reside in other member states, and the refusal of permits for security and public policy reasons. The ECJ held that the directives provided for all necessary measures and the member states did not have the right to add to those measures.²⁷

In numerous other cases,²⁸ the ECJ decided that when a directive purports to regulate fully a certain topic, member states retained the freedom to use their public policy concepts during negotiations, but that once the negotiations were closed and a Community text was adopted, member states lost their capacity to use their public policy concepts to curtail the application of the directive or to try to avoid the concrete effects of the directive.²⁹ The relevant decisions of the court are frequently based on the principle of cooperation stemming from article 10 of the EC Treaty, particularly its second paragraph, which reads as follows: '[Members States] shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty'. Initially it was thought that the public policy

States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive'.

²⁷ Case C-363/89, *Roux* [1991] ECR, I-00273. More recently, in the matter of waste management, Case C-277/02, *EU-Wood-trading* [2004] ECR, I-11957.

²⁸ See, for example, case 5/77, *Denkavit*, 1555; the opinion of the Advocate General in the case 34/79, *Henn & Darby* [1979] ECR, 03795 at 03821; Case C-323/93, *Centre d'insémination de la Crespelle* [1994] ECR, I- 05077 point 31; Case C-5/94, *Hedley Lomasm* [1996] ECR, I- 02553, point 18; Case C-1/96, *Compassion in World Farming Ltd.* [1998] I-01251.

²⁹ Case C-50/06, *Commission v. The Netherlands* [2007] ECR, in application of Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health.

exception could still work as an exception to this negative obligation imposed on member states by the EC Treaty. However, in recent years it has become increasingly clear that even the public policy exception is limited by the principle of cooperation.

The court has also used the principle of proportionality to control the adequacy of member states' measures ensuing from their mandatory rules. However, this is not specific to public policy, as any measure taken by member states is subject to a proportionality test. In addition, the proportionality test may very well simply denote a shift in discretion: the ECJ replaces the member states' discretion with its own. Whether the court's discretion is more legitimate than that of the member states remains to be seen, particularly when it comes to member states' public policy.

The last blow to the freedom of member states to use their public policy against their European obligations comes from the case *Eglise de Scientologie*.³⁰ Here, the court was faced with French measures on the transfer of capital within the Scientology Church group for the benefit of the French Branch. One of the measures at stake consisted of the imposition of an authorisation prior to any transfer. One must remember that France considers the Scientology Church to be a sect along with all legal and policy consequences stemming from that characterisation. It was clear that the prior authorisation constituted an obstacle, a restriction on the free movement of capital. There is no dispute about that. However, France considered the prior authorisation system to be the only way for French authorities to make sure nothing was done that would run contrary to its policy against sects. The court, however, was of a different opinion. It held that the generality of the law was such that no operator could know *in advance* what *specific circumstances* would trigger the granting or the refusal of the authorisation. So, for the court, perhaps the prior authorisation was a necessity but it held that the authorisations should not have been formulated as a general requirement. The result is squarely contrary to the usual meaning and working of a public policy exception and the fact that its content may necessarily evolve over time. Indeed, it is clear that a state must adapt to activities in the marketplace. By obliging a state to define *in advance* the specific circumstances in which an authorisation will be necessary, it dooms the state to always be late—operators always try to find ways to circumvent adverse legislative measures—and leaves the state with only *ex post* means of protecting its public policy. Moreover, *ex post* measures often mean 'all for nought'.

The above does not imply that we deny the necessity of verifying the proportionality of public policy measures, the goals of which are set by the

³⁰ Above n. 8.

member state that takes those measures. It is beyond doubt that the public policy exception, as any other measure taken by member states, must indeed comply with the principle of proportionality. In fact, compliance with proportionality principles has become a general principle of law, whether European, international or national, derived from the requirement of good governance. However, by obliging states to be specific with regard to the kind of activities that hurt their public policy and, moreover, by obliging them to do that *ex ante*, the ECJ deprives states of the most important effect of their public policy exceptions. Indeed, traditionally, the public policy exception comes as an *ex post* control of activities on the market. However, legislators have much less imagination than actors in the marketplace. Thus, for any legislator in the world it is extremely difficult to imagine, before the fact, what kind of violations could be committed in real life. The fight against what is often called *terrorism* nowadays is a dramatic but clear example of this difficulty.

4 Conclusion

In summary, when one gathers together all the restrictions the court has crafted upon the use of the EC Treaty-based public policy exceptions, one may wonder what is left. In our opinion, the answer is *not much*. It is true that the exception remains intact in primary law,³¹ but the freedom of member states has been curtailed to such an extent that it is now exceedingly limited. The ECJ was right to fear that states may abuse the use of the public policy exception. But as a result of that fear it has emptied the provision of its basic meaning, with only a few remaining instances where the states are allowed to apply the exception. The *Omega* case³² is one recent example where the court has finally accepted a member state's measure under the public policy exception. However, that case may not be entirely significant for our purpose. In that case, indeed the court accepted that Germany forbid the commercialisation of a video/internet game called 'playing at killing' because it plainly violated the basic protection due to human beings and human life. But who can argue that human rights protection is not a European/Community public policy nowadays? Hence, the reason Germany was allowed to use its public policy to forbid the commercialisation of the game may simply be that Germany's public policy is clearly the same as

³¹ It is noteworthy that the draft Constitutional Treaty changed nothing to the exceptions.

³² Above n. 7.

European public policy.³³ We are still waiting for a case where the member state's public policy is different from that of the European Community, and where that state wins.³⁴ Whether this is an acceptable state of affairs remains to be seen. Perhaps European society is so integrated now that public policy exceptions must be outlawed. We have doubts about that. This is mainly because public policy is the utmost symbol of culture and we think that the varied cultures of the different member states constitute a richness, not an impairment. If European institutions continue to act as if the cultures of member states should no longer be allowed to express themselves, we must not be surprised if we witness the flourishing of anti-European campaigns, as we have seen periodically in the history of European construction.

³³ The same is true in the case C-7/98, *Krombach* [2000] ECR I-01935, where Germany was allowed to block enforcement of a French criminal judgment rendered after proceedings of 'contumace'. The specificities of that procedure, make it contrary to the fundamental right of every person to benefit from an equitable treatment (art. 6 of the European Convention on Human Rights). Similarly, in the field of bankruptcy, see C-341/04, *Eurofoods* [2006] ECR, I-03813.

³⁴ By analogy, we can look at the *Rosengren* decision rendered on 7 June 2007 (C-170/04) where the ECJ was once again looking at the state-owned alcohol monopoly of Sweden under the public health exception of the EC Treaty. Here again, because of the violation of the proportionality requirement, the court prevents Sweden from taking a measure to prevent private imports of alcoholic beverages. The same is true in the cases C-359/04 and C-338/04, *Placanica* [2007] ECR, in matters of regulation of games of chance and bets on sporting events. This activity is normally not regulated by specific European secondary law, and the Service directive excludes it from its scope of application. However, it clearly falls under the free circulation of services of primary law.

