



**GUIDE TO THE CASE LAW  
Of the European Court of Justice  
on Articles 56 et seq. TFEU**

**FREEDOM TO PROVIDE SERVICES**

**European Commission**

## PREFACE

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The present guide forms part of a series of guides concerning the case law of the European Court of Justice. To date this series includes publications concerning Article 49 TFEU et seq. (Freedom of Establishment) and Article 56 TFEU et seq. (Freedom to Provide Services).

A separate chapter in the guide concerning Article 56 TFEU is dedicated to the case law on Directive 2006/123/EC on services in the internal market (Services Directive).

The guides are produced and updated by the European Commission, Internal Market, Industry, Entrepreneurship and SMEs Directorate-General.

This guide, which concerns Article 56 TFEU, aims to present the cases in a practical way by gathering together the essential passages of the cases, thus making it possible to find all the relevant parts of the judgement without having to consult the complete text of the case. The structure of the guide, following recent case law, provides an approach to Article 56 intended to help not only academics, but also practitioners directly involved in dealing with infringements.

In the 2015 Single Market Strategy<sup>1</sup> and the accompanying Staff Working Document<sup>2</sup>, the Commission states the intention to engage in a more active enforcement policy. In this respect, the guides, by presenting the relevant case law in an organised way, aim to provide clarity on the legal interpretations given by the Court of fundamental notions, on the proportionality analysis and on the correct application of fundamental freedoms of the Treaty.

To highlight the essential passages, without ignoring their context, the reasoning of the Court is given without alteration, but the key words are shown in ***bold and italics***. It must be noted that this method of presentation does not commit the Court, only the editors.

Within each chapter, cases are cited in reverse chronological order starting with the most recent. The dynamic development of the interpretation by the Court of the concept of "restriction" on the freedom to provide services can thus be followed.

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<sup>1</sup> <http://ec.europa.eu/DocsRoom/documents/14007?locale=en>

<sup>2</sup> <http://ec.europa.eu/DocsRoom/documents/14012>

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## TABLE OF EQUIVALENCES OF TREATY ARTICLES

<b>Initial EC Numbering</b>	<b>TEC Numbering following the Treaty of Amsterdam</b>	<b>TFEU numbering after the Treaty of Lisbon</b>
Article 2	Article 2 <sup>3</sup>	
Article 3	Article 3 paragraph 1 <sup>4</sup>	
Article 3	Article 3 paragraph 2	Article 8
Article 3b	Article 5 <sup>5</sup>	
Article 5	Article 10 <sup>6</sup>	
Article 6	Article 12 (repealed)	Article 18
Article 7	Article 6	Article 11
Article 8	Article 17	Article 20
Article 8a	Article 18	Article 21
Article 30	Article 28	Article 34
Article 37	Article 31	Article 37
Article 48	Article 39	Article 45
Article 52	Article 43	Article 49
Article 54	Article 44	Article 50
Article 55	Article 45	Article 51
Article 56	Article 46	Article 52
Article 57	Article 47	Article 53
Article 58	Article 48	Article 54
Article 59	Article 49	Article 56
Article 61	Article 51	Article 58
Article 64	Article 53	Article 60
Article 65	Article 54	Article 61
Article 73b	Article 56	Article 63
Article 73c	Article 57	Article 64
Article 73f	Article 59	Article 66
Article 90	Article 86	Article 106
Article 164	Article 220 <sup>7</sup>	
Article 165	Article 221 paragraph 1 <sup>8</sup>	
Article 165	Article 221 paragraphs 2 and 3	Article 251

<sup>3</sup> Repealed and replaced, in substance by Article 3 TEU

<sup>4</sup> Repealed and replaced, in substance, by Articles 3 to 6 TFEU

<sup>5</sup> Replaced, in substance, by Article 5 TEU

<sup>6</sup> Replaced, in substance, by Article 4, paragraph 3 TEU

<sup>7</sup> Repealed and replaced, in substance, by article 19 TEU

<sup>8</sup> Repealed and replaced, in substance, by Article 19 paragraph 2, first subparagraph TEU

# 1. DEFINITION OF "SERVICES"

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## 1.1 THE SERVICE PROVIDER

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### 1.1.1 Economic Activities

#### *1.1.1.1 Principle*

In that regard, it should be borne in mind that, according to the case-law of the Court, *the concept of 'services' within the meaning of Article 50 EC implies that they are ordinarily provided for remuneration and that the remuneration constitutes consideration for the service in question and is agreed upon between the provider and the recipient of the service* (see Case 263/86 *Humbel and Edel* [1988] ECR 5365, paragraph 17; Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 15; and Case C-355/00 *Freskot* [2003] ECR I-5263, paragraphs 54 and 55).

#### Case C-169/08 Presidente del Consiglio dei Ministri /Regione Sardegna [2009] ECR I-10821 §23

As the Advocate General noted in point 12 of his Opinion, *the decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide services is its economic character*, that is to say, the activity *must not be provided for nothing*.

By contrast, contrary to the view which the national court appears to take, there is no need in that regard *for the person providing the service to be seeking to make a profit* (see, inter alia, C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 50 and 52).

#### Case C-281/06 Jundt [2007] ECR I- I-12231 §32, 33

At the outset, it should be stated that the Treaty provisions relating to freedom to provide services apply to a situation such as that in the main proceedings.

In fact, the premiums which Skandia pays are the consideration for the pension which will be paid to Mr Ramstedt when he retires. *It is irrelevant that Mr Ramstedt does not pay the premiums himself, as Article 50 does not require that the service be paid for by those for whom it is performed* (see, to that effect, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16). Moreover, the premiums unquestionably represent remuneration for the insurance companies which receive them (see, to that effect, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 58).

#### Case C-422/01 Skandia and Ramstedt [2003] ECR I-6817 §22, 24

Second, Article 60 of the Treaty states that it applies to services normally provided for remuneration and it has been held that, for the purposes of that provision, *the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question* (*Humbel*, paragraph 17). In the present cases, the payments made by the sickness insurance funds under the contractual arrangements provided for by the ZFW, albeit set at a flat



rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character.

Case C-157/99 Geraets-Smits and Peerbooms [2001] ECR I-5473 §58

*Where such a service is provided by a member of a profession and therefore*, as required by Article 60 of the Treaty, is *normally provided for remuneration*, the principle of equal treatment laid down in Article 59 applies.

Case C-20/92 Hubbard [1993] ECR I-3777 §13

According to the first paragraph of that provision, services are to be considered to be 'services' within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons. Indent (d) of the second paragraph of Article 60 expressly states that *activities of the professions fall within the definition of services*.

Case C-159/90 Grogan [1991] ECR I-4685 §17

See also: Case C-205/84 Commission v Federal Republic of Germany [1986] ECR 3755 §18

*The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.*

Case C263/86 Humbel [1988] ECR 5365 §17

According to Article 60 of the Treaty, *services are deemed to be "services" within the meaning of the Treaty where they are normally provided for remuneration*, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Within the context of Title III of Part Two of the Treaty ('Free movement of persons, services and capital'), the free movement of persons includes the movement of workers within the Community and freedom of establishment within the territory of the Member States.

Joined Cases C-286/82 and C-26/83 Luisi & Carbone [1984] ECR 377 §9

### 1.1.1.2 Examples

The same is true of the prohibition on any insemination not authorised by the territorially competent insemination centre, since that prohibition, on account of the connection between distribution and insemination, is also *likely to impede or render less attractive the provision of the semen distribution service*.

Case C-389/05 Commission v France [2008] ECR I-5337 §62

The Court has thus *excluded from the definition of services within the meaning of Article 50 EC* courses offered by certain *establishments forming part of a system of public education financed, entirely or mainly, by public funds* (see, to that effect, *Humbel and Edel*, paragraphs 17 and 18, and Case C-109/92 *Wirth* [1993] ECR I-6447, paragraphs 15 and 16).

The Court has made clear that, by establishing and maintaining such a system of public education, funded as a general rule from the public purse and not by pupils or their parents, *the State was not seeking to engage in gainful activity, but was fulfilling its duties towards its own population in the social, cultural and educational fields.*

However, the Court has held that courses offered by educational establishments essentially *financed by private funds, in particular by students and their parents, constitute services within the meaning of Article 50 EC*, since the aim of those establishments is to offer a service for remuneration (*Wirth*, paragraph 17).

Case C-56/09 Zanotti [2010] ECR I-4517 §31,32

*It is important to note in that context that it is not necessary for such private financing to be provided mainly by the pupils or their parents.* According to consistent case-law, *Article 50 EC does not require that the service be paid for by those for whom it is performed* (see, in particular, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 56; *Smits and Peerbooms*, paragraph 57; and *Skandia and Ramstedt*, paragraph 24).

Case C-318/05, Commission v Federal Republic of Germany [2007] ECR I-6957 §70

Case C-76/05 Schwarz v Finanzamt Bergisch Gladbach [2007] ECR I-6849 §39, 40

Case C-281/06 Jundt [2007] ECR I-12231 §30

It is to be remembered that, having regard to the objectives of the Community, sport is subject to *Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC* (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 4; Case 13/76 *Donà* [1976] ECR 1333, paragraph 12; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 41; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 32).

Thus, *where a sporting activity takes the form of gainful employment or the provision of services for remuneration*, which is true of the activities of semiprofessional or professional sportsmen (see, to this effect, *Walrave and Koch*, paragraph 5, *Donà*, paragraph 12, and *Bosman*, paragraph 73), *it falls, more specifically, within the scope of Article 39 EC et seq. or Article 49 EC et seq.*

Case C-519/04 Meca-Medina v Commission [2006] ECR I-6991 §22, 23

As the Portuguese Government in particular points out, the Court has already held *that lotteries constitute an economic activity, within the meaning of the Treaty, inasmuch as they consist in the importation of goods or the provision of services for remuneration* (Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 19). With particular regard to the activities in issue in the main proceedings, the Court has held that *games consisting in the use, in return for a money payment, of slot machines must be regarded as gambling which is comparable to the lotteries forming the subject of the Schindler judgment* (Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 18).

The answer to the second, third and fifth questions must therefore be *that the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service* within

the meaning of the Treaty and, accordingly, it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.

Given that games of chance or gambling constitute services, within the meaning of the Treaty, as held at paragraph 56 above, ***any monopoly in the operation of games of chance or gambling falls outside the scope of Article 31 EC.***

Case C-6/01 Anomar and others [2003] ECR I-8621 §46, 56, 60

In the present case, ***it is clear that the payment of the contribution by the Greek farmers does not constitute economic consideration for the benefits provided by ELGA under the compulsory insurance scheme.***

***The contribution is essentially in the nature of a charge imposed by the legislature and it is levied by the tax authority.*** The characteristics of that charge, including its rate, are also determined by the legislature. It is for the competent ministers to decide any variation of the rate.

Similarly, the rate and detailed rules governing the benefits provided by ELGA under the compulsory insurance scheme are framed by the national legislature in such a way as to apply equally to all operators.

Consequently, ***benefits such as those provided by ELGA under the compulsory insurance scheme cannot be classified as services*** within the meaning of Articles 59 and 60 of the Treaty.

Case C- 355/00 Freskot AE [2003] ECR I-5263 §56, 57, 58, 59

It is to be remembered at the outset that, having regard to the objectives of the Community, ***sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*** (see Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405, paragraph 4, and Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman* [1995] ECR I-4921, paragraph 73). The Court has also recognised that sporting activities are of considerable social importance in the Community (*Bosman*, paragraph 106).

In that regard, ***it is important to note that the mere fact that a sports association or federation unilaterally classifies its members as amateur athletes does not in itself mean that those members do not engage in economic activities within the meaning of Article 2 of the Treaty.***

In that connection, it must be stated ***that sporting activities and, in particular, a high-ranking athlete's participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 59 of the Treaty even if some of those services are not paid for by those for whom they are performed*** (see Case 352/85 *Bond van Adverteerders and Others v Netherlands State* [1988] ECR 2085, paragraph 16).

For example, an organiser of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to

advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself.

**Joined Cases C-51/96 and C-191/97 Deliège [2000] ECR I-2549 §41, 46, 56, 57**

The dispute before the national court concerns treatment provided by an *orthodontist* established in another Member State, outside any hospital infrastructure. ***That service, provided for remuneration, must be regarded as a service within the meaning of Article 60 of the Treaty, which expressly refers to activities of the professions.***

However, ***that does not permit them to exclude the public health sector, as a sector of economic activity and from the point of view of freedom to provide services, from the application of the fundamental principle of freedom of movement*** (see Case 131/85 *Gül v Regierungspräsident Düsseldorf* [1986] ECR 1573, paragraph 17).

**Case C-158/96 Kohll [1998] ECR I-1931 §29, 46**

***Since the provision of insurance constitutes a service within the meaning of Article 60 of the Treaty***, it must next be borne in mind that, according to the case-law of the Court, Article 59 of the Treaty precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them (see, in particular, Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 16).

**Case C-118/96 Safir [1998] ECR I-1897 §22**

As was held in Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, ***advertising broadcast for payment by a television broadcaster established in one Member State for an advertiser established in another Member State constitutes provision of a service within the meaning of Article 59 of the Treaty.***

**Joined cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843 §48**

It should be pointed out at the outset that the activities of a tourist guide may be subject to two distinct sets of rules. A tourist agency may itself employ guides but it may also engage self-employed tourist guides. ***In the latter case, the service is provided by the tourist guide to the tourist agency and constitutes an activity carried on for remuneration within the meaning of Article 60 of the Treaty*** (Case C-198/89 *Commission v Greece* [1991] ECR I-727, paragraphs 5 and 6).

**Case C-398/95 SETTG [1997] ECR I-3091 §7**

Since ***transactions such as building loans provided by banks constitute services within the meaning of Article 59 of the Treaty***, it is also necessary to ascertain whether the rule referred to by the national court is compatible with the Treaty provisions on freedom to provide services.

**Case C-484/93 Svensson & Gustavsson [1995] ECR I-3955 §11**

Before considering that question, the Court notes that it has already held in Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6, that ***the transmission of television signals comes, as such, within the rules of the Treaty relating to the provision of services. In Debaue, cited above, paragraph***

*8, the Court stated that there was no reason to treat the transmission of such signals by cable television any differently.*

Case C-23/93 TV10 [1994] ECR I-4795 §13

Some governments stress the chance character of lottery winnings. However, a normal lottery transaction consists of the payment of a sum by a gambler who hopes in return to receive a prize or winnings. *The element of chance inherent in that return does not prevent the transaction having an economic nature.*

It is also the case that, like amateur sport, a lottery may provide *entertainment* for the players who participate. However, *that recreational aspect of the lottery does not take it out of the realm of the provision of services.* Not only does it give the players, if not always a win, at least the hope of a win, it also yields a gain for the operator. Lotteries are operated by private or public persons with a view to *profit* since, in most cases, not all the money staked by the participants is redistributed as prizes or winnings.

Although in many Member States the law provides that the profits made by a lottery may be used only for certain purposes, in particular in the public interest, or may even be required to be paid into the State budget, *the rules on the allocation of profits do not alter the nature of the activity in question or deprive it of its economic character.*

Case C-275/92 Schindler [1994] ECR I-1039 §33, 34, 35

As the Court has already emphasized in Case 263/86 *Belgian State v Humbel* [1988] ECR 5365, at paragraphs 17, 18 and 19, *the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question*, and is normally agreed upon between the provider and the recipient of the service.

In the same judgment the Court considered *that such a characteristic is absent in the case of courses provided under the national education system.* First of all, *the State*, in establishing and maintaining such a system, *is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields.* Secondly, *the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.* The Court added that *the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees* in order to make a certain contribution to the operating expenses of the system.

Case C-109/92 Wirth [1993] ECR I-6447 §15

See also: Case C-263/86 Humbel [1988] ECR 5365 §17-19

Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds.

However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and *which seek to make an economic profit.* When courses

are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a *service for remuneration*.

Case C-109/92 Wirth [1993] ECR I-6447 §16, 17

It must be held that termination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity. In any event, the Court has already held in the judgment in Luisi and Carbone (Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 16) that *medical activities fall within the scope of Article 60 of the Treaty*.

The information to which the national court's questions refer is not distributed on behalf of an economic operator established in another Member State. On the contrary, the information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the *economic activity* carried on by clinics established in another Member State.

Case C-159/90 Grogan [1991] ECR I-4685 §18, 26

As the Advocate General has pointed out in paragraph 33 of his Opinion, the person providing a service such as that referred to in the present case does not advise his clients, who are themselves often patent agents or undertakings which employ qualified patent experts. He confines himself to alerting them when renewal fees have to be paid in order to prevent a patent from lapsing, to requesting them to state whether they wish to renew the patent and to paying the corresponding fees on their behalf if they so desire. *Those tasks, which are carried out without its being necessary for the provider of the service to travel*, are essentially of a straightforward nature and do not call for specific professional aptitudes, as is indicated by the high level of computerization which, in the present case, appears to have been attained by the defendant in the main proceedings.

Case C-76/90 Säger [1991] ECR I-4221 §18

The two cases described above thus relate to the provision of services by the tour company to tourists and by the self-employed tourist guide to the tour company respectively. *Such services, which are of limited duration and are not governed by the provisions on the free movement of goods, capitals and persons, constitute activities carried on for remuneration within the meaning of Article 60 of the Treaty*.

Case C-198/89 Commission v Greece [1991] ECR I-727 §6

See also: Case C-180/90 Commission v Italy [1991] ECR I-709 §6

and: Case C-154/89 Commission v France [1991] ECR I-659 §7

The two services in question are also *provided for remuneration* within the meaning of Article 60 of the Treaty. Firstly, the cable network operators are paid, in the form of the fees which they charge their subscribers, for the service which they provide for the broadcasters. It is irrelevant that the broadcasters generally do not themselves pay the cable network operators for relaying their programmes. *Article 60 does not require the service to be paid for by those for whom it is*

*performed*. Secondly, the broadcasters are paid by the advertisers for the service which they perform for them in scheduling their advertisements.

Case C-352/85 Bond van Adverteerders [1988] ECR 2085 §16

Where an undertaking *hires out, for remuneration, staff* who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions laid down in the first paragraph of Article 60. Accordingly they must be considered a "service" within the meaning of that provision.

Case C-279/80 Webb [1981] ECR 3305 §9

In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. Although it is not ruled out that *services normally provided for remuneration* may come under the provisions relating to free movement of goods, such is however the case, as appears from Article 60, only insofar as they are governed by such provisions.

Case C-155/73 Sacchi [1974] ECR 409 §6

## 1.1.2 Cross-border character

### *1.1.2.1 Principle*

It is settled law that Article 49 EC precludes the application of any national rules which have the effect of *making the provision of services between Member States more difficult than the provision of services entirely within a single Member State* (see, inter alia, *Stamatelaki*, paragraph 25 and the case-law cited).

The Court has also held that Article 49 EC applies where the person providing the service and the recipient are established in different Member States (see Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 19). *Services which the provider carries out without moving from the Member State in which he is established for recipients established in other Member States constitute the provision of cross-border services for the purposes of Article 49 TFEU* (see, inter alia, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 21 and 22 and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 53).

In addition, it should be noted that *the potential effect of the legislation at issue on the situation of an insured person in that position depends on a factor which is uncertain at the time when that person is faced with such a choice*, that is to say, the possibility that the level of cover applicable in the Member State of stay for hospital treatment there – the overall cost of which is, at that time, not known – is lower than the cost of equivalent treatment in Spain.

Case C-211/08 European Commission v Spain [2010] ECR I-5267 §55, 48, 68

It is clear from the case-file that the legal proceedings pending before the Tingsrätt are between *two Finnish nationals, both established in Finland, concerning the right of one of them to fish in waters belonging to the other situated in Finland.*



Such a situation does not present any link to one of the situations envisaged by Community law in relation to the freedom to provide services.

Case C-97/98 Jägerskiöld [1999] ECR I-7319 §43, 44

It has consistently been held *that the Treaty rules governing freedom of movement and regulations adopted to implement them cannot be applied to cases* which have no factor linking them with any of the situations governed by Community law and *all elements of which are purely internal to a single Member State* (Joined Cases C-64/96 and C-65/96 *Nordrhein-Westfalen v Uecker and Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-03171, paragraph 16; Case C-134/95 *USSL N° 47 di Biella v INAIL* [1997] ECR I-00195 paragraph 19 and Case C-332/90 *Steen v Deutsche Bundespost* [1992] ECR I-00341, paragraph 9).

Case C-108/98 RLSAN [1999] ECR I-5219 §23

Joined Cases C-225/95, C-226/95 and C-227/95 Kapasakalis [1998] ECR I-4239 §22

Case C-70/95 Sodemare [1997] ECR I-3395 §38

Case C-134/95 USSL N°47 di Biella [1997] ECR I-195 §19

Case C-3/95 Reisebüro Broede [1996] ECR I-6511 §14

Case C-60/91 Criminal proceedings v José António Batista Morais [1992] ECR I-2085 §7.9

Joined Cases C-330/90 and C-331/90 López Brea [1992] ECR I-323 §7, 9

In paragraph 42 the Court went on to state that a Member State's jurisdiction *ratione personae* over a broadcaster can be based only on the broadcaster's connection to that State's legal system, which in substance overlaps with the concept of *establishment as used in the first paragraph of Article 59 of the EC Treaty, the wording of which presupposes that the supplier and the recipient of a service are 'established' in two different Member States*.

Case C-56/96 VT4 Ltd [1997] ECR I-3143 §17

Case C-14/96 Denuit [1997] ECR I-2785 §23

Case C-222/94 Commission v United Kingdom [1996] ECR I-4025 §42

Case C-55/94 Gebhard [1995] ECR I-4165 §22

By virtue of Article 59 of the Treaty, restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are *established in a Member State other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established*.

Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital.

Joined Cases C-286/82 and C-26/83 Luisi and Carbone [1984] ECR 377 §10

### 1.1.2.2 Examples

*Services which a provider carries out without moving from the Member State in which he is established for recipients established in other Member States constitute the provision of cross-border services for the purposes of Article 56 TFEU (see, to that effect, judgments in Alpine Investments, C-384/93, EU:C:1995:126, paragraphs 21 and 22; Gambelli and Others, C-243/01, EU:C:2003:597, paragraph 53, and Commission v Spain, C-211/08, EU:C:2010:340, paragraph 48).*

Furthermore, it is far from inconceivable that operators established in Member States other than Hungary have been or are interested in opening amusement arcades in Hungary (see, to that effect, judgments in Blanco Pérez and Chao Gómez, C-570/07 and C-571/07, EU:C:2010:300, paragraph 40, and Garkalns, C-470/11, EU:C:2012:505, paragraph 21).

#### Case C-98/14 Burlington Hungary and Others [2015] not published yet § 26, 27

Transposing that interpretation to the issue in the main proceedings, it follows that **Article 49 EC relates to the services which a provider** such as Stanley **established in a Member State**, in this case the United Kingdom, **offers via the internet** — and so without moving — **to recipients in another Member State**, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.

#### Case C-243/01 Gambelli [2003] ECR I-13031 §54

Finally, as regards the objections expressed in the observations submitted to the Court according to which, first, the main proceedings concern a purely internal situation and, second, certain international events fall outside the territorial scope of the Treaty, it must be remembered that the Treaty provisions on the freedom to provide services are not applicable to activities which are confined in all respects within a single Member State (see, most recently, Case C-108/98 R.I.SAN. [1999] ECR I-5219, paragraph 23, and Case C-97/98 Jägerskiöld [1999] ECR I-7319, paragraph 42). **However, a degree of extraneity may derive in particular from the fact that an athlete participates in a competition in a Member State other than that in which he is established.**

#### Joined cases C-51/96 and C-191/97 Deliège [2000] ECR I-2549 §58

In this case, **the offers of services are made by a provider established in one Member State** to a potential recipient established in another Member State. It follows from the express terms of Article 59 that **there is therefore a provision of services within the meaning of that provision.**

The answer to the first question is therefore that, on a proper construction, **Article 59 of the EEC Treaty covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving** from the Member State in which he is established.

#### Case C-384/93 Alpine Investments [1995] ECR I-1141 §21, 22

In pursuance of those rules the freedom to provide services may be relied on not only by nationals of Member States established in a Member State other than that of the recipient of the services but

also by an undertaking against the State in which it is established where the services are provided to recipients established in another Member State (see judgment in Case C-18/93 *Corsica Ferries Italia* [1994] ECR I-0000, paragraph 30), **and more generally whenever a provider of services offers services in a Member State other than the one in which he is established** (see judgment in Case C-154/89 *Commission v France* [1991] ECR I-659, paragraphs 9 and 10, and the abovementioned *Peralta* judgment, at paragraph 41).

Case C-381/93 Commission v France [1994] ECR I-5145 §14

**The circumstance that, according to the Raad van State, *TV10 established itself in the Grand Duchy of Luxembourg in order to escape the Netherlands legislation does not preclude its broadcasts being regarded as services within the meaning of the Treaty.*** That is distinct from the question of what measures a Member State may take to prevent a provider of services established in another Member State from evading its domestic legislation. The latter point is the subject of the Raad van State's second question.

Case C-23/93 TV10 [1994] ECR I-4795 §15

Second, in a judgment delivered on 17 May 1994 in Case C-18/93 *Corsica Ferries v Corpo dei Piloti del Porto di Genova*, [1994] ECR I-1783, paragraph 30, the Court held that ***the freedom to provide maritime transport services between Member States may be relied on by an undertaking as against the State in which it is established, if the services are provided for persons established in another Member State.***

Case C-379/92 Peralta [1994] ECR I-3453 §40

Case C-18/93 Corsica Ferries Italia [1994] ECR I-1783 §30

The services in question are ***cross-border*** services when, as in the main proceedings, they are offered in a Member State other than that in which the lottery operator is established.

Case C-275/92 Schindler [1994] ECR I-1039 §29

Each of those services are ***transfrontier*** services for the purposes of Article 59 of the Treaty. In each ***case the suppliers of the service are established in a Member State other than that of certain of the persons for whom it is intended.***

Case C-352/85 Bond van Adverteerders [1988] ECR 2085 §15

### 1.1.3 Temporary character

#### *1.1.3.1 Principle*

(...) ***the temporary nature of the provision of services, envisaged in the third paragraph of Article 60 of the EC Treaty, is to be determined in the light of its duration, regularity, periodicity and continuity.***

Case C-55/94 Gebhard [1995] ECR I-4165 §39

(see also §27, 28, 37 and 38)

The aim of those provisions is primarily to enable the person providing the service to pursue his activities in the host Member State without suffering discrimination in favour of nationals of that State. As the Court pointed out in its judgment in Case 279/80 Webb [1981] ECR 3305, at paragraph 16, *those provisions do not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of persons established therein may be similarly applied in their entirety to the temporary activities of persons who are established in other Member States.*

C-294/89 Commission v France [1991] ECR I-3591 §26

Case C-205/84 Commission v Germany [1986] ECR 3755 §26

Case C-279/80 Webb [1981] ECR 3305 §16

The two cases described above thus relate to the provision of services by the tour company to tourists and by the self-employed tourist guide to the tour company respectively. Such *services, which are of limited duration* and are not governed by the provisions on the free movement of goods, capitals and persons, constitute activities carried on for remuneration within the meaning of Article 60 of the Treaty.

Case C-198/89 Commission v Greece [1991] ECR I-727 §6

See also: Case C-180/89 Commission v Italy [1991] ECR I-709 §6

and: Case C-154/89 Commission v France [1991] ECR I-659 §7

Under Article 59 and the third paragraph of Article 60 of the EEC Treaty a person providing a service may, in order to do so, *temporarily* pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals. As the Court has repeatedly emphasized, most recently in its judgment of 17 December 1981 in Case 279/80 Webb [1981] ECR 3305, those provisions entail the abolition of all discrimination against a person providing a service on the grounds of his nationality or the fact that he is established in a Member State other than that in which the service must be provided. Thus they prohibit not only overt discrimination based on the nationality of the person providing a service but also all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result.

Joined Cases 62 and 63/81 Seco [1982] ECR 223 §8

### 1.1.3.2 Examples

Thus, '*services*' within the meaning of the Treaty may cover services varying widely in nature, including *services which are provided over an extended period, even over several years*, where, for example, the *services in question are supplied in connection with the construction of a large building*. Services within the meaning of the Treaty may likewise be constituted by services which a business established in a Member State supplies *with a greater or lesser degree of*

*frequency or regularity, even over an extended period*, to persons established in one or more other Member States, for example *the giving of advice or information for remuneration*.

The answer to the question referred for a preliminary ruling must therefore be that Community law on freedom to provide services precludes a business from being subject to an *obligation to be entered on the trades register* which *delays, complicates or renders more onerous* the provision of its services in the host Member State if *the conditions prescribed by the directive governing recognition of professional qualifications* which is applicable to pursuit of that activity in the host Member State **are satisfied**.

*The mere fact that a business established in one Member State supplies identical or similar services in a repeated or more or less regular manner in a second Member State, without having an infrastructure* there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, *cannot be sufficient for it to be regarded as established in the second Member State*.

Case C-215/01 Schnitzer [2003] ECR I-14847 §30, 40

*The organisation of trade fairs* is an economic activity falling within the chapter of the Treaty dealing with the right of establishment when that activity is carried on by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State and within the chapter of the Treaty dealing with services when it is carried on by a national of one Member State who moves to another Member State in order to carry on that activity on a temporary basis (see, to that effect, Case C-55/94 *Gebhard*, [1995] ECR I-4165, paragraphs 25 and 26).

Case C-439/99 Commission v Italy [2002] ECR I-305 §21

The answer to the fourth question must therefore be that Article 59 of the Treaty does not cover *the situation of a company which, having established itself in a Member State* in order to run old people's homes there *provides services to residents who, for that purpose, reside in those homes permanently or for an indefinite period*.

Case C-70/95 Sodemare [1997] ECR I-3395 §40

The rule of territorial exclusivity laid down in the fourth paragraph of Article 126-3 of Decree No 72-468 is in fact part of national legislation *normally relating to a permanent activity* of lawyers established in the territory of the Member State concerned, all of whom are entitled to plead before the Tribunal de Grande Instance within whose area of jurisdiction they are established.

However, a lawyer providing services who is established in another Member State is not in a position where he can plead before a French Tribunal de Grande Instance.

In those circumstances, it must be stated that the rule of territorial exclusivity cannot be applied *to activities of a temporary nature* pursued by lawyers established in other Member States, *since the conditions of law and fact which apply to those lawyers are not in that respect comparable to those applicable to lawyers established on French territory*.

Case C-294/89 Commission v France [1991] ECR I-3591 §27, 28

It must be stated that the requirements in question in these proceedings, namely that an insurer who is established in another Member State, authorized by the supervisory authority of that State and subject to the supervision of that authority, must have a permanent establishment within the territory of the State in which the service is provided and that he must obtain a separate authorization from the supervisory authority of that State, constitute restrictions on the freedom to provide services inasmuch as they increase the cost of such services in the State in which they are provided, *in particular where the insurer conducts business in that State only occasionally*.

Case C-205/84 Commission v Germany [1986] ECR 3755 §281.1.4 Independent nature

At the outset, it should be stated that the present action is confined to performing artists recognised as service providers established in their Member State of origin where they usually provide similar services ('the performing artists in question'). It therefore concerns individuals who go to France to pursue their activities on a *temporary, self-employed basis*. That action does not relate either to performing artists established in France (see, to that effect, Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraph 24) or to performing artists pursuing their activities in France as *employees* and therefore as 'employed persons' within the meaning of Community law (see, to that effect, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 25). It follows that, by the present action, the Commission calls French law into question only in so far as it applies to performing artists who are service providers from another Member State.

Whilst the matter of paid leave for the performing artists in question has not therefore been harmonised at Community level and the French Republic thus retains, in principle, the right to provide for such a form of protection, it must nevertheless be stated that *a right to paid leave on the part of a service provider* (established either indirectly by a presumption of salaried status or directly) *is difficult to reconcile with the concept of self-employment*. Entitlement to leave paid by an employer is one of the most fundamental characteristic rights of salaried

employment. By contrast, self-employed activity is characterised precisely by the absence of a right to paid leave.

Case C-255/04 Commission v France [2006] ECR I-5251 §36, 511.1.5 Residual Application

It has been argued before the Court that, in such circumstances and in the light of the wording of the first paragraph of Article 50 EC, *the provisions concerning the freedom to provide services apply as an alternative to those which govern the free movement of capital*.

That argument cannot be accepted. Although in the definition of the notion of 'services' laid down in the first paragraph of Article 50 EC it is specified that the services 'are not governed by the provisions relating to freedom of movement for goods, capital and persons', that relates to the definition of that notion and *does not establish any order of priority between the freedom to*

*provide services and the other fundamental freedoms. The notion of 'services' covers services which are not governed by other freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms.*

Case C-452/04 Fidium Finanz [2006] ECR I-9521 §31, 32

*The provisions of the chapter on services are subordinate to those of the chapter on the right of establishment* in so far, first, as the wording of the first paragraph of Article 59 assumes that the provider and the recipient of the service concerned are 'established' in two different Member States and, second, as the first paragraph of Article 60 specifies that *the provisions relating to services apply only if those relating to the right of establishment do not apply (...).*

Case C-55/94 Gebhard [1995] ECR I-4165 §22

Finally, lotteries *are governed neither by the Treaty rules on the free movement of goods* (see paragraph 24 above), *nor by the rules on the free movement of persons*, which concern only movements of persons, *nor by the rules on free movement of capital*, which concern only capital movements though not all monetary transfers necessary to economic activities (see the judgment in Case 7/78 *Regina v Thompson* [1978] ECR 2247).

Case C-275/92 Schindler [1994] ECR I-1039 §30

According to the first paragraph of that provision, services are to be considered to be 'services' within the meaning of the Treaty *where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons*. Indent (d) of the second paragraph of Article 60 expressly states that activities of the professions fall within the definition of services.

Case C-159/90 Grogan [1991] ECR I-4685 §17

and: Case C-205/84 Commission v Germany [1986] ECR 3755 §18

The two cases described above thus relate to the provision of services by the tour company to tourists and by the self-employed tourist guide to the tour company respectively. Such services, which are *of limited duration and are not governed by the provisions on the free movement of goods, capitals and persons, constitute activities carried on for remuneration within the meaning of Article 60 of the EEC Treaty.*

Case C-198/89 Commission v Greece [1991] ECR I-727 §6

See also: C-180/89 Commission v Italy [1991] ECR I-709 §6

Case C-154/89 Commission v France [1991] ECR I-659 §7

By virtue of Article 59 of the Treaty, restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity

temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity *not covered by the free movement of goods, persons and capital*.

Joined cases 286/82 and 26/83 Luisi & Carbone [1984] ECR 377 §10

## 1.2 THE RECIPIENT OF SERVICES

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### 1.2.1 General principles

Next, as regards the freedom to provide services under Article 56 TFEU, the provisions of the Flemish Decree at issue may also hinder the business activities of undertakings active in the property sector, as regards both undertakings established in Belgium which offer their services to, inter alia, non-residents and undertakings established in other Member States.

By application of those provisions, *immovable property located in a target commune cannot be sold or leased to just any Union citizen, but only to those demonstrating a ‘sufficient connection’ with the commune in question, which clearly restricts the freedom to provide services of the property undertakings in question*.

Case C-197/11 Libert and Others [2013] not published vet § 42, 43

It should be noted that, in a situation such as that at issue in the main proceedings, the fact that the habitual residence of the policyholder is transferred to a Member State other than that of the establishment of the assurance undertaking with which the assurance contract has been concluded, is apt to bring that situation within the scope of the provisions relating to the freedom to provide services, irrespective of the fiscal arrangements applicable to the contract at issue. Indeed, in order to invoke the provisions of the TFEU relating to the freedom to provide services, *it is sufficient for services to be provided to nationals of a Member State on the territory of another Member State* (see, to that effect, Case C-55/98 Vestergaard [1999] ECR I-7641, paragraph 18).

Case C-243/11 RVS Levensverzekeringen [2013] not published vet §42

Article 56 TFEU requires *the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services is for the benefit of both providers and recipients of services* (see Case C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International [2009] ECR I-7633, paragraph 51 and the case-law cited).

Case C-403/08 Football Association Premier League and Others [2011] ECR I-9083 §85



Furthermore, it is settled case-law *that Article 49 EC confers rights not only on the provider of services but also on the recipient* (see, to that effect, Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraph 32 and the case-law cited).

Case C-233/09 Dijkman [2010] ECR I-6649 §24

Furthermore, the Court has consistently held that *the freedom to provide services involves not only the freedom of the provider to carry out services for recipients established in a Member State other than that in which the provider is established but also the freedom to receive or to benefit, as recipient, from the services carried out by a provider established in another Member State, without being hampered by restrictions* (see, inter alia, *Gambelli and Others*, paragraph 55 and the case-law cited).

On the other hand, with regard to services other than medical services, such as tourist and educational services as specifically referred to by the Commission in its action, it is necessary to bear in mind, in addition to the case-law referred to in paragraph 48 above, *that persons established in a Member State who travel to another Member State as tourists or on a study trip must be regarded as recipients of services for the purposes of Article 49 EC* (Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16; Case 186/87 *Cowan* [1989] ECR 195, paragraph 15; and Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 16).

Case C-211/08 Commission v Spain [2010] ECR I-5267 §49, 51

(available only in French)

En ce qui concerne l'article 49 CE, ainsi que la Commission l'a observé à juste titre, *le compte obligatoire entrave la libre prestation des services à l'égard des médecins en tant que destinataires de services offerts par des banques établies dans d'autres États membres ainsi qu'à l'égard des dites banques qui voudraient proposer aux médecins installés en Haute-Autriche l'ouverture de comptes pour la perception des honoraires versés par les caisses d'assurance maladie.*

Case C-356/08 Commission v Austria [2009] ECR I-108 §40

It is settled case-law that Article 49 EC requires not only the elimination of *all discrimination* against service providers from other Member States, but also the abolition of any restriction on the freedom to provide services, even if that restriction applies *without distinction to national providers of services and to those of other Member States*, which is liable to *prohibit, impede or render less advantageous the activities of service providers from other Member States* who lawfully provide similar services in their Member State of origin (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 28). That freedom *is enjoyed by both providers and recipients of services* (see Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case C-262/02 *Commission v France* [2004] ECR I-6569, paragraph 22).

Case C-255/04 Commission v France [2006] ECR I-5251 §37

Case C-262/02 Commission v France [2004] ECR I-6569 §22

Accordingly, the answer to the first question should be that the third paragraph of Article 4(2) of Directive 73/148 is to be interpreted as meaning that *the recognition by a Member State of the right of residence of a recipient of services who is a national of another Member State may not be made subject to his production of a valid identity card or passport, where his identity and nationality can be proven unequivocally by other means.*

Case C-215/03 Oulane [2005] ECR I-1215 §26

Thirdly, it is important to point out that in order for services such as those in question in the main proceedings, *namely the organisation of professional training courses*, to fall within the scope of Article 59 of the Treaty, *it is sufficient for them to be provided to nationals of a Member State on the territory of another Member State, irrespective of the place of establishment of the provider or recipient of the services.*

Case C-55/98 Vestergaard [1999] ECR I-7641 §18

As the Bundesfinanzhof observed in an order of 30 December 1996 referred to by the national court which made the reference in this case, *a merely indirect link between a fiscal advantage accorded to a taxable person, such as the absence in the case of German undertakings leasing from lessors established in Germany of the obligation to make the add-backs in question, and unfavourable tax treatment of another taxable person, such as the liability of such lessors to pay trade tax, cannot be used to justify the fact that German undertakings are treated differently according to whether they lease from lessors established in Germany or from lessors established in other Member States.*

*Any tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State* (see, as regards Article 52 of the EC Treaty (now, after amendment, Article 43 EC), *Commission v France*, paragraph 21, and *Asscher*, paragraph 53, both cited above).

C-294/97 Eurowings Luftverkehr [1999] ECR I-7447 §42, 44

Situations governed by Community law include those covered by the freedom to provide services, the right to which is laid down in Article 59 of the Treaty. The Court has consistently held that *this right includes the freedom for the recipients of services to go to another Member State in order to receive a service there* (Cowan, paragraph 15). *Article 59 therefore covers all nationals of Member States who*, independently of other freedoms guaranteed by the Treaty, *visit another Member State where they intend or are likely to receive services*. Such persons - and they include both Mr Bickel and Mr Franz - are free to visit and move around within the host State. Furthermore, pursuant to Article 8a of the Treaty, '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

Case C-274/96 Bickel & Franz [1998] ECR I-7637 §15

Furthermore, *Article 59 of the Treaty applies* not only where a person providing services and the recipient thereof are established in different Member States, but also *in all cases where the person providing services offers those services in a Member State other than that in which he is established, wherever the recipients of those services may be established* (*Commission v Greece*, cited above, paragraphs 8 to 10).

Case C-398/95 SETTG [1997] ECR I-3091 §8

It should be borne in mind that *the nationals of Member States of the Community have the right to enter the territory of the other Member States in the exercise of the various freedoms recognized by the Treaty and in particular the freedom to provide services which*, according to settled case-law, *is enjoyed both by providers and by recipients of services* (see the judgments in Case 186/87 *Cowan v Trésor Public* [1989] ECR 195 and in Case C-68/89 *Commission v Netherlands* [1991] ECR I-2637, paragraph 10).

Case C-43/93 Vander Elst [1994] ECR I-3803 §13

By virtue of Article 59 of the Treaty, restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. In order to enable services to be provided, *the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof*, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital.

Joined cases 286/82 and 26/83 Luisi & Carbone [1984] ECR 377 §10

## 1.2.2 Patients

### *1.2.2.1 Hospital care*

With regard, on the one hand, to healthcare services, it should be noted that, according to settled case-law, *medical services provided for consideration fall within the scope of the provisions on the freedom to provide services, including situations where care is provided in a hospital environment* (see, to that effect, *Watts*, paragraph 86 and the case-law cited, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 19). Furthermore, *the provision of medical services does not cease to be a provision of services for the purposes of Article 49 EC simply because, after paying the foreign provider for the care received, the insured person subsequently seeks reimbursement of the related costs through a social security system* (see, to that effect, *Watts*, paragraph 89 and the case-law cited).

Consequently, *the fact of imposing on a Member State the obligation to guarantee to persons insured under the national system that the competent institution will provide complementary*

*reimbursement whenever the level of cover applicable in the Member State of stay in respect of the unscheduled hospital treatment in question proves to be lower than that applicable under its own legislation would ultimately undermine the very fabric of the system which Regulation No 1408/71 sought to establish. In every case concerning such treatment, the competent institution of the Member State of affiliation would be systematically exposed to the highest financial burden, whether through the application, in accordance with Article 22(1)(a) of that regulation, of the legislation of a Member State of stay under which the level of cover is higher than that provided for under its own or through the application of its own legislation in the contrary situation.*

Case C-211/08 Commission v Spain [2010] ECR I-5267 §47, 79

In such a situation, the fact that the grant of the authorisation sought would oblige a national health service such as that in issue in the main proceedings, which is characterised *by free hospital treatment provided within its own establishments, to establish a financial mechanism so as to enable that service to satisfy the request for reimbursement from the institution of the host Member State and relating to the benefits in kind provided by that institution to the patient in question is also not a legitimate ground for refusing authorisation* (see to that effect *Müller-Fauré and van Riet*, paragraph 105).

It should be noted in that regard that, according to settled case-law, *medical services provided for consideration fall within the scope of the provisions on the freedom to provide services* (see, inter alia, Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 18, and *Kohll*, paragraph 29), there being no need to distinguish between care provided in a hospital environment and care provided outside such an environment (*Vanbraekel*, paragraph 41; *Smits and Peerbooms*, paragraph 53; *Müller-Fauré and van Riet*, paragraph 38; and *Inizan*, paragraph 16).

It has also been held *that the freedom to provide services includes the freedom for the recipients of services, including persons in need of medical treatment, to go to another Member State in order to receive those services there* (see Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16).

Case C-372/04 Watts [2006] ECR I-4325 § 74, 86, 87

It must therefore be found that Article 49 EC applies where a patient [...] receives medical services *in a hospital environment for consideration* in a Member State other than her State of residence, regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates.

Case C-372/04 Watts [2006] ECR I-4325 §90

Case C-157/99 Geraets-Smits and Peerbooms [2001] ECR I-5473 §55

It must therefore be found *that a situation* such as that which gave rise to the dispute in the main proceedings, *in which a person whose state of health necessitates hospital treatment goes to another Member State and there receives the treatment in question for consideration, falls within the scope of the Treaty provisions on the freedom to provide services*, there being no need

in the present case to determine whether the provision of hospital treatment in the context of a national health service such as the NHS is in itself a service within the meaning of those provisions.

Whilst it is not in dispute *that Community law does not detract from the power of the Member States to organise their social security systems*, and that, *in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions in which social security benefits are granted*, when exercising that power Member States must comply with Community law, in particular the provisions on the freedom to provide services (see, inter alia, *Smits and Peerbooms*, paragraphs 44 to 46; *Müller-Fauré and van Riet*, paragraph 100; and *Inizan*, paragraph 17). *Those provisions prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of that freedom in the healthcare sector.*

In the light of the foregoing, and in answer to Question 1(c), Community law, in particular *Article 49 EC, does not therefore preclude the right of a patient to receive hospital treatment in another Member State at the expense of the system with which he is registered from being subject to prior authorisation.*

*It follows from the case-law* cited in paragraph 94 of the present judgment *that the legislation of a Member State cannot, without infringing Article 49 EC, exclude reimbursement of the ancillary costs incurred by a patient authorised to go to another Member State to receive there hospital treatment whilst providing for the reimbursement of those costs where the treatment is provided in a hospital covered by the national system in question.*

By contrast, *a Member State is not required* under Article 49 EC to lay down a duty on its competent institutions *to reimburse the ancillary costs associated with a cross-border movement* authorised for medical purposes where there is no such duty in respect of such costs where these arise from movement within the Member State.

If that is the case, *the patient* who was authorised to go to another Member State to receive there hospital treatment or who received a refusal to authorise subsequently held to be unfounded *is entitled*, as the Belgian Government stated in its written observations and as Advocate General Geelhoed stated in point 118 of his Opinion, *to seek reimbursement of the ancillary costs associated with that cross-border movement for medical purposes subject to the same objective and transparent limits as those set by the competent legislation for the reimbursement of the ancillary costs associated with medical treatment provided in the competent Member State* (see to that effect Case C-8/02 *Leichtle* [2004] ECR I-2641, particularly paragraphs 41 to 48).

Case C-372/04 Watts [2006] ECR I-4325 §91, 92, 113, 139, 140, 142

In that connection, in order *to determine* whether treatment which is equally effective for the patient can be *obtained without undue delay* in the Member State of residence, the competent institution is required to *have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought and, where appropriate, of the degree of pain or the nature of the patient's disability which might, for example, make it impossible or extremely difficult for him to carry out a professional*

*activity, but also of his medical history* (see *Smits and Peerbooms*, paragraph 104, and *Müller-Fauré and Van Riet*, paragraph 90).

So far as concerns Article R. 332-2 of the Social Security Code, it must be stated that, by providing, in the third paragraph, that *treatment provided outside France may give rise to flat-rate reimbursement by sickness insurance funds, subject to the favourable opinion of the medical supervisory body, where the insured person shows that he was not able to receive in France the treatment appropriate to his condition*, the consequence of that provision is to deter or prevent insured persons from approaching providers of medical services established in Member States other than the State of residence. It follows *that such a national provision constitutes*, as is apparent from the case-law referred to in paragraph 19 of this judgment, *a restriction on freedom to provide services*.

In view of all the foregoing considerations, the answer to the second part of the question must be that:

- the second subparagraph of Article 22(2) of Regulation No 1408/71 must be interpreted as meaning that *the authorisation* to which that provision refers *may not be refused* where it is apparent, first, that *the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resides* and, secondly, that *treatment which is the same or equally effective cannot be obtained without undue delay in that Member State*;
- Articles 49 EC and 50 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which, first, makes reimbursement of the cost of hospital care provided in a Member State other than that in which the insured person's sickness fund is established conditional *upon prior authorisation by that fund* and, secondly, *makes the grant of that authorisation subject to the condition that it be established that the insured person could not receive within the territory of the Member State where the fund is established the treatment appropriate to his condition*. However, authorisation may be refused on that ground only if *treatment which is the same or equally effective for the patient can be obtained without undue delay in the territory of the Member State in which he resides*.

Case C-56/01 Inizan [2003] ECR I-12403 §46, 54, 60

#### 1.2.2.2 Non-hospital care

Accordingly, the Court has ruled in particular that Article 49 EC precludes the application of any national rule making reimbursement of medical *costs incurred in another Member State subject to a system of prior authorisation where it is apparent that such a system deters, or prevents, insured persons from approaching providers of medical services established in Member States other than the State of insurance*, save where the barrier to the freedom to provide services to which it gives rise is justifiable under one of the derogations allowed by the EC Treaty (see, to

that effect, *Kohll*, paragraphs 33 to 36; *Smits and Peerbooms*, paragraphs 62, 69 and 71; and *Müller-Fauré* and *Van Riet*, paragraphs 44 and 45).

It is nevertheless the case, however, ***that the fact that a Member State's rules subject the reimbursement of the other expenditure incurred in respect of such a cure to conditions different from those applicable to cures taken in that Member State is capable of deterring those covered by social insurance from approaching providers of medical services established in Member States other than that in which they are insured.***

In that regard, it must be observed that, ruling on a somewhat similar problem, the Court has previously held, as regards the prior authorisation to receive health care provided in another Member State referred to in Article 22(1)(c) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), that both the practical effect and the spirit of that provision required that if the request of ***an insured person for authorisation*** on the basis of that provision ***has been refused by the competent institution*** and it is subsequently established by a court decision that that refusal was unfounded, ***that person is entitled to be reimbursed directly by the competent institution by an amount equivalent to that which it would ordinarily have borne if authorisation had been properly granted in the first place*** (*Vanbraekel and Others*, cited above, paragraph 34).

Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude rules of a Member State, such as those at issue in the main proceedings, ***under which reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is conditional on obtaining prior recognition of eligibility, which is given only provided it is established***, in a report drawn up by a medical officer or a medical consultant, that the proposed cure is absolutely necessary owing to the ***greatly increased*** prospects of success ***in that other Member State***.

Articles 49 EC and 50 EC are to be interpreted as meaning that they do not in principle preclude rules of a Member State, such as those at issue in the main proceedings, under which ***reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure***, whether taken in that Member State or in another Member State, ***is made only where the health spa concerned is listed in the Register of Health Spas***. However, it is for the national court to ensure that any conditions to which the registration of a health spa in such a register may be subject are objective and do not have the effect of making the provision of services between Member States more difficult than the provision of services purely within the Member State concerned.

Articles 49 EC and 50 EC are to be interpreted as meaning that ***they preclude the application of national rules under which the reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is precluded where the person concerned has not awaited the conclusion of the court proceedings*** brought against the decision refusing to recognise that expenditure as eligible for assistance before commencing the cure in question.

Case C-8/02 Leichtle [2004] ECR I-2641 §1, 2, 3, 30, 32, 55

While *the national rules* at issue *in the main proceedings do not deprive insured persons of the possibility of approaching a provider of services established in another Member State, they do nevertheless make reimbursement of the costs incurred in that Member State subject to prior authorisation, and deny such reimbursement to insured persons who have not obtained that authorisation*. Costs incurred in the State of insurance are not, however, subject to that authorisation.

Consequently, *such rules* deter insured persons from approaching providers of medical services established in another Member State and *constitute, for them and their patients, a barrier to freedom to provide services* (see Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 16, and Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249, paragraph 31).

Case C-158/96 Kohll [1998] ECR I-1931 §34, 35

### 1.2.3 Tourists

It should be remembered at the outset *that the principle of freedom to provide services* established in Article 59 of the Treaty, which is one of its fundamental principles, *includes the freedom for the recipients of services to go to another Member State in order to receive a service there*, without being obstructed by restrictions, and *that tourists must be regarded as recipients of services* (see Case 186/87 *Cowan v Trésor Public* [1989] ECR 195, paragraph 15).

Case C-348/96 Calfa [1999] ECR I-11 §16

### 1.2.4 Television transmission and television advertising

In the first place, it must be observed that *the French rules on television advertising constitute a restriction on freedom to provide services* within the meaning of Article 59 of the Treaty. They entail a restriction on *freedom to provide advertising services* in so far as the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France. They also impede *the provision of broadcasting services for television programmes*. French broadcasters must refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France may be visible. Furthermore, the organisers of sporting events taking place outside France cannot sell the retransmission rights to French broadcasters if the transmission of the television programmes of such events is likely to contain indirect television advertising for those alcoholic beverages.

Case C-262/02 Commission v France [2004] ECR I-6569 §26

It follows from those considerations that *the tax on satellite dishes introduced by the tax regulation is liable to impede more the activities of operators in the field of broadcasting or television transmission established in Member States other than the Kingdom of Belgium*, while



giving an *advantage to the internal Belgian market* and to radio and television distribution within that Member State.

In that regard, it suffices to state that *even if the need for protection* relied on by the municipality of Watermael-Boitsfort *is capable of justifying restriction of the freedom to provide services, and even if it is established that merely reducing the number of satellite dishes as anticipated by the introduction of a tax such as the one in question in the main proceedings is capable of meeting that need, the tax exceeds what is necessary to do so.*

As the Commission observed, there are *methods other than the tax* in question in the main proceedings, *less restrictive* of the freedom to provide services, *which could achieve an objective such as the protection of the urban environment*, for instance the adoption of requirements concerning the size of the dishes, their position and the way in which they are fixed to the building or its surroundings or the use of communal dishes. Moreover, such requirements have been adopted by the municipality of Watermael-Boitsfort, as is apparent from the planning rules on outdoor aerials adopted by that municipality and approved by regulation of 27 February 1997 of the government of the Brussels-Capital region (Moniteur belge of 31 May 1997, p. 14520).

Case C-17/00 De Coster [2001] ECR I-9445 §35, 37, 38

### 1.2.5 Job seekers

By making payment of the recruitment voucher subject to the condition that the person seeking employment be employed in a post which is subject to compulsory social security contributions in the national territory, legislation such as the legislation at issue in the main proceedings gives rise to a restriction on the freedom to provide services based on the place where that service is provided.

Such legislation is capable of affecting the recipient of the services, that is to say, in the main proceedings, the person seeking employment, who must himself, where the job found by the private-sector recruitment agency is in another Member State, pay the fee due to the agency.

Case C-208/05 ITC [2007] ECR I-181 §57, 58

### 1.2.6 Taxation<sup>9</sup>

Furthermore, it is settled case-law that *Article 49 EC confers rights not only on the provider of services but also on the recipient* (see, to that effect, Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraph 32 and the case-law cited).

Legislation such as that at issue in the main proceedings introduces a difference in treatment on the basis both of the origin of the income of resident taxpayers from moveable assets and of the service provider who pays them that income.

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<sup>9</sup> More case-law on taxation issues to be found under paragraph 5.11

The introduction by a Member State of a difference in treatment on the basis of the *place of investment of capital thus has the effect of discouraging residents of that Member State from investing their capital in a company established in another Member State and also has a restrictive effect on companies established in other Member States in that it constitutes an obstacle to their raising capital in the first Member State* (see, to that effect, Case C-446/04 Test Claimants in the FII Group Litigation [2006] ECR I-11753, paragraph 166, and Case C-436/06 Grønfeldt [2007] ECR I-12357, paragraph 14).

**Case C-233/09 Dijkman [2010] ECR I-6649 §24, 27, 31**

If a taxpayer who has attended a private establishment in another Member State was refused a deduction, *national legislation which excludes, in general, the right to deduct the costs of attending university courses offered in another Member State from gross tax, while at the same time permitting the deduction of the costs of attending university courses offered in that Member State, would result in a larger tax burden for taxpayers attending universities abroad.*

Such *legislation would have the effect of deterring taxpayers resident in Italy from attending university courses at establishments established in another Member State. Furthermore, it would also hinder the offering of education by private educational establishments established in other Member States to taxpayers resident in Italy* (see, to that effect, *Schwarz and Gootjes-Schwarz*, paragraph 66, and Case C-318/05 *Commission v Germany* [2007] ECR I-6957, paragraph 40).

**Case C-56/09 Zanotti [2010] ECR I-4517 §40, 41**

It must be held that *national legislation such as that at issue in the main proceedings – which applies a less favourable tax regime to investments in assets which, once they have been hired out for remuneration, are used in other Member States, than to investments in such assets that are used domestically – is likely to discourage undertakings that would be eligible for that tax advantage from providing rental services to economic operators that carry out their activities in other Member States.*

**Case C-330/07 Jobra [2008] ECR I-9099 §24**

The Court has also held, in general terms, that *any tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State.* Such compensatory tax arrangements prejudice the very foundations of the single market (see Case C-294/97 *Eurowings Luftverkehrs* [1999] ECR I-7447, paragraphs 44 and 45).

**Case C-422/01 Försäkringsaktiebolaget Skandia (publ) and Ramstedt [2003] ECR I-6817 §52**

### 1.2.7 National measures for services provided within the territory of this Member State

Although *the promotion of research and development may*, as argued by the French Government, *be an overriding reason relating to public interest*, the fact remains *that it cannot justify a national measure such as that at issue in the main proceedings, which refuses the benefit of a tax credit for research for any research not carried out in the Member State concerned*. Such legislation is directly contrary to the objective of the Community policy on research and technological development which, according to Article 163(1) EC is, inter alia, 'strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level'. Article 163(2) EC provides in particular that, for this purpose, the Community is to 'support [undertakings'] efforts to cooperate with one another, aiming, notably, at enabling [them] to exploit the internal market potential to the full, in particular through ... the removal of legal and fiscal obstacles to that cooperation'.

However, *national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred* and satisfies the prescribed requirements *cannot be justified in the name of effectiveness of fiscal supervision*. The possibility cannot be excluded a priori that the taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States (see *Baxter and Others*, paragraphs 19 and 20).

Accordingly, the answer to the questions referred must be that *Article 49 EC precludes legislation of a Member State which restricts the benefit of a tax credit for research only to research carried out in that Member State*.

#### Case C-39/04 Laboratoires Fournier [2005] ECR I-2057 §23, 25, 26

As the application of the *fixed levy is restricted* under Article 125 A I of the CGI *to investment or life assurance contracts where the debtor is resident or established in France*, it has the effect of *discouraging* taxpayers who are resident in France from *entering into contracts of this type with companies which are established in another Member State*. Article 49 EC precludes the application of any national legislation which has the effect of *making the provision of services between Member States more difficult* than the provision of services exclusively within one Member State (see, inter alia, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 23).

The legislation in question *also* has a *restrictive effect* as regards companies established in other Member States as *it prevents them from raising capital in France, given that the proceeds of contracts taken out with those companies are treated less favourably from a tax point of view than proceeds payable by a company which is established in France*. This means that their contracts are less attractive to investors residing in France than those of companies which are established in that Member State (for a similar situation, see Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 35, and Case C-478/98 *Commission v Belgium* [2000] ECR I-7587, paragraph 18).

The French Government has therefore failed to justify the measure in question. The Commission's application should accordingly be granted, and it should be held that by *excluding altogether application of the rate of the fixed levy to income arising from the investments and contracts* referred to in Articles 125-0 A and 125 A of the Code général des impôts *where the debtor is not resident or established in France, the French Republic has failed to fulfil its obligations under Articles 49 and 56 EC.*

Case C-334/02 Commission v France [2004] ECR I-2229 §23, 24, 34

## 2. RESTRICTIONS OF FREEDOM TO PROVIDE SERVICES

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### 2.1 GENERAL PRINCIPLES

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In accordance with the case-law, *unfavourable tax treatment contrary to a fundamental freedom cannot be considered to be compatible with European Union law as a result of the existence of other advantages, even supposing that such advantages exist* (see, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 61, and *Amurta*, paragraph 75).

Case C-233/09 *Dijkman* [2010] ECR I-6649 §41

Article 49 EC requires the abolition of all restrictions on the freedom to provide services, *even if those restrictions apply without distinction to national providers of services and to those from other Member States*, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 51 and the case-law cited).

Case C-258/08 *Ladbrokes Betting* [2010] ECR I-4757 §15

Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695 §23

Joined cases C-447/08 and C-448/08 *Sjöberg and Gerdin* [2010] ECR I-6921 §32

With regard to the question whether the legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services, it should be borne in mind at the outset that, *in the field of freedom to provide services*, a national tax measure restricting that freedom may constitute a prohibited measure, *whether it was adopted by the State itself or by a local authority* (see, inter alia, Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 28 and the case-law cited).

Case C-169/08 *Presidente del Consiglio dei Ministri /Regione Sardegna* [2009] ECR I-10821 §29

*Whilst it is true that, in a sector which has not been subject to full harmonisation at Community level, Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they must, when exercising their powers, respect the basic freedoms guaranteed by the EC Treaty* (see Case C-393/05 *Commission v Austria* [2007] ECR I-10195, paragraph 29, and Case C-404/05 *Commission v Germany* [2007] ECR I-10239, paragraph 31 and the case-law cited).

Case C-438/08 *Commission v Portugal* [2009] ECR I-10219 §27

In that regard, according to the case-law of the Court, *Articles 43 EC and 49 EC require the elimination of restrictions on the freedom of establishment and the freedom to provide services. All measures which prohibit, impede or render less attractive the exercise of those freedoms must be regarded as constituting such restrictions* (cases C-465/05 *Commission v Italy* [2007] ECR I-11091 §17 and C-518/06 *Commission v Italy* [2009] ECR I-03491 §62).

Case C-356/08 *Commission v Austria* [2009] ECR I-108 §38

In this regard, it must be borne in mind that, according to settled case-law, Articles 39 EC, 43 EC and 49 EC *do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services* (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Dona* [1976] ECR 1333, paragraph 17; Bosman, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

Furthermore, *the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services* since those two sets of provisions are to be applied in different circumstances (see, to that effect, Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991).

Case C-438/05 *Viking* [2007] ECR I-10779 §33,53

*Since the duty to abide by the rules relating to the freedom to provide services applies to the actions of public authorities* (Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17), *it is, in that respect, irrelevant that the tax measure in question was adopted, as in the main proceedings, by a local authority and not by the State itself.*

Case C-17/00 *De Coster* [2001] ECR I-9445 §27

The answer to be given to the first question must therefore be *that Article 55 of the Treaty does not apply in a situation* such as that in the main proceedings *in which all the facts are confined to within a single Member State and which does not therefore have any connecting link with one of the situations envisaged by Community law in the area of the freedom of movement for persons and freedom to provide services.*

Case C-108/98 *RISAN* [1999] ECR I-5219 §23

Since the provision of insurance constitutes a service within the meaning of Article 60 of the Treaty, it must next be borne in mind that, according to the case-law of the Court, *Article 59 of the Treaty precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them* (see, in particular, Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 16).

In the perspective of a single market and in order to enable its objectives to be attained, *Article 59 of the Treaty likewise precludes the application of any national legislation which has the effect*

*of making the provision of services between Member States more difficult than the provision of services exclusively within one Member State* (Case C-381/93 *Commission v France*, cited above, paragraph 17).

Case C-118/96 *Safir* [1998] ECR I-1897 §22, 23

*The freedom to provide services would become illusory if national rules were at liberty to restrict offers of services.* The prior existence of an identifiable recipient cannot therefore be a condition for application of the provisions on the freedom to provide services.

*A prohibition such as that at issue in the main proceedings does not constitute a restriction on freedom to provide services within the meaning of Article 59 solely by virtue of the fact that other Member States apply less strict rules to providers of similar services established in their territory* (see the judgment in Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 48).

Case C-384/93 *Alpine Investments* [1995] ECR I-1141 §19, 27

*An analysis of the abovementioned General Programmes for the abolition of restrictions on freedom of establishment and freedom to provide services reveals that the restrictions envisaged by those provisions are essentially measures discriminating, directly or indirectly, between nationals of other Member States and nationals of the host country.*

Joined cases C-330/90 and C-331/90 *López Brea* [1992] ECR I-323 §13

By making the provision of services by tourist guides accompanying a group of tourists from another Member State subject to possession of a specific qualification, *that legislation prevents both tour companies from providing that service with their own staff and self-employed tourist guides from offering their services to those companies for organized tours. It also prevents tourists taking part in such organized tours from availing themselves at will of the services in question.*

Case C-198/89 *Commission v Greece* [1991] ECR I-727 §17

Case C-180/89 *Commission v Italy* [1991] ECR I-709 §16

Case C-154/89 *Commission v France* [1991] ECR I-659 §13

Articles 59 and 60 of the Treaty therefore preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit. *To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.*

Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417 §12

It must be stated that *the requirements* in question in these proceedings, namely that an insurer who is established in another Member State, authorized by the supervisory authority of that State

and subject to the supervision of that authority, must have a permanent establishment within the territory of the State in which the service is provided and that he must obtain a separate authorization from the supervisory authority of that State, *constitute restrictions on the freedom to provide services inasmuch as they increase the cost of such services in the State in which they are provided*, in particular where the insurer conducts business in that State only occasionally.

Case C-205/84 Commission v Germany [1986] ECR 3755 §28

Such is the case with national legislation of the kind in question when the obligation to pay the employer's share of social security contributions imposed on persons providing services within the national territory is extended to employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same periods of employment. In such a *case the legislation of the State in which the service is provided proves in economic terms to be more onerous for employers established in another Member State*, who in fact have to bear a heavier burden than those established within the national territory.

Joined Cases 62 and 63/81 Seco [1982] ECR 223 §9

Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, *save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States*. Such would be the case if that application enabled parties to an assignment of copyright to create *artificial barriers* to trade between Member States.

Case C-62/79 Coditel [1980] ECR 881 §15

From information given to the Court during these proceedings it appears that the television broadcasting of advertisements is subject to widely divergent systems of law in the various Member States, passing from almost total prohibition, as in Belgium, by way of rules comprising more or less strict restrictions, to systems affording broad commercial freedom. In the absence of any approximation of national laws and taking into account the considerations of general interest underlying the restrictive rules in this area, *the application of the laws in question cannot be regarded as a restriction upon freedom to provide services so long as those laws treat all such services identically whatever their origin or the nationality or place of establishment of the persons providing them*.

The answer must therefore be that Articles 59 and 60 of the Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television — as they prohibit the broadcasting of advertisements by television — *if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established*.

Case C-52/79 Debaue [1980] ECR 833 §13, 16



As the Court has already ruled in its judgment of 12 December 1974 in *Walrave v Union Cycliste Internationale* (Case 36/74 [1974] ECR 1405), ***the prohibition on discrimination based on nationality does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at collectively regulating gainful employment and services.***

The answer to the questions referred to the Court must therefore be ***that rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the State in question, are incompatible with Article 7 and, as the case may be, with Articles 48 to 51 or 59 to 66 of the Treaty unless such rules or practice exclude foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.***

**Case C-13/76 Donà [1976] ECR 1333 §17, 19**

The restrictions to be abolished pursuant to this ***provision include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service.***

**Case C-39/75 Coenen [1975] ECR 1547 §6**

**Case C-33/74 Van Binsbergen [1974] ECR 1299 §10**

## **2.2 DISCRIMINATORY MEASURES**

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However, in circumstances such as those at issue in the main proceedings, ***the taxation by a Member State of winnings from casinos in other Member States and the exemption of such winnings from casinos situated on its territory are not a suitable and coherent means of ensuring the attainment of the objective of combatting compulsive gambling***, as such an exemption is in fact likely to encourage consumers to participate in games of chance which allow them to benefit from such an exemption (see, to that effect, judgment in *Commission v Spain*, EU:C:2009:618, point 41).

It follows that the discrimination at issue in the main proceedings is ***not justified*** under Article 52 TFEU.

**Joined cases C-344/13 and C-367/13 Blanco [2014] not published yet §46, 47**

*(available only in French)*

En outre, la notion de restriction couvre les mesures prises par un État membre ***qui, quoique indistinctement applicables, affectent l'accès au marché pour les entreprises d'autres États membres et entravent ainsi le commerce intracommunautaire*** (voir, notamment, arrêt du 28 avril 2009, *Commission/Italie*, précité, point 64).

**Case C-356/08 Commission v Austria [2009] ECR I-108 §39**

Consequently, it is necessary to state that in enacting a provision, such as Paragraph 3(2) of the AEntG, under which foreign temporary employment agencies *are required to declare, not only the placement of a worker with a user of his services in Germany, but also any change relating to the place of employment of that worker*, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC.

Case C-490/04 Commission v Germany [2007] ECR I-6095 §89

Contrary to that Government's submission, *the fact that gaming providers established in Finland are subject to tax as organisers of gambling does not rid the Finnish legislation of its manifestly discriminatory character*, since that tax is not analogous to the income tax charged on winnings from taxpayers' participation in lotteries held in other Member States.

Case C-42/02 Lindman [2003] ECR I-13519 §22

Having regard to all the foregoing, it must be held that:

- *by maintaining, contrary to Article 59 of the Treaty, the general prohibition whereby lawyers established in other Member States and practising in Italy in the exercise of their freedom to provide services cannot have in that State the infrastructure needed to provide their services,*
- by requiring members of the Bar to reside in the judicial district of the court to which the Bar at which they are enrolled is attached, contrary to Article 52 of the Treaty, and
- by incompletely transposing Directive 89/48, inasmuch as no rules have been laid down to regulate the conduct of the aptitude test for lawyers from other Member States, *the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the Treaty and Directive 89/48.*

Case C-145/99 Commission v Italy [2002] ECR I-2235 §57

The reply to be given to the second question must therefore be that *the fact that*, in concluding a collective agreement specific to one undertaking, *a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement* declared to be generally applicable, *whilst an employer established in another Member State cannot do so*, constitutes an *unjustified restriction* on the freedom to provide services.

Case C-164/99 Portuguesa Construções [2002] ECR I-787 §35

However, it is settled law that *discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations* (see, inter alia, Case C-279/93 Finanzamt Köln-Altstadt v Schumacker [1995] ECR I-225, paragraph 30).

Case C-390/96 Lease Plan [1998] ECR I-2553 §34

An analysis of the abovementioned General Programmes for the abolition of restrictions on freedom of establishment and freedom to provide services reveals that the restrictions envisaged

by those provisions are essentially measures *discriminating, directly or indirectly*, between nationals of other Member States and nationals of the host country.

Joined cases C-330/90 and C-331/90 López Brea [1992] ECR I-323 §13

In this respect, the Court has consistently held (see, most recently, the judgments in Case C-154/89 *Commission v France* [1991] ECR I-659, paragraph 12, Case C-180/89 *Commission v Italy* [1991] ECR I-709, paragraph 15, and Case C-198/89 *Commission v Greece* [1991] ECR I-727, paragraph 16) that **Article 59 of the Treaty entails, in the first place, the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided.**

Case C-288/89 Mediawet I [1991] ECR I-4007 §10

As the Court held in its judgment in Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, at paragraphs 32 and 33, **national rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption**, such as that contained in Article 56 of the Treaty. It also appears from that judgment (paragraph 34) that economic aims cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty.

Case C-288/89 Mediawet I [1991] ECR I-4007 §11

Case C-352/85 Bond van Adverteerders [1988] ECR 2085 §32, 33, 34

Case C-224/97 Ciola [1999] ECR I-2517 §16

In any event, that fact is not such as to exclude the preferential system enjoyed by the NOPB from the field of application of Article 59 of the Treaty. Moreover, it is not necessary for all undertakings in a Member State to be advantaged in comparison with foreign undertakings. **It is sufficient that the preferential system set up should benefit a national provider of services.**

Case C-353/89 Mediawet II [1991] ECR I-4069 §25

**The aim** of those provisions is primarily to enable the person providing the service to pursue his activities in the host Member State **without suffering discrimination in favour of nationals of that State**. As the Court pointed out in its judgment in Case 279/80 *Webb* [1981] ECR 3305, at paragraph 16, those provisions do not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of persons established therein may be similarly applied in their entirety to the temporary activities of persons who are established in other Member States.

Case C-294/89 Commission v France [1991] ECR I-3591 §26

**It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects unless those rules fall within the derogating provision contained in Article 56 of the Treaty to which Article 66 refers.** It follows from Article 56, which must be interpreted strictly, that discriminatory rules may be justified on grounds of public policy, public security or public health.

Case C-260/89 ERT [1991] ECR I-2925 §24

Articles 59 and 60 of the Treaty therefore preclude a Member State from prohibiting a person providing services established in another Member State from *moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit*. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.

Case C-113/89 Rush Portuguesa [1990] ECR I-1417 §12

It should also be emphasized that *the right to equal treatment is conferred directly by Community law* and may not therefore be made subject to the issue of a certificate to that effect by the authorities of the relevant Member State (in that respect see the judgment of 3 July 1980 in Case 157/79 Regina v Pieck [1980] ECR2171).

Case C-186/87 Cowan [1989] ECR 195 §11

However, in so far as those rules have the effect of restricting freedom of movement for workers, the right of establishment and the freedom to provide services within the Community, they are compatible with the Treaty only if the restrictions which they entail are actually justified in view of the general obligations inherent in the proper practice of the professions in question and *apply to nationals and foreigners alike. That is not the case where the restrictions are such as to create discrimination against practitioners established in other Member States or raise obstacles to access to the profession which go beyond what is necessary in order to achieve the intended goals*.

Case C-96/85 Commission v France [1986] ECR 1475 §11

Such is the case with national legislation of the kind in question when the obligation to pay the employer's share of social security contributions imposed on persons providing services within the national territory is extended to employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same periods of employment. In such a case the legislation of the State in which the service is provided proves in economic terms to be more onerous for employers established in another Member State, who in fact *have to bear a heavier burden than those established within the national territory*.

That argument cannot be accepted. A Member State's power to control the employment of nationals from a non-member country may not be used in order to impose a *discriminatory burden* on an undertaking from another Member State enjoying the freedom under Articles 59 and 60 of the Treaty to provide services.

Joined Cases 62 and 63/81 Seco [1982] ECR 223 §9, 12

The reply to the second and third questions raised by the Hoge Raad is therefore that Article 59 does not preclude a Member State which requires agencies for the provision of manpower to hold a licence from requiring a provider of services established in another Member State and pursuing

such activities on the territory of the first Member State to comply with that condition even if he holds a licence issued by the State in which he is established, provided however, that in the first place when considering applications for licences and in granting them the Member State in which the service is provided makes *no distinction based on the nationality of the provider of the services or his place of establishment*, and in the second place that it takes into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established.

**Case C-279/80 Webb [1981] ECR 3305 §21**

The national court is referring in this question to the spatial limits on the diffusion of television programmes depending, on the one hand, on the natural relief of the ground and of built-up areas and, on the other, on the technical features of the broadcasting systems used. These natural and technical factors undoubtedly lead to differences as regards reception of television signals in view of the correlation between the location of broadcasting stations and television receivers.

*However, such differences, which are due to natural phenomena, cannot be described as "discrimination" within the meaning of the Treaty; the latter regards only differences in treatment arising from human activity, and especially from measures taken by public authorities, as discrimination.* Moreover, it should be pointed out that even if the Community has in some respects intervened to compensate for natural inequalities, it has no duty to take steps to eradicate differences in situations such as those contemplated by the national court.

**Case C-52/79 Debaue [1980] ECR 833 §21**

The answer to the questions referred to the Court must therefore be that rules or a national practice, even adopted by a sporting organization, which *limit* the right to take part in football matches as professional or semi-professional players *solely to the nationals of the State* in question, are incompatible with Article 7 and, as the case may be, with Articles 48 to 51 or 59 to 66 of the Treaty unless such rules or practice exclude foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.

**Case C-13/76 Donà [1976] ECR 1333 §19**

## 2.3 NON-DISCRIMINATORY MEASURES

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Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the *abolition of any restriction on the freedom to provide services, even if that restriction applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State where it lawfully provides similar services* (see, to that effect, judgments in *Sporting Exchange*, C-203/08, EU:C:2010:307, paragraph 23 and the case-law cited, and *HIT and HIT LARIX*, C-176/11, EU:C:2012:454, paragraph 16).

By contrast, measures, the only effect of which is to create *additional costs* in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, *do not fall within the scope of Article 56* TFEU (judgment in *Mobistar and Belgacom Mobile, Joined Cases C-544/03 and C-545/03, EU:C:2005:518, paragraph 31*).

Case C-98/14 Burlington Hungary and Others [2015] not published vet § 35, 36

It is settled case-law that *Article 49 EC* requires not only the elimination of all discrimination against service providers from other Member States, but also *the abolition of any restriction on the freedom to provide services, even if that restriction applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of service providers from other Member States who lawfully provide similar services in their Member State of origin* (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 28). That freedom is enjoyed by both providers and recipients of services (see Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case C-262/02 *Commission v France* [2004] ECR I-6569, paragraph 22).

Case C-255/04 Commission v France [2006] ECR I-5251 §37

Case C-58/98 Corsten [2000] ECR I-7919 §33

Case C-222/95 Parodi [1997] ECR I-3899 §18

Case C-398/95 SETTG [1997] ECR I-3091 §16

Case C-3/95 Reisebüro Broede [1996] ECR I-6511 §25

Case C-272/94 Guiot 1996 I-1905 §10

Case C-43/93 Vander Elst [1994] ECR I-3803 §14

Case C-76/90 Säger [1991] ECR I-4221 §12

Since no precise argument has been put before the Court to justify such a difference in treatment, Articles 59 and 60 must be held to preclude a national provision such as that at issue in the main proceedings in so far as it *excludes the possibility for partially taxable persons to deduct business expenses from their taxable income, whereas such a possibility is granted to wholly taxable persons*.

Case C-234/01 Arnoud Gerritse [2003] ECR I-5933 §29

In the light of the foregoing, the answer to the question referred must be that:

- benefits such as those provided by ELGA under *the compulsory insurance scheme against natural risks do not fall within the scope of either Articles 59 and 60* of the Treaty or Directive 73/239;
- *such a compulsory insurance scheme may, however, constitute a restriction on the freedom of insurance companies established in other Member States, who wish to offer services covering such risks, to provide services*, within the meaning of those Treaty

provisions. It is for the referring court to determine whether that scheme is in fact justified by social policy objectives and to examine, in particular, whether the cover provided by that compulsory insurance scheme is proportionate to those objectives.

Case C-355/00 Freskot AE [2003] ECR I-5263 §74

In fact, in view of the disadvantage to the employer in financial terms in the postponement of the right to deduction until the time the pension benefits are paid to the employee, national rules such as those at issue in the main proceedings are liable *both to dissuade Swedish employers from taking out occupational pension insurance with institutions established in a Member State other than the Kingdom of Sweden and to dissuade those institutions from offering their services on the Swedish market* (see, to that effect, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 30, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 31).

Case C-422/01 Försäkringsaktiebolaget Skandia (publ) and Ramstedt [2003] ECR I-6817 §28

However, *such a prohibition deprives the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross-border services.*

*Although a prohibition such as the one at issue in the main proceedings is general and non-discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States, it can none the less, as has been held above (see paragraph 28), constitute a restriction on the freedom to provide cross-border services.*

The answer to the second question is therefore that *rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services* within the meaning of Article 59 of the Treaty.

Case C-384/93 Alpine Investments [1995] ECR I-1141 §28, 35, 39

*In the perspective of a single market and in order to permit the realization of its objectives, that freedom likewise precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.*

Where *national legislation, though applicable without discrimination to all vessels whether used by national providers of services or by those from other Member States, operates a distinction according to whether those vessels are engaged in internal transport or in intra-Community transport*, thus securing a *special advantage for the domestic market and the internal transport services of the Member State in question*, that legislation must *be deemed to constitute a restriction on the freedom to provide maritime transport services* contrary to Regulation No 4055/86.

Case C-381/93 Commission v France [1994] ECR I-5145 §17, 21

In France *the requirement that undertakings should obtain work permits in order to employ nationals of non-member countries* is coupled with *the obligation to pay a fee* which, like *the heavy administrative fine imposed for non-compliance with that obligation, may entail a considerable financial burden for employers.*

Finally, as regards *the work permits* which are the focus of the main proceedings, they are *required in order for a national of a non-member country to be employed by an undertaking established in France*, whatever the nationality of the employer, because a short-stay visa is not equivalent to a permit. Such a system is intended to regulate access to the French labour market for workers from non-member countries.

Case C-43/93 Vander Elst [1994] ECR I-3803 §12, 20

It is to be noted that provisions such as those contained in the Belgian legislation at issue constitute a restriction on freedom to provide services. Provisions requiring an insurer to be established in a Member State as a condition of the eligibility of insured persons to benefit from certain tax deductions in that State operate to *deter* those seeking insurance from approaching insurers established in another Member State, and thus *constitute a restriction of the latter's freedom to provide services.*

Case C-204/90 Bachmann [1992] ECR I-249 §31

See also: Case C-300/90 Commission v Belgium [1992] ECR I-305 §22

As regards, first, the provisions of Article 59 of the Treaty, which prohibit any restriction on the freedom to supply services, it is apparent from the facts of the case that the link between the activity of the students associations of which Mr Grogan and the other defendants are officers and medical terminations of pregnancies carried out in clinics in another Member State *is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59 of the Treaty.*

The information to which the national court's questions refer is not distributed on behalf of an economic operator established in another Member State. On the contrary, the information constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State.

It follows that, in any event, a *prohibition on the distribution of information* in circumstances such as those which are the subject of the main proceedings cannot be regarded as a restriction within the meaning of Article 59 of the Treaty.

Case C-159/90 Grogan [1991] ECR I-4685 §24, 26, 27

However, in so far as those rules have the effect of restricting freedom of movement for workers, the right of establishment and the freedom to provide services within the Community, they are compatible with the Treaty only if the restrictions which they entail are actually justified in view of the general obligations inherent in the proper practice of the professions in question and *apply to nationals and foreigners alike.* That is not the case where the restrictions are such as to create



discrimination against practitioners established in other Member States or raise obstacles to access to the profession which go beyond what is necessary in order to achieve the intended goals.

Case 96/85 Commission v France [1986] ECR 1475 §11

Under Article 59 and the third paragraph of Article 60 of the EEC Treaty a person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals. As the Court has repeatedly emphasized, most recently in its judgment of 17 December 1981 in Case 279/80 *Webb* [1981] ECR 3305, those provisions entail ***the abolition of all discrimination*** against a person providing a service on the grounds of his ***nationality or the fact that he is established in a Member State other*** than that in which the service must be provided. ***Thus they prohibit not only overt discrimination based on the nationality of the person providing a service but also all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result.***

Joined cases 62 and 63/81 Seco [1982] ECR 223 §8

## 2.4 RESTRICTIONS IMPOSED BY THE STATE OF DESTINATION

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### 2.4.1 Non-recognition of the rules of the state of origin

The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, ***in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established*** (Case 279/80 *Webb* [1981] ECR 3305, paragraph 17).

***By requiring all undertakings to fulfil the same conditions*** for obtaining prior authorisation or approval, ***the Belgian legislation makes it impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established.***

Case C-355/98 Commission v Belgium [2000] ECR I-1221 §37, 38

The items of information respectively required by the rules of the Member State of establishment and by those of the host Member State concerning, in particular, the employer, the worker, working conditions and remuneration ***may differ to such an extent that the monitoring required under the rules of the host Member State cannot be carried out on the basis of documents kept in accordance with the rules of the Member State of establishment.***

On the other hand, ***the mere fact that there are certain differences of form or content cannot justify the keeping of two sets of documents***, one of which conforms to the rules of the Member

State of establishment and the other to those of the host Member State, *if the information provided, as a whole, by the documents required under the rules of the Member State of establishment is adequate to enable the controls needed in the host Member State to be carried out.*

Consequently, *the authorities* and, if need be, *the courts of the host Member State must verify in turn*, before demanding that social or labour documents complying with their own rules be drawn up and kept in the territory of that State, *that the social protection for workers which may justify those requirements is not sufficiently safeguarded by the production, within a reasonable time, of originals or copies of the documents kept in the Member State of establishment or, failing that, by keeping the originals or copies of those documents available on site or in an accessible and clearly identified place in the territory of the host Member State.*

Joined cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453 §63, 64, 65

In that respect, it should be recalled that the Court has consistently held *that a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned* has acquired in order to exercise the same profession in another Member State, *by making a comparison* between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.

That examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. That assessment of the equivalence of the foreign *diploma must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates* (see judgments in Case C-340/89 *Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg* [1991] ECR I-2357, paragraphs 16 and 17, and Case C-104/91 *Aguirre Borrell and Others v Colegio Oficial de Agentes de la Propiedad Inmobiliaria* [1992] ECR I-3003).

Case C-375/92 Commission v Spain [1994] ECR I-923 §12, 13

It should however be emphasized that the authorization must be granted on request to any undertaking established in another Member State which meets the conditions laid down by the legislation of the State in which the service is provided, that *those conditions may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established and that the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment.* According to the German Government, which has not been contradicted on that point by the Commission, the German authorization procedure conforms fully to those requirements.

Case C-205/84 Commission v Germany [1986] ECR 3755 §47

The answer to the questions submitted by the Cour de Cassation of the Grand Duchy of Luxembourg must therefore be that Community law precludes a Member State from requiring an employer who is established in another Member State and temporarily carrying out work in the first-named Member State, using workers who are nationals of non-member countries, to pay the employer's share of social security contributions in respect of those workers *when that employer is already liable under the legislation of the State in which he is established for similar contributions in respect of the same workers and the same periods of employment* and the contributions paid in the State in which the work is performed do not entitle those workers to any social security benefits. Nor would such a requirement be justified if it were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the State in which the work is performed.

Joined cases 62 and 63/81 Seco [1982] ECR 223 §15

Such a measure would be excessive in relation to the aim pursued, however, if the requirements to which the issue of a licence is subject *coincided with the proofs and guarantees required in the State of establishment*. In order to maintain the principle of freedom to provide services the first requirement is that in considering applications for licences and in granting them the Member State in which the service is to be provided may not make any distinction based on the nationality of the provider of the services or the place of his establishment; the second requirement is *that it must take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment*.

Case C-279/80 Webb [1981] ECR 3305 §20

Taking into account the particular nature of certain services to be provided, such as the placing of entertainers in employment, specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good or by the need to ensure the protection of the entertainer, which are binding upon any person established in the said State, *in so far as the person providing the service is not subject to similar requirements in the Member State in which he is established*.

Joined cases 110 and 111/78 Van Wesemael [1979] ECR 35 §28

#### 2.4.2 Application of the rules of the state of destination

In the light of all the foregoing, the answer to the second question is that, on a proper interpretation of Articles 43 EC and 49 EC, in the current state of EU law, the fact *that an operator holds*, in the Member State in which it is established, *an authorisation permitting it to offer games of chance does not prevent another Member State*, while complying with the requirements of EU law, *from making such a provider offering such services to consumers in its territory subject to the holding of an authorisation issued by its own authorities*.

Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07. Markus Stoß [2010] ECR I-8069 §116

It follows that the *disputed obligation to swear that oath*, imposed *on the employees of private security undertakings*, constitutes an obstacle to the freedom of establishment and to the freedom to provide services for operators not established in Italy.

The Court has already held that the requirement that *members of the staff of a private security undertaking must obtain a fresh specific authorisation in* the host Member State constitutes an unjustified restriction on that undertaking's freedom to provide services within the meaning of Article 49 EC, in so far as it does not take account of the controls and verifications already carried out in the Member State of origin (*Commission v Portugal*, paragraph 66; *Commission v Netherlands*, paragraph 30; and Case C-514/03 *Commission v Spain*, paragraph 55).

The Court has already ruled that, in the private security sector, the obligation *to lodge a guarantee with a deposits and loans office* is likely to hinder or make less attractive the exercise of freedom of establishment and freedom to provide services within the meaning of Articles 43 EC and 49 EC, in so far as it makes the provision of services or the formation of a subsidiary or secondary establishment more onerous for private security undertakings established in other Member States than for those established in the Member State of destination (see Case C-514/03 *Commission v Spain*, paragraph 41).

Case C-465/05 Commission v Italy [2007] ECR I-11091 §48, 93, 109

It should be remembered at the outset that, with regard to legislation analogous to the Spanish legislation criticised by the Commission, the Court has already held *that the requirement that a private security undertaking must be constituted as a legal person in order to be able to carry out its activities constituted a restriction contrary to Articles 43 EC and 49 EC* (Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraphs 41 to 44).

It should be noted that *the requirement to lodge security [...] is likely to hinder or make less attractive the exercise of freedom of establishment and freedom to provide services* within the meaning of Articles 43 EC and 49 EC. It makes the provision of services or the formation of a subsidiary or secondary establishment in Spain more onerous for private security undertakings established in other Member States than for those established in Spain. It must be determined whether this requirement is justified.

As a preliminary point, it should be noted that the *provisions setting a minimum number of persons employed* by security undertakings constitute an impediment to freedom of establishment and freedom to provide services in that they make the formation of secondary establishments or subsidiaries in Spain more onerous and dissuade foreign private security undertakings from offering their services on the Spanish market.

Case C-514/03 Commission v Spain [2006] ECR I-963 §31, 41, 48

*The condition that every staff member of a security firm or internal security service must carry an identification card issued by the Belgian Minister for the Interior must also be regarded as a restriction on the freedom to provide services.* The formalities involved in obtaining such an identification card are likely to make the provision of services across frontiers more difficult.

Moreover, as the Commission has rightly emphasised, *the provider of a service who goes to another Member State must be in possession of an identity card or a passport. It follows that the requirement of an additional identity document, issued by the Belgian Minister for the Interior, is disproportionate in relation to the need to ensure the identification of the persons in question.*

Case C-355/98 Commission v Belgium [2000] ECR I-1221 §39, 40

As regards the compatibility with Article 59 of the Treaty of national rules imposing the net principle, which a Member State may prescribe by exercising its right under Article 3(1) of Directive 89/552, as amended, it must be observed that, *since such rules limit the possibility for television broadcasters established in the State of transmission to broadcast advertisements for the benefit of advertisers established in other Member States, they involve a restriction on the freedom to provide services.*

Case C-6/98 ARD [1999] ECR I-7599 §49

Where the rules applicable to services have not been harmonized, *restrictions on the freedom guaranteed by the Treaty in this field may result from application of national rules affecting any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation* (Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 12).

Joined cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843 §51

Case C-288/89 Mediawet I [1991] ECR I-4007 §12

It should next be stated that *national legislation which makes the provision of certain services on the national territory by an undertaking established in another Member State subject to the issue of an administrative licence for which the possession of certain professional qualifications is required constitutes a restriction on the freedom to provide services* within the meaning of Article 59 of the Treaty. By reserving the provision of services in respect of the monitoring of patents to certain economic operators possessing certain professional qualifications, national legislation prevents an undertaking established abroad from providing services to the holders of patents in the national territory and also prevents those holders from freely choosing the manner in which their patents are to be monitored.

Case C-76/90 Säger [1991] ECR I-04221 §14

As the Court has consistently held (see, most recently, the judgments in *Commission v France*, cited above, paragraph 15; *Commission v Italy*, cited above, paragraph 18; and *Commission v Greece*, cited above, paragraph 18), *such restrictions come within the scope of Article 59 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.*

Case C-288/89 Mediawet I [1991] ECR I-4007 §13

The aim of those provisions is primarily to enable the person providing the service to pursue his activities in the host Member State without suffering discrimination in favour of nationals of that State. As the Court pointed out in its judgment in Case 279/80 Webb [1981] ECR 3305, at paragraph 16, *those provisions do not mean that all national legislation* applicable to nationals of that State and usually applied to the permanent activities of persons established therein *may be similarly applied in their entirety to the temporary activities of persons who are established in other Member States.*

Case C-294/89 Commission v France [1991] ECR I-3591 §26

Case 205/84 Commission v Germany [1986] ECR 3755 §26

Case 279/80 Webb [1981] ECR 3305 §16

In those circumstances, it must be stated that *the rule of territorial exclusivity cannot be applied to activities of a temporary nature* pursued by lawyers established in other Member States, since the conditions of law and fact which apply to those lawyers are not in that respect comparable to those applicable to lawyers established on French territory.

Case C-294/89 Commission v France [1991] ECR I-3591 §28

It should however be emphasized that the authorization must be granted on request to any undertaking established in another Member State which meets *the conditions laid down by the legislation of the State in which the service is provided, that those conditions may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established* and that the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment. According to the German Government, which has not been contradicted on that point by the Commission, the German authorization procedure conforms fully to those requirements.

Case 205/84 Commission v Germany [1986] ECR 3755 §47

Such is the case with national legislation of the kind in question when the obligation to pay the employer's share of social security contributions imposed on persons providing services within the national territory is extended to employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same periods of employment. In such a case *the legislation of the State in which the service is provided proves in economic terms to be more onerous* for employers established in another Member State, who in fact have to bear a heavier burden than those established within the national territory.

Joined cases 62 and 63/81 Seco [1982] ECR 223 §9

## 2.5 RESTRICTIONS IMPOSED BY THE STATE OF ORIGIN

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It follows from those considerations that, on the one hand, *by making the posting of workers who are nationals of non-Member States by an undertaking established in another Member State subject to obtaining the ‘EU Posting Confirmation’* [...] issue of which requires, first, that *the workers concerned must have been employed for at least one year by that undertaking or must have concluded an employment contract of indefinite duration with it* and, secondly, *evidence that the Austrian employment and wage conditions are complied with*, and, on the other hand, by laying [...] *a ground for the automatic refusal of an entry and residence permit*, without exception, which does not allow the situation of workers from a non-Member State, lawfully posted by an undertaking established in another Member State, to be regularised when those workers have entered the national territory without a visa, the Republic of Austria has failed to fulfil its obligations under Article 49 EC.

Case C-168/04 Commission v Austria [2006] ECR I-9041 §68

Moreover, *the legislation of a Member State, such as that at issue in the main proceedings, by restricting the benefit of a tax credit for research only to research carried out in that Member State, makes the provision of services constituted by the research activity subject to different tax arrangements depending on whether it is carried out in other Member States or in the Member State concerned* (see, to that effect, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 21).

Such legislation *differentiates according to the place where the services are provided, contrary to Article 49 EC*.

The French Government submits, however, that that difference of treatment flows directly from the principle of fiscal territoriality, which the Court expressly recognised in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 22, and hence cannot be regarded as giving rise to overt or covert discrimination prohibited by the EC Treaty.

In that case, however, the Court was considering the compatibility with the Treaty provisions on the freedom of establishment of national tax rules applying to resident and non-resident undertakings, whereas the main proceedings in the present case involve an assessment of the compatibility with the Treaty of national tax provisions which confer a benefit on companies established in a Member State in return for the provision of services provided on their behalf in that Member State alone. *Such provisions are contrary to Article 49 EC because they are, albeit indirectly, based upon the place of establishment of the provider of services and are consequently liable to restrict its cross-border activities*.

Case C-39/04 Laboratoires Fournier [2005] ECR I-2057 §15, 16, 17, 18

Provisions such as those in question in the main proceedings, *where they restrict the possibility for television broadcasters established in the broadcasting State to broadcast, for advertisers established in the receiving State, television advertising specifically directed at the public in the receiving State, involve a restriction on freedom to provide services.*

Joined cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843 §50

The first paragraph of *Article 59* of the Treaty *prohibits restrictions on freedom to provide services within the Community in general. Consequently, that provision covers not only restrictions laid down by the State of destination but also those laid down by the State of origin.* As the Court has frequently held, the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State (see Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, paragraph 30; *Peralta*, cited above, paragraph 40, and Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 14).

It follows that the prohibition of cold calling does not fall outside the scope of Article 59 of the Treaty simply because it is imposed by the State in which the provider of services is established.

*A prohibition* such as that *at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State.* It therefore directly affects access to the market in services in the other Member States and is thus *capable of hindering intra-Community trade in services.*

The answer to the second question is therefore that *rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services* within the meaning of Article 59 of the Treaty.

Case C-384/93 *Alpine Investments* [1995] ECR I-1141 §30, 31, 38, 39

## **2.6 RESTRICTIONS IMPOSED BY NON-PUBLIC BODIES**

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*(available only in French)*

D'abord, il convient de rappeler qu'il est de jurisprudence constante que les articles 43 CE et 49 CE ne régissent pas seulement l'action des autorités publiques, mais *s'étendent également aux réglementations d'une autre nature qui visent à régler, de façon collective, le travail salarié, le travail indépendant et les prestations de services* (voir arrêt du 11 décembre 2007, *International Transport Workers' Federation et Finnish Seamen's Union*, C-438/05, Rec. p. I-10779, point 33 et jurisprudence citée). L'accès au marché du travail salarié ou indépendant ainsi que les prestations de services étant régis dans les différents États membres tantôt par la voie de dispositions d'ordre législatif ou réglementaire, tantôt par d'autres actes conclus ou adoptés par des personnes privées, une limitation des interdictions prévues en cette matière par le traité aux



actes de l'autorité publique risquerait de créer des inégalités quant à leur application (voir, en ce sens, arrêt *International Transport Workers' Federation et Finnish Seamen's Union*, précité, point 34).

**Case C-356/08 Commission v Austria [2009] ECR I-108 §37**

In order to answer that question, the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised ***if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy*** (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège*, paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others*, paragraph 120).

Moreover, the Court has ruled, first, that ***the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual*** who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively (see, to that effect, Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 31 and 39).

**Case C-438/05 Viking Line ABP [2007] ECR I-10779 §57, 58**

## 3. EXAMPLES OF RESTRICTIONS

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### 3.1 NATIONALITY

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It is clear from settled case-law that the freedom to provide services implies, in particular, *the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a Member State other than that in which the service is provided* (see, inter alia, C-490/04 *Commission v Germany*, paragraph 83 and the case-law cited).

Case C-546/07 *Commission v Germany* [2010] ECR I-439 §39

In that regard, the Court notes that it is settled case-law that Article 49 EC requires *not only the elimination of all discrimination on grounds of nationality against service providers who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where he lawfully provides similar services* (see, in particular, Case C-131/01 *Commission v Italy* [2003] ECR I-1659, paragraph 26 and the case-law cited).

Case C-564/07 *Commission v Austria* [2009] ECR I-100 §30

Case C-219/08 *Commission v Belgium* [2009] ECR I-9213 §13

Having regard to all the preceding considerations, it must be held that, by reserving, in Article 4 of Law No 85-704, *the task of delegated project contracting to an exhaustive list of legal persons under French law, the French Republic has failed to fulfil its obligations under Directive 92/50 and Article 49 EC.*

Case C-264/03 *Commission v France* [2005] ECR I-8831 §71

In the present case, *the penalty of expulsion for life from the territory, which is applicable to the nationals of other Member States in the event of conviction for obtaining and being in possession of drugs for their own use, clearly constitutes an obstacle to the freedom to provide services recognised in Article 59 of the Treaty*, since it is the very negation of that freedom. This would also be true for the other fundamental freedoms laid down in Articles 48 and 52 of the Treaty and referred to by the national court.

Case C-348/96 *Calfa* [1999] ECR I-11 §18

Next, it must be held that the fact that a Member State requires security for costs to be given by a national of another Member State who, in his capacity as an executor, has brought an action before one of its courts, whilst its own nationals are not subject to such a requirement, *constitutes discrimination on grounds of nationality contrary to Articles 59 and 60.*

The reply to the national court's first and third questions must therefore be that *Articles 59 and 60 must be interpreted as precluding a Member State from requiring security for costs to be given by a member of a profession established in another Member State who brings an action before one of its courts, on the sole ground that he is a national of another Member State.*

Case C-20/92 Hubbard [1993] ECR I-3777 §14, 15

*By prohibiting "any discrimination on grounds of nationality" Article 7 of the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State.* In so far as this principle is applicable it therefore precludes a Member State from making the grant of a right to such a person subject to the condition that he reside on the territory of that State - that condition is not imposed on the State's own nationals .

Case 186/87 Cowan [1989] ECR 195 §10

However, in so far as those rules have the effect of restricting freedom of movement for workers, the right of establishment and the freedom to provide services within the Community, they are compatible with the Treaty only if the restrictions which they entail are actually justified in view of the general obligations inherent in the proper practice of the professions in question and *apply to nationals and foreigners alike*. That is not the case where the restrictions are such as to create discrimination against practitioners established in other Member States or raise obstacles to access to the profession which go beyond what is necessary in order to achieve the intended goals.

Case 96/85 Commission v France [1986] ECR 1475 §11

## **3.2 RESIDENCE/ESTABLISHMENT REQUIREMENT IN THE MEMBER STATE IN WHICH THE SERVICE IS PROVIDED**

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### **3.2.1 Establishment requirement**

In the light of the foregoing considerations, the answer to the first question is that Article 49 TFEU must be interpreted as *opposing* the legislation of a Member State, such as that at issue in the main proceedings, which, for the purposes of the grant of authorisation to operate a public urban bus service, where fixed stopping points are called at regularly in accordance with a timetable, requires applicant economic operators established in another Member State *to hold a seat or another establishment in the territory of the host Member State even before being authorised to operate that service*. By contrast, Article 49 TFEU must be interpreted as not precluding national legislation which provides for an establishment requirement where such a requirement does not apply *until after that authorisation has been granted and before the applicant commences operation of that service*.

Case C-338/09 Yellow Cab Verkehrsbetrieb [2010] ECR I-13927 §41

The requirement that *an undertaking create a permanent establishment or branch in the Member State in which the services are provided runs directly counter to the freedom to provide services* since it renders impossible the provision of services, in that Member State, by undertakings established in other Member States (see, to that effect, inter alia, Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 52; Case C-279/00 *Commission v Italy* [2002] ECR I-1425, paragraph 17; and Case C-496/01 *Commission v France* [2004] ECR I-2351, paragraph 65).

Case C-546/07 *Commission v Germany* [2010] ECR I-439 §39

Even though those rules apply *in exactly the same way* to operators established in one Italian province which wish to extend their activities to other provinces and to operators from other Member States which wish to pursue their activities in several Italian provinces, *they nonetheless constitute, for any operator not established in Italy, a serious obstacle to the pursuit of its activities in that Member State and one which affects its access to the market.*

Inasmuch as those rules require an operator from another Member State wishing to pursue its activities in several Italian *provinces not to confine itself to one single establishment in Italian territory, but on the contrary require it to have premises in each of those provinces* unless authority is conferred on an authorised agent, *they place that operator at a disadvantage as compared with Italian operators established in Italy which already have premises in at least one of those provinces and generally have better opportunities than foreign operators to establish contacts with authorised operators in other provinces in order to issue, where necessary, powers of agency* (see, to that effect, Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 12 and 13).

Case C-134/05 *Commission v Italy* [2007] ECR I-6251 §57, 58

(available only in French)

Or, dans la présente affaire, une telle menace ne saurait être constatée. En effet, il ne peut être soutenu que, *en raison du simple fait qu'il est établi non pas sur le territoire autrichien mais dans un autre État membre et, partant, qu'il ne peut faire l'objet de contrôles administratifs de la part des autorités autrichiennes, un organisme d'inspection des chaudières et des équipements sous pression constitue une menace réelle et suffisamment grave pour les personnes, affectant un intérêt fondamental de la société autrichienne.*

S'agissant, enfin, de *la protection de la loyauté de la concurrence*, il convient de constater que celle-ci peut, en principe, relever des raisons impérieuses d'intérêt général *qui pourraient justifier une restriction à la libre prestation des services* (voir, dans le contexte de la libre circulation des marchandises, arrêts du 7 mars 1990, GB-INNO-BM, C-362/88, Rec. p. I-667, point 10; du 18 mai 1993, Yves Rocher, C-126/91, Rec. p. I-2361, point 12).

Toutefois, le gouvernement autrichien ne saurait invoquer cet objectif, ainsi qu'il le fait, pour réserver tout un secteur, en l'occurrence celui de l'inspection des chaudières et des équipements sous pression, aux opérateurs établis sur le territoire autrichien, au motif que seuls ces derniers sont soumis à des règles identiques, tandis que les prestataires en provenance d'un autre membre

sont soumis à des règles différentes, et qu'il pourrait en résulter à une concurrence déloyale. *D'une part, une telle réserve subordonnerait la libre prestation des services à la condition que l'harmonisation de toutes les réglementations nationales concernant l'exercice de l'activité en question soit réalisée, ce qui reviendrait à priver de son contenu et de sa portée le droit à la libre prestation des services* (voir, dans le contexte de la libre circulation des marchandises, arrêt du 9 décembre 1981, Commission/Italie, 193/80, Rec. p. 3019, point 17). *D'autre part, la simple protection des entreprises nationales ne saurait justifier des restrictions à la libre prestation des services* (voir arrêt du 25 octobre 2001, Finalarte e.a., C-49/98, C-50/98, C-52/98 à C-54/98 et C-68/98 à C-71/98, Rec. p. I-7831, point 39).

Case C-257/05 Commission v Austria [2006] ECR I-134 §26, 30, 31

It follows from all the foregoing considerations that *Article 49 EC precludes a contracting authority from providing* in the tendering specifications for a public contract for health services of home respiratory treatment and other assisted breathing techniques, first, *for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favour the undertaking which was already providing the service concerned*, in so far as those elements are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine.

Case C-234/03 Contse and Others [2005] ECR I-9315 §79

Case C-158/03 Commission v Spain [2005] not published yet §87

It follows from the foregoing considerations that, *by imposing on bio-medical analysis laboratories established in other Member States the requirement that they have a place of business in France in order to obtain the requisite operating authorisation*, the French Republic *has failed* to fulfil its obligations under Article 49 EC.

Consequently, it must be held that, *by precluding any reimbursement of the costs of bio-medical analyses carried out by a bio-medical analysis laboratory established in another Member State*, the French Republic has failed to fulfil its obligations under Article 49 EC.

Case C-496/01 Commission v France [2004] ECR I-2351 §77, 95

In the light of the foregoing, the answer to the question referred must be that:

- benefits such as those provided by ELGA under the *compulsory insurance scheme against natural risks do not fall within the scope of either Articles 59 and 60 of the Treaty or Directive 73/239*;
- *such a compulsory insurance scheme may, however, constitute a restriction on the freedom of insurance companies established in other Member States, who wish to offer*

*services covering such risks* in Greece, to provide services, within the meaning of those Treaty provisions. It is for the referring court to determine whether that scheme is in fact justified by social policy objectives and to examine, in particular, whether the cover provided by that compulsory insurance scheme is proportionate to those objectives.

Case C-355/00 Freskot AE [2003] ECR I-5263 §74

In fact, in view of *the disadvantage to the employer in financial terms in the postponement of the right to deduction until the time the pension benefits are paid to the employee*, national rules such as those at issue in the main proceedings are liable both to *dissuade Swedish employers from taking out occupational pension insurance with institutions established in a Member State other than the Kingdom of Sweden and to dissuade those institutions from offering their services on the Swedish market* (see, to that effect, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 30, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 31).

Case C-422/01 Försäkringsaktiebolaget Skandia (publ) and Ramstedt [2003] ECR I-6817 §28

Having regard to all the foregoing, it must be held that:

- *by maintaining, contrary to Article 59 of the Treaty, the general prohibition whereby lawyers established in other Member States and practising in Italy in the exercise of their freedom to provide services cannot have in that State the infrastructure needed to provide their services,*
- by requiring members of the Bar to reside in the judicial district of the court to which the Bar at which they are enrolled is attached, contrary to Article 52 of the Treaty, and
- by incompletely transposing Directive 89/48, inasmuch as no rules have been laid down to regulate the conduct of the aptitude test for lawyers from other Member States, *the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the Treaty and Directive 89/48.*

Case C-145/99 Commission v Italy [2002] ECR I-2235 §57

The fact remains, however, that *the requirement to have the registered office or a branch office on Italian territory*, under Article 2(2)(a) of Law No 196/97, *goes beyond what is necessary to achieve the objective of protection of workers* relied upon by the Italian Government.

The said requirement *applies equally to every undertaking providing temporary labour established in a Member State other than the Italian Republic, without any distinction according to the place of residence of the workers whom such an undertaking employs.*

However, it cannot be excluded that *the workers made available to a user of temporary manpower established in Italy, by an undertaking providing temporary labour which is established in another Member State, may reside in that latter State, so that the need to protect the workers*, relied on in this case by the Italian Government to justify the requirement in issue, *does not exist so far as they are concerned.*

*The same* applies in cases in which *the worker usually works in Italy under an individual employment contract*.

Case C-279/00 Commission v Italy [2002] ECR I-1425 §20, 21, 22, 23

It follows from all the preceding considerations that, *by requiring undertakings engaged in the provision of temporary labour which are established in other Member States to maintain their registered office or a branch office on Italian territory, and to lodge a guarantee of ITL 700 million with a credit institution having its registered office or a branch office on Italian territory*, the Italian Republic has failed to fulfil its obligations under Articles 49 EC and 56 EC.

Case C-279/00 Commission v Italy [2002] ECR I-1425 §41

As regards *the requirement that a trade-fair organiser must have a permanent national or local headquarters*, it must be observed that if the requirement of authorisation constitutes a restriction on the freedom to provide services, *the requirement of a permanent establishment is the very negation of that freedom*. It makes a dead letter of Article 59 of the Treaty, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided. *If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued* (see, inter alia, Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 31).

Case C-439/99 Commission v Italy [2002] ECR I-305 §30

*The condition that a security firm must have its place of business in Belgium directly negates the freedom to provide services* in so far as it makes it impossible for undertakings established in other Member States to provide services in Belgium (see Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 52).

Case C-355/98 Commission v Belgium 2000 I-1221 §27

However, *any legislation of a Member State which*, like that at issue in the main action, *reserves a fiscal advantage to the majority of undertakings which lease goods from lessors established in that State whilst depriving those leasing from lessors established in another Member State of such an advantage gives rise to a difference of treatment based on the place of establishment of the provider of services, which is prohibited by Article 59 of the Treaty*.

Case C-294/97 Eurowings Luftverkehr [1999] ECR I-7447 §40

*Such rules, which treat taxable persons differently depending on whether they are established in the territory of the Member State concerned or not, are such as to constitute discrimination prohibited by Article 59 of the Treaty*.

As no other ground has been put forward to justify such discrimination, *it must be concluded that rules such as those in issue in the main proceedings are contrary to Article 59 of the Treaty, inasmuch as they give taxable persons not established in the territory of the Member State concerned interest only as from service of notice to pay on that State and at a rate lower than that applicable to the interest received automatically by taxable persons established in the*

*territory of that State on the expiry of the statutory time-limit for reimbursement.*

Case C-390/96 Lease Plan [1998] ECR I-2553 §33, 39

In those circumstances, *legislation* such as that in question in the main proceedings *contains a number of elements liable to dissuade individuals from taking out capital life assurance with companies not established in Sweden* and liable to dissuade insurance companies from offering their services on the Swedish market.

Case C-118/96 Safir [1998] ECR I-1897 §30

Subject to the national court's determination of this issue, it must be noted that, as the Court has already pointed out, if the requirement of an authorization constitutes a restriction on the freedom to provide services, *the requirement of a permanent establishment is the very negation of that freedom*. It has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided. If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued (see *Commission v Germany*, cited above, paragraph 52, and *Case C-101/94 Commission v Italy* [1996] ECR I-2691, paragraph 31).

Case C-222/95 Parodi [1997] I-3899 §31

Case C-101/94 Commission v Italy [1996] I-2691 §31

Case 205/84 Commission v Germany [1986] 3755 §52

It must be noted, first, that *a rule which makes the grant of interest rate subsidies subject to the requirement that the loans have been obtained from an establishment approved in the Member State in question also constitutes discrimination against credit institutions established in other Member States, which is prohibited by the first paragraph of Article 59* of the Treaty.

As stated in paragraph 12 above, *the rule in question entails discrimination based on the place of establishment. Such discrimination can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty, to which Article 66 refers, and which do not include economic aims* (see in particular *Case C-288/89 Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11).

Case C-484/93 Svensson and Gustavsson [1995] ECR I-3955 §12, 15

(...) However, the Decree-Law links the grant of licences for dubbing such films to the obligation to distribute a Spanish film. *It thus accords preferential treatment to the producers of national films in comparison with producers established in other Member States*, since the former have a guarantee that their films will be distributed and that they will receive the corresponding receipts, whereas the latter are dependent solely on the choice of the Spanish distributors. That obligation *therefore has the effect of protecting undertakings producing Spanish films and by the same token places undertakings of the same type established in other Member States at a disadvantage*. Since the producers of films from other Member States are thus deprived of the advantage granted to the producers of Spanish films, that restriction is of a *discriminatory nature*.

Case C-17/92 Distribuidores Cinematográficos [1993] ECR I-2239 §15



It is important to note that the legislation in question *constitutes a barrier to the freedom to provide services* in that it *prevents* broadcasting stations established in other Member States from having programmes that are transmitted *in a language other than that of the country in which they are established* relayed by the cable networks of the Flemish Community.

That barrier is *discriminatory* not only because, as the Belgian Government admits, it does not apply to broadcasting stations established in Belgium but above all because it prevents stations established in a Member State other than the Netherlands from offering programmes in Dutch to audiences in the Flemish Community, *when that possibility naturally exists for national broadcasting stations*.

Case C-211/91 Commission v Belgium [1992] ECR I-6757 §5, 6

It is to be noted that provisions such as those contained in the Belgian legislation at issue *constitute a restriction on freedom to provide services*. Provisions *requiring an insurer to be established in a Member State* as a condition of the eligibility of insured persons to benefit from certain tax deductions in that State operate to deter those seeking insurance from approaching insurers established in another Member State, and thus *constitute a restriction of the latter's freedom to provide services*.

However, as the Court has previously held (see the judgment in Commission v Germany, referred to above, paragraph 52), *the requirement of an establishment is compatible* with Article 59 of the Treaty where it constitutes a condition which is indispensable to the achievement of the public-interest objective pursued.

Case C-204/90 Bachmann v Belgian State [1992] ECR I-249 §31, 32

Case C-300/90 Commission v Belgium [1992] ECR I-305 §22, 23

In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and *thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services*. Such a restriction is all the less permissible where, as in the main proceedings, and unlike the situation governed by the third paragraph of Article 60 of the Treaty, the service is supplied without its being necessary for the person providing it to visit the territory of the Member State where it is provided.

Case C-58/98 Corsten [2000] ECR I-7919 §43

Case C-76/90 Säger [1991] ECR I-4221 §13

It must be stated that the requirements in question in these proceedings, namely that an insurer who is established in another Member State, authorized by the supervisory authority of that State and subject to the supervision of that authority, must *have a permanent establishment* within the territory of the State in which the service is provided and that he must obtain a separate authorization from the supervisory authority of that State, *constitute restrictions on the freedom to provide services* inasmuch as they increase the cost of such services in the State in which they are provided, in particular where the insurer conducts business in that State only occasionally.

Case 205/84 Commission v Germany [1986] ECR 3755 §28

In those circumstances the requirement imposed by the Danish legislation that the leading insurer must *have a permanent establishment in the State in which the service is provided*, which requirement is the sole subject of the first head of claim, cannot be justified in respect of an insurance undertaking which is established and authorized in another Member State and which wishes to conduct its business as a leading insurer pursuant to Directive 78/473 solely in the context of the provision of services. *Such a requirement is contrary to Articles 59 and 60 of the Treaty.*

Case 252/83 Commission v Denmark [1986] ECR 3713 §22

It should be noted that the result of that interpretation of Directive 71/305 is in conformity with the scheme of the Treaty provisions concerning the provision of services. To make the provision of services in one Member State by a contractor established in another Member State conditional upon the possession of an establishment permit in the first State *would be to deprive Article 59 of the Treaty of all effectiveness*, the purpose of that article being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

Accordingly, the reply to the first question must be that Council Directive 71/305 must be interpreted as precluding a Member State from requiring a tenderer established in another Member State to furnish proof *by any means, for example by an establishment permit*, other than those prescribed in Articles 23 to 26 of that directive, that he satisfies the criteria laid down in those provisions and relating to his good standing and qualifications.

Case 76/81 Transporoute [1982] ECR 417 §14, 15

### 3.2.2 Requirement of residence or domicile

Accordingly, the Luxembourg legislation making the supply of services by patent agents subject to a *requirement to elect domicile with an approved agent*, as it stood when the period prescribed by the reasoned opinion expired is *incompatible with Article 49 EC*, as the Grand Duchy of Luxembourg has itself acknowledged.

Case C-478/01 Commission v Luxembourg [2003] ECR I-2351 §19

The Court has repeatedly held that *the right of establishment enshrined in Article 52 of the Treaty entails the right to set up and maintain, subject to observance of the rules of professional practice, more than one place of work within the Community* (see, to that effect, Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19, Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 20 to 22 and 28, and Case C-162/99 *Commission v Italy* [2001] ECR I-541, paragraph 20).

*The residence obligation complained of by the Commission is therefore incompatible with Article 52 of the Treaty, inasmuch as it prevents members of the Bar established in Member States other than the Italian Republic from maintaining an establishment in Italy.*

Case C-145/99 Commission v Italy [2002] ECR I-2235 §27, 28

While the restriction of the number of moorings which may be allocated to non-resident boat-owners is not based on their nationality, and so may not be regarded as direct discrimination, it does, however, use as the distinguishing criterion their place of residence.

*It is settled case-law that national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreigners* (see Case C-350/96 *Clean Car Autoservice v Landeshauptmann von Wien* [1998] ECR I-2521, paragraph 29).

Case C-224/97 Ciola [1999] ECR I-2517 §14

*The rule according to which directors and managers of all security undertakings must reside in Spain constitutes an obstacle to freedom of establishment* (see, in this regard, Case C-221/89 *Factortame* [1991] ECR I-3905, paragraph 32) and to the freedom to provide services.

Case C-114/97 Commission v Spain [1998] ECR I-6717 §44

As for *the requirement for the owners, charterers, managers and operators of the vessel and, in the case of a company, the shareholders and directors to be resident and domiciled in the Member State in which the vessel is to be registered*, it must be held that such a requirement, which is not justified by the rights and obligations created by the grant of a national flag to a vessel, *results in discrimination on grounds of nationality*. The great majority of nationals of the Member State in question are resident and domiciled in that State and therefore meet that requirement automatically, whereas nationals of other Member States would, in most cases, have to move their residence and domicile to that State in order to comply with the requirements of its legislation. It follows that such a requirement is contrary to Article 52.

Case C-221/89 Factortame Ltd [1991] ECR I-3905 §32

By prohibiting "any discrimination on grounds of nationality" Article 7 of the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State. In so far as this principle is *applicable it therefore precludes a Member State from making the grant of a right to such a person subject to the condition that he reside on the territory of that State - that condition is not imposed on the State's own nationals*.

Case 186/87 Cowan [1989] ECR 195 §10

On these grounds it must be concluded that the provisions of the EEC Treaty, in particular Articles 59, 60 and 65, must be interpreted as meaning that national legislation may not, by means of a *requirement of residence in the territory, make it impossible for persons residing in another Member State* to provide services when less restrictive measures enable the professional rules to which provision of the service is subject in that territory to be complied with.

Case 39/75 Coenen [1975] ECR 1547 §12

In particular, *a requirement that the person providing the service must be habitually resident within the territory of the State where the service is to be provided may, according to the circumstances, have the result of depriving Article 59* of all useful effect, in view of the fact that the precise object of that Article is to abolish restrictions on freedom to provide services imposed on persons who are not established in the State where the service is to be

provided.

Case 33/74 Van Binsbergen [1974] ECR 1299 §11

That cannot, however, be the case when the provision of certain services in a Member State is not subject to any sort of qualification or professional regulation and *when the requirement of habitual residence is fixed by reference to the territory of the State in question.*

Case 33/74 Van Binsbergen [1974] ECR 1299 §15

### **3.3 PROFESSIONAL QUALIFICATIONS REQUIREMENTS**

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#### **3.3.1 Diplomas**

As the Court has previously held, *the content of the education and training required by a Member State which regulates a profession is a criterion which is especially relevant in order to establish the requirements connected to the practice thereof* (Case C-149/05 *Price* [2006] ECR I-7691, paragraph 55). *Consequently, a profession which is open to persons who have not received significant education and training in law cannot be considered to be one 'whose practice requires precise knowledge of national law'.*

Case C-197/06 Van Leuken [2008] ECR I-2627 §38

The answer to the first question must therefore be that Article 31(1) (a) of Directive 93/16 *does not make access to specific training in general medical practice subject to the condition that a basic diploma referred to in Article 3 must first be obtained.*

Case C-93/97 Fédération Belge des Chambres Syndicales de Médecins ASBL [1998] ECR I-4837 §29

The mere fact that *tourist guides from another Member State* do not need such a licence when they accompany a group of tourists to Greece *does not mean that they cannot have an interest in acquiring the said diploma, in order to secure a higher qualification*, and thus obtaining the licence to pursue the profession in that State. In those circumstances, the rules in question apply to them.

Case C-398/95 SETTG [1997] ECR I-3091 §12

In that respect, it should be recalled that the Court has consistently held that a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must *take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State, by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.*

Case C-375/92 Commission v Spain [1994] ECR I-923 §12

In the absence of harmonization of the conditions of access to a particular profession, *the Member States are entitled to specify the knowledge and qualifications needed in order to pursue it and to require the production of a diploma certifying that the holder has the relevant knowledge and qualifications* (see the judgment in Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, paragraph 10, and in Case C-340/89 *Vlassopoulou v Ministerium fuer Justiz, Bundes-und Europaangelegenheiten Baden-Wuerttemberg* [1991] ECR I-2357, paragraph 9).

Case C-104/91 Colegio Oficial de Agentes [1992] ECR I-3003 §7

Consequently, a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must *take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules* (see the judgment in *Vlassopoulou*, cited above, paragraph 16).

That examination procedure must enable the authorities of the host Member State to *assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma*. That assessment of the equivalence of the foreign diploma must be effected exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates (see the judgment in *UNECTEF v Heylens*, cited above, paragraph 13).

In the course of that examination, a Member State may, however, take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity. In the case of the profession of estate agent, a Member State may therefore carry out *a comparative examination of diplomas*, taking account of the differences identified between the national legal systems concerned (see the judgment in *Vlassopoulou*, cited above, paragraph 18).

If that comparative examination of diplomas results in the finding that the knowledge and qualifications certified by the foreign diploma correspond to those required by the national provisions, *the Member State must recognize that diploma as fulfilling the requirements laid down by those provisions*. If, on the other hand, the comparison reveals that the knowledge and qualifications certified by the foreign diploma and those required by the national provisions correspond only partially, the host Member State is entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking (see the judgment in *Vlassopoulou*, cited above, paragraph 19).

In those circumstances, the answer to the second question referred by the Juzgado de Instrucción No 20 of Madrid, as recast, must be that Articles 52 and 57 of the Treaty are to be interpreted as meaning that:

- in the absence of a directive on the mutual recognition of diplomas, certificates or other evidence of formal qualifications relating to the profession of estate agent, the authorities

of a Member State, in response to a request for permission to practice that profession from a national of another Member State who holds a diploma or qualification relating to the pursuit of that profession in his State of origin, must assess the extent to which the knowledge and skills certified by the diplomas or professional qualifications obtained by the person concerned in his State of origin correspond to those required by the rules of the host State;

- where there is only partial equivalence between the diplomas or qualifications, the authorities of the host State are entitled to require the person concerned to show that he has acquired the knowledge and skills which are lacking by requiring him to pass an examination if necessary;
- the decision to deny a national of another Member State recognition or equivalent treatment of the diploma or professional qualification awarded to him by the Member State of which he is a national must be capable of being made the subject of judicial proceedings in which its legality under Community law can be reviewed and the person concerned must be able to ascertain the reasons for the decision taken.

Case C-104/91 Colegio Oficial de Agentes [1992] ECR I-3003 §11,12,13, 14, 16

That is true in particular where the fact that a national of a Member State has obtained in another Member State a diploma whose scope and value are not recognized by any Community provision might place his Member State of origin under an obligation to allow him to exercise the activities covered by that diploma within its territory even though access to those activities is restricted there to the holders of a higher qualification which enjoys *mutual recognition* at Community level and there is nothing to indicate that the restriction is arbitrary.

Case C-61/89 Bouchoucha [1990] ECR I-3551 §15

### 3.3.2 Other professional qualifications

Consequently, *in so far as national legislation which constitutes a restriction on the freedom to provide services does not establish mechanisms to ensure effective judicial scrutiny of the taking into account at their proper value of the qualifications of a court expert translator recognised by courts in other Member States*, that legislation does not comply with the requirements of EU law.

The answer to the third question in Case C-372/09 is, therefore, that Article 49 EC (now Article 56 TFEU) precludes national legislation, such as that at issue in the main proceedings, under which *enrolment in a register of court expert translators is subject to conditions concerning qualifications, but the interested parties cannot obtain knowledge of the reasons for the decision taken in their regard and that decision is not open to effective judicial scrutiny enabling its legality to be reviewed*, inter alia, as regards its compliance with the requirement under EU law that the qualifications obtained and recognised in other Member States must have been properly taken into account.

Joined Cases C-372/09 and C-373/09 Peñarroja [2011] ECR I-1785 §64, 65

It should next be stated that national legislation which makes the provision of certain services on the national territory by an undertaking established in another Member State subject to the issue of *an administrative licence for which the possession of certain professional qualifications is required constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty*. By reserving the provision of services in respect of the monitoring of patents to certain economic operators possessing certain professional qualifications, national legislation prevents an undertaking established abroad from providing services to the holders of patents in the national territory and also prevents those holders from freely choosing the manner in which their patents are to be monitored.

Case C-76/90 Säger [1991] ECR I-4221 §14

The requirement imposed by the abovementioned provisions of Greek legislation amounts to such a restriction. By making the provision of services by tourist guides accompanying a group of tourists from another Member State subject *to possession of a specific qualification*, that legislation *prevents* both tour companies from providing that service with their own staff and self-employed tourist guides from offering their services to those companies for organized tours. It also *prevents* tourists taking part in such organized tours from availing themselves at will of the services in question.

Case C-198/89 Commission v Greece [1991] ECR I-727 §17

Case C-180/89 Commission v Italy [1991] ECR I-709 §16

Case C-154/89 Commission v France 1991 I-659 §13

However, as has been rightly pointed out by the French Government, the SNMOF and the SNMSRRF, the diploma from the European School of Osteopathy held by Mr Bouchoucha does not at present enjoy any mutual recognition within the Community. *It cannot therefore be regarded as a professional qualification recognized by the provisions of Community law*.

Furthermore, according to Knoors, *supra*, it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting to evade the application of their national legislation as regards vocational training (paragraph 25).

Case C-61/89 Bouchoucha [1990] ECR I-3551 §14

### 3.3.3 Registration with professional bodies

In that respect, *the requirement imposed on an undertaking established in one Member State which wishes, as a provider of a service, to carry on a skilled trade activity in another Member State to be entered on the latter's trades register constitutes a restriction within the meaning of Article 59 of the Treaty*.

*Even if the requirement of entry on that Register, entailing compulsory membership of the Chamber of Skilled Trades for the undertakings concerned and therefore payment of the related subscription, could be justified in the case of establishment in the host Member State, which is*

not the situation in the main proceedings, *the same is not true for undertakings which intend to provide services in the host Member State only on an occasional basis, indeed perhaps only once.*

Case C-58/98 Corsten [2000] ECR I-7919 §34, 45

It must accordingly be held that, *by making the provision of cleansing, disinfection, disinfestation, rodent-control and sanitation services by operators established in other Member States subject to registration in the registers referred to in Article 1 of Law No 82/94, in accordance with Articles 1 and 6 of that Law, the Italian Republic has failed to fulfil its obligations under Article 59 of the Treaty.*

Case C-358/98 Commission v Italy [2000] ECR I-1255 §18

Those considerations show that *the prohibition on the enrolment in a register of the Ordre* in France of any doctor or dental surgeon who is still enrolled or registered in another Member State is too absolute and general in nature to be justified by the need to ensure continuity of medical treatment or of applying French rules of medical ethics in France.

The Commission is therefore correct to argue that the French legislation *prohibiting* any doctor or dentist established in another Member State from practising in France *as a locum, as a principal in a practice or as an employee* is contrary to the provisions of the Treaty on freedom of movement for persons.

Case 96/85 Commission v France [1986] ECR 1475 §14, 15

With regard to the specific question raised by the Italian Government as to whether the person affected may be so entitled *even if he has not been enrolled on the relevant professional register*, it should be stated that the conformity of such a requirement with Community law depends upon whether the fundamental principles of Community law and in particular the principle of non-discrimination are observed.

As the Court made clear in the aforementioned judgment, enrolment on a professional register cannot be refused on grounds which fail to take into account the validity of a professional qualification obtained in another Member State in so far as such a qualification is one which all the Member States and their professional organizations, acting as bodies entrusted with a public duty, are required to recognize under Community law. Thus legislation which provides for the bringing of criminal or administrative proceedings against a veterinary surgeon practising his profession without having been enrolled on the professional register, to the extent to which such enrolment has been refused in breach of Community law, is incompatible with Community law in so far as its result is to deprive of any effectiveness the provisions of the Treaty and of Directive 78/1026, the second recital in the preamble to which states that it is to facilitate the 'effective' exercise of the right of establishment and freedom to provide services in respect of the activities of veterinary surgeons.

The reply to the first question referred to the Court by the Pretore di Lodi must therefore be that a Member State *may not enforce a penal measure* in respect of the improper practice of the profession of veterinary surgeon against a national of another Member State, who is entitled to



practise as a veterinary surgeon in his own country, on the ground that he is not enrolled on the register of veterinary surgeons of the first Member State, where such enrolment is refused in breach of Community law.

Case 5/83 Rienks [1983] ECR 4233 §9, 10, 11

### 3.3.4 General system of mutual recognition of diplomas

It must be observed, first, that the Directive, which is based on Articles 49, 57(1) and 66 of the Treaty, *aims to facilitate freedom of movement of persons and services by allowing nationals of the Member States to pursue a profession, on a self-employed or employed basis, in a Member State other than that in which they have obtained their professional qualifications.*

Joined cases C-225/95, C-226/95 and C-227/95 Kapasakalis [1998] ECR I-4239 §18

However, as has been rightly pointed out by the French Government, the SNMOF and the SNMSRRF, the diploma from the European School of Osteopathy held by Mr Bouchoucha *does not at present enjoy any mutual recognition* within the Community. *It cannot therefore be regarded as a professional qualification recognized by the provisions of Community law.* Furthermore, according to Knors, *supra*, it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting to evade the application of their national legislation as regards vocational training (paragraph 25).

That is true in particular where the fact that a national of a Member State has obtained in another Member State a diploma whose scope and value are not recognized by any Community provision might place his Member State of origin under an obligation to allow him to exercise the activities covered by that diploma within its territory even though access to those activities is restricted there to the holders of a higher qualification which enjoys *mutual recognition* at Community level and there is nothing to indicate that the restriction is arbitrary.

Case C-61/89 Bouchoucha [1990] ECR I-3551 §14, 15

### 3.3.5 Obligation to provide the original diploma

The Commission considers that *the obligation to produce the original diploma or a certified copy* imposes additional costs on architects applying for recognition of their qualifications and thus creates an *obstacle to freedom to provide services and to freedom of establishment.* The objective pursued by the Italian authorities could be achieved by less restrictive measures, such as an obligation to provide a certified statement or a photocopy of the diploma.

However, the requirement in Article 4(2)(a) of Decree No 129/92 specifying that the only acceptable evidence is the original of the diploma or a certified copy is clearly disproportionate to the objective pursued, in that *it precludes any other form of evidence which might establish with the same degree of certainty the existence of the diploma in question*, such as a certified

statement or recognition of the applicant's diploma by the authorities or professional organisations of the Member State of origin.

Case C-298/99 Commission v Italy [2002] ECR I-3129 §34, 39

### 3.4 LICENCES, APPROVALS, AUTHORISATIONS (AND RELATED FEES)

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It follows that, in this particular context, *the reorganisation of the licensing system through the alignment of licence expiry dates may, by providing for a shorter period of validity for the new licences than that for the licences awarded previously, contribute to a coherent pursuit of the legitimate objectives of reducing gambling opportunities or combating criminality linked to betting and gambling and may also satisfy the proportionality requirements.*

C-463/13 Stanlev International Betting and Stanlevbet [2015] not published yet §53

In order to rule on the merits of the Commission's action, it is necessary, firstly, to ascertain whether the provisions at issue constitute an obstacle to the freedom to supply services, it having been specified that *that action concerned only the prior declaration required of self-employed service providers lawfully established in a Member State other than the Kingdom of Belgium and wishing to supply services in Belgium on a temporary basis*, excluding cases of posting of workers carried out in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1996 L 18, p. 1).

In the present case, it must be noted that the declaration requirement at issue means, for the persons referred to in Articles 137(8) and 138, third indent, of the Programme Law who reside or are established in a Member State other than the Kingdom of Belgium to register by creating an account before, in principle and in accordance with Article 153 of the Programme Law, then providing the Belgian authorities, before each supply of services on Belgian territory, with a certain amount of information such as *the date, duration and place of the service which will be supplied, its nature and the identity of the legal or natural person receiving it*. That information must be provided *on a form which must preferably be completed online or, if that is impossible, which must be sent to the competent service by post or by fax*. Failure to comply with those formalities is subject to criminal penalties laid down in Article 157(3) of the Programme Law.

*The formalities implied by the declaration requirement at issue are thus such as to impede the supply of services on the territory of the kingdom of Belgium by self-employed service providers established in another Member State. That obligation thus constitutes an obstacle to the freedom to provide services.*

Accordingly, it is appropriate, secondly, to ascertain whether the declaration requirement at issue could be justified, taking into consideration the fact that matters relating to the cross-border supply of services by *self-employed workers, which is the subject-matter of the present action, have not, to date, been harmonised at European Union level.*

Where national legislation falling within an area which has not been harmonised at European Union level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets an overriding requirement in the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (Arblade and Others, paragraphs 34 and 35; Case C-224/04 Commission v Germany [2006] ECR I-885, paragraph 31; and Case C-219/08 Commission v Belgium [2009] ECR I-9213, paragraph 14).

In that regard, it is appropriate to note that the objectives relied on in the present case by the Kingdom of Belgium can be taken into consideration as overriding requirements in the public interest which are capable of justifying a restriction on the freedom to provide services. On that point, it is sufficient to state that *the objective of combating fraud, particularly social security fraud, and preventing abuse, in particular detecting ‘bogus self-employed persons’ and combating undeclared work, can form part not only of the objective of the financial balance of social security systems, but also of the objectives of preventing unfair competition and social dumping and protecting workers, including self-employed service providers.*

The Court has previously held that, as regards the ability of the authorities of the Member State in whose territory services are supplied to check that the rules intended to ensure that the rights conferred by national law on workers in its territory are followed, *there are, clearly, objective differences between businesses established in the Member State where the services are supplied and those established in other Member States posting workers to the first Member State to supply services there* (see, to that effect, Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 Finalarte and Others [2001] ECR I-7831, paragraphs 63, 64 and 73). The fact that self-employed service providers established in Belgium are not subject to strictly equivalent requirements, in particular as regards the information to be provided, to those following from the declaration requirement at issue for self-employed service providers established in another Member State may thus be attributed to *objective differences between those two categories of self-employed service providers.*

That being so, it must be borne in mind that *a general presumption of fraud is not sufficient to justify a measure which compromises the objectives of the FEU Treaty* (see, to that effect, Commission v France, paragraph 52, and Case C-433/04 Commission v Belgium [2006] ECR I-10653, paragraph 35).

In the present case, even if it were accepted that self-employed service providers established in a Member State other than the Kingdom of Belgium could be subject, in the latter State, to tax and social security obligations, it is established that the application of the declaration requirement at issue is not restricted to cases where there is cause to ascertain that those tax and social security obligations are met.

In the present case, it is clear that *a national rule excluding, in all cases, payment for hospital treatment given in another Member State without prior authorisation deprives the insured person who, for reasons relating to his state of health or to the need to receive urgent treatment in a hospital, was prevented from applying for such authorisation or was not able, like Mr Elchinov, to wait for the answer of the competent institution, of reimbursement from that institution in respect of such treatment, even though all other conditions for such reimbursement to be made are met.*

In the light of all the foregoing, the answer to the fifth question is that Articles 49 EC and 22 of Regulation No 1408/71 preclude legislation of a Member State which is interpreted as excluding, in all cases, reimbursement in respect of hospital treatment given in another Member State without prior authorisation.

**Case C-173/09 Elchinov [2010] ECR I-8889 §45, 51**

In the circumstances of the case, *the prior authorisation* to which the national legislation makes subject responsibility for payment by the competent institution, in accordance with the rules governing cover in force in the Member State to which it belongs, for *treatment planned in another Member State and involving the use of major medical equipment outside hospital infrastructures* is capable of deterring, or even preventing, persons insured under the French system from applying to providers of medical services established in such another Member State in order to obtain the treatment in question. It constitutes, therefore, for both the insured persons and the providers of those services, *a restriction of the freedom to provide services* (see, to that effect, *Müller-Fauré and van Riet*, paragraphs 44 and 103, and *Watts*, paragraph 98).

**Case C-512/08 Commission v France [2010] ECR I-8833 §32**

Having regard to all the foregoing, the answer to the first question is that, on a proper interpretation of *Article 49 EC*, *an operator wishing to offer via the internet bets on sporting competitions in a Member State other than the one in which it is established does not cease to fall within the scope* of the said provision solely because that operator *does not have an authorisation permitting it to offer such bets to persons within the territory of the Member State in which it is established, but holds only an authorisation to offer those services to persons located outside that territory.*

**Case C-46/08 Carmen Media Group Ltd [2010] ECR I-8149 §52**

In that respect, it is clear from the case-law of the Court *that a licensing system which restricts the number of operators in the national territory is capable of being justified by general-interest objectives* (see, to that effect, *Placanica and Others*, paragraph 53), *on condition that the restrictions resulting from them are appropriate and do not go beyond what is necessary to attain those objectives.*

**Case C-380/05 Centro Europa 7 [2008] ECR I-349 §100**

According to settled case-law, national legislation which makes the provision of certain services on national territory, by an undertaking established in another Member State, *subject to the issue of an administrative authorisation* constitutes a restriction on the freedom to provide services

within the meaning of Article 49 EC (see, inter alia, Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 15; *Commission v Belgium*, paragraph 35; Case C-189/03 *Commission v Netherlands* [2004] ECR I-9289, paragraph 17; and Case C-134/05 *Commission v Italy* [2007] ECR I-0000, paragraph 23).

In addition, *the limitation of the territorial scope of the authorisation*, which *obliges* the service provider, under Article 136 of the Consolidated Law, *to request authorisation in each of the provinces where it intends to operate* (bearing in mind that Italy is divided into 103 provinces) further complicates the exercise of the freedom to provide services (see, to that effect, Case C-298/99 *Commission v Italy* [2002] ECR I-3129, paragraph 64).

The Court has already held that the requirement that members of the staff of a private security undertaking must obtain *a fresh specific authorisation* in the host Member State constitutes an unjustified restriction on that undertaking's freedom to provide services within the meaning of Article 49 EC, in so far as it does not take account of the controls and verifications already carried out in the Member State of origin (*Commission v Portugal*, paragraph 66; *Commission v Netherlands*, paragraph 30; and Case C-514/03 *Commission v Spain*, paragraph 55).

**Case C-465/05 Commission v Italy [2007] ECR I-11091 §58, 59, 93**

It must be stated, first of all, that it is clear from settled case-law that national legislation which makes the provision of services on national territory by an undertaking established in another Member State *subject to the issue of an administrative authorisation constitutes a restriction on the freedom to provide services* within the terms of Article 49 EC (see, inter alia, Case C-189/03 *Commission v Netherlands* [2004] ECR I-9289, paragraph 17, and Case C-168/04 *Commission v Austria* [2006] ECR I-9041, paragraph 40).

Even though those rules apply in exactly the same way to operators established in one Italian province which wish to extend their activities to other provinces and to operators from other Member States which wish to pursue their activities in several Italian provinces, they nonetheless constitute, for any operator not established in Italy, a serious obstacle to the pursuit of its activities in that Member State and one which affects its access to the market.

Inasmuch *as those rules require an operator from another Member State wishing to pursue its activities in several Italian provinces not to confine itself to one single establishment in Italian territory, but on the contrary require it to have premises in each of those provinces unless authority is conferred on an authorised agent, they place that operator at a disadvantage as compared with Italian operators* established in Italy which already have premises in at least one of those provinces and generally have better opportunities than foreign operators to establish contacts with authorised operators in other provinces in order to issue, where necessary, powers of agency (see, to that effect, Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 12 and 13).

With regard to the grounds put forward by the Italian Republic in justification of that obstacle to the freedoms guaranteed by Articles 43 EC and 49 EC, it must be stated first of all that neither the territorial limitation of the licence nor the obligation to have premises in the province for which

the licence has been granted can a priori be considered to be inappropriate for attaining the objective of effective supervision of the activities concerned which is assigned to them.

However, as the Commission points out, those rules go beyond what is necessary to attain that objective in so far as it may be achieved by less restrictive means.

Case C-134/05 Commission v Italy [2007] ECR I-6251 §23, 57, 58, 59, 60

In the light of the above, the answer to the first question referred must be that national rules whereby a Member State *makes the granting of credit on a commercial basis*, on national territory, by a company established in a non-member country *subject to prior authorisation*, and which provide that such authorisation must be refused, in particular, if that company does not have its central administration or a branch in that territory, *affect primarily the exercise of the freedom to provide services within the meaning of Article 49 EC* et seq. A company established in a non-member country cannot rely on those provisions.

Case C-452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht [2006] ECR I-9521 §50

Secondly, as regards making the issue of the EU Posting Confirmation subject to *the requirement that there must be an employment contract of at least one year or of indefinite duration*, such a measure *goes beyond* what is required for the objective of social protection as a necessary condition for providing services through the posting of workers who are nationals of non-Member States (*Commission v Luxembourg*, paragraphs 32 and 33, and *Commission v Germany*, paragraph 58).

In addition, the Austrian Government cannot rely on the formula used by the Court in paragraph 26 of the judgment in *Vander Elst* to argue that such a requirement enables verification to be made that a posted worker who is a national of a non-Member State has lawful and habitual employment in his employer's Member State of establishment. It must be observed that the Court did not couple the concept of *'lawful and habitual employment' with a requirement of residence or employment for a certain period* in the State of establishment of the service provider (*Commission v Germany*, paragraph 55).

It follows from those considerations that, on the one hand, by making the posting of workers who are nationals of non-Member States by an undertaking established in another Member State subject to *obtaining the 'EU Posting Confirmation'* provided for in Paragraph 18(12) to (16) of the AuslBG, the issue of which requires, first, that the workers concerned must have been employed *for at least one year by that undertaking* or must have concluded *an employment contract of indefinite duration* with it and, secondly, *evidence that the Austrian employment and wage conditions are complied with*, and, on the other hand, by laying down in Paragraph 10(1)(3) of the FrG a ground for the automatic refusal of an entry and residence permit, without exception, which does not allow the situation of workers from a non-Member State, lawfully posted by an undertaking established in another Member State, to be regularised when those workers have entered the national territory without a visa, the Republic of Austria has failed to fulfil its obligations under Article 49 EC.

Case C-168/04 Commission v Austria [2006] ECR I-9041 §50, 51, 68

In that regard, it is sufficient to find that, [...], *national legislation which makes the grant of a licence to pursue an activity such as the engagement of performing artists subject to the need to engage performing artists constitutes a restriction in that it tends to limit the number of suppliers of services. The French Government has not given any reason whatsoever that could justify that restriction.*

Case C-255/04 Commission v France [2006] ECR I-5251 §29

It must therefore be found that *the system of prior authorisation* referred to in paragraph 95 of the present judgment deters, or even *prevents, the patients concerned from applying to providers of hospital services established in another Member State and constitutes, both for those patients and for service providers, an obstacle to the freedom to provide services* (see to that effect *Smits and Peerbooms*, paragraph 69, and *Müller-Fauré and van Riet*, paragraph 44). *It is settled case-law that a system of prior authorisation cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings* (see *Smits and Peerbooms*, paragraph 90, and *Müller-Fauré and van Riet*, paragraph 84, and the case-law cited in those paragraphs).

Thus, in order for *a system of prior authorisation* to be justified even though it derogates from a fundamental freedom of that kind, it *must* in any event *be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion*, so that it is not used arbitrarily. *Such a system must furthermore be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings* (*Smits and Peerbooms*, paragraph 90, and *Müller-Fauré and van Riet*, paragraph 85).

To that end, *refusals to grant authorisation*, or the advice on which such refusals may be based, *must refer to the specific provisions* on which they are based and be properly reasoned in accordance with them. Likewise, courts or tribunals hearing actions against such refusals must be able, if they consider it necessary for the purpose of carrying out the review which it is incumbent on them to make, to seek the advice of wholly objective and impartial independent experts (see to that effect *Inizan*, paragraph 49).

It follows that, where the delay arising from such waiting lists appears to exceed in the individual case concerned an acceptable period having regard to an objective medical assessment of all the circumstances of the situation and the clinical needs of the person concerned, *the competent institution may not refuse the authorisation sought on the grounds of the existence of those waiting lists, an alleged distortion of the normal order of priorities* linked to the relative urgency of the cases to be treated, the fact that *the hospital treatment* provided under the national system in question is *free of charge*, the duty to make available specific *funds* to reimburse the cost of treatment provided in another Member State and/or *a comparison between the cost* of that treatment and that of equivalent treatment in the competent Member State.

It should be noted in that connection that the Court has already held that *the fact* that the legislation of the competent Member State *does not guarantee a patient* covered by that legislation, *who has been authorised to receive hospital treatment in another Member State* in accordance with Article 22(1)(c) of Regulation No 1408/71, *a level of payment equivalent* to that to which he would have been entitled if he had received hospital treatment in the competent Member State *is an unjustified restriction of the freedom to provide services within the meaning of Article 49 EC* (see *Vanbraekel*, paragraphs 43 to 52).

Case C-372/04 Watts [2006] I-4325 §98, 115, 116, 117, 120, 129

It has already been held, with respect to the deployment of workers who are nationals of non-member States by a service-providing undertaking established in the Community, *that national legislation which makes the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative visa constitutes a restriction on the freedom to provide services* within the meaning of Article 49 EC (see *Vander Elst*, paragraph 15, and *Commission v Luxembourg*, paragraph 24).

Consequently, it must be held that, *by not confining itself to making the posting of workers who are nationals of non-member States for the purpose of the provision of services in Germany subject to a simple prior declaration by the undertaking* established in another Member State which intends to post such workers, and *by requiring that they have been employed for at least a year by that undertaking*, the Federal Republic of Germany has *failed to fulfil its obligations under Article 49 EC*.

Case C-244/04 Commission v Germany [2006] ECR I-885 §34, 64

In view of all the foregoing considerations, the answer to the first question must be that:

- Articles 49 EC and 50 EC are to be interpreted as meaning that they *preclude* rules of a Member State, such as those at issue in the main proceedings, under which *reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is conditional on obtaining prior recognition of eligibility*, which is given only where it is established, in a report drawn up by a medical officer or a medical consultant, that the proposed cure is *absolutely necessary* owing to the greatly increased prospects of success in that other Member State.
- Articles 49 EC and 50 EC are to be interpreted as meaning that they do not in principle preclude rules of a Member State, such as those at issue in the main proceedings, under which *reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure, whether taken in that Member State or in another Member State, is made only where the health spa concerned is listed in the Register of Health Spas*. However, it is for the national court to ensure that any conditions to which the registration of a health spa in such a register may be subject are objective and do not have the effect of making the provision of



services between Member States more difficult than the provision of services purely within the Member State concerned.

Case C-8/02 Leichtle [2004] ECR I-2641 §51

Second, as has already been made clear in paragraph 39 above, a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system providing benefits in kind. The Court has, in particular, held that a medical service provided in one Member State and paid for by the patient cannot cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation which is essentially of the type which provides for benefits in kind (*Smits and Peerbooms*, paragraph 55). ***The requirement for prior authorisation where a person is subsequently to be reimbursed for the costs of that treatment is precisely what constitutes, as has already been stated in paragraph 44 above, the barrier to freedom to provide services, that is to say, to a patient's ability to go to the medical service provider of his choice in a Member State other than that of affiliation. There is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly.***

In the light of all the foregoing considerations, the answer to the questions must be that:

- ***Articles 59 and 60 of the Treaty*** must be interpreted as ***not precluding legislation*** of a Member State, such as that at issue in the main proceedings, which (i) ***makes the assumption of the costs of hospital care provided in a Member State other than that in which the insured person's sickness fund is established, by a provider with which that fund has not concluded an agreement, conditional upon prior authorisation by the fund*** and (ii) ***makes the grant of that authorisation subject to the condition that such action is necessary for the insured person's health care.*** However, ***authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in an establishment which has concluded an agreement with the fund;***
- by contrast, ***Articles 59 and 60 of the Treaty do preclude the same legislation*** in so far as ***it makes the assumption of the costs of non-hospital care provided in another Member State*** by a person or establishment with whom or which the insured person's sickness fund has not concluded an agreement conditional upon prior authorisation by the fund, even when the ***national legislation concerned sets up a system of benefits in kind under which insured persons are entitled not to reimbursement of costs incurred for medical treatment, but to the treatment itself which is provided free of charge.***

Case C-385/99 Müller-Fauré and van Riet [2003] ECR I-4509 §103, 109

While the national rules at issue in the main proceedings do not deprive insured persons of the possibility of approaching a provider of services established in another Member State, ***they do nevertheless make reimbursement of the costs incurred in that Member State subject to prior***

*authorisation, and deny such reimbursement to insured persons who have not obtained that authorisation. Costs incurred in the State of insurance are not, however, subject to that authorisation.*

Case C-158/96 Kohll [1998] ECR I-1931 §34

Subject to the national court's determination of this issue, it must be noted that, as the Court has already pointed out, *if the requirement of an authorization constitutes a restriction on the freedom to provide services*, the requirement of a permanent establishment is the very negation of that freedom. It has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided. If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued (see *Commission v Germany*, cited above, paragraph 52, and Case C-101/94 *Commission v Italy* [1996] ECR I-2691, paragraph 31).

Case C-222/95 Parodi [1997] ECR I-3899 §31

In France the requirement that undertakings should obtain work permits in order to employ nationals of non-member countries is coupled with the obligation to pay a fee which, like the heavy administrative fine imposed for non-compliance with that obligation, *may entail a considerable financial burden for employers.*

Similarly, the Court has already held that national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue *of an administrative licence constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty* (see the judgment in Saeger, paragraph 14). Furthermore, it is apparent from the judgment in Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral v Etablissement d' Assurance contre la Vieillesse et l' Invalidité* [1982] ECR 223 that legislation of a Member State which requires undertakings established in another Member State to pay fees in order to be able to employ in its own territory workers in respect of whom they are already liable for the same periods of employment to pay similar fees in the State in which they are established *proves financially to be more onerous for those employers, who in fact have to bear a heavier burden than those established within the national territory.*

Case C-43/93 Vander Elst [1994] ECR I-3803 §12, 15

In that respect, it should be recalled that the Court has consistently held that a Member State which receives a request *to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification* must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State, by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.

Case C-375/92 Commission v Spain [1994] ECR I-923 §12

It should next be stated that *national legislation which makes the provision of certain services on the national territory by an undertaking established in another Member State subject to the issue of an administrative licence for which the possession of certain professional qualifications is required constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty.*

By reserving the provision of services in respect of the monitoring of patents to certain economic operators possessing certain professional qualifications, *national legislation prevents an undertaking established abroad from providing services* to the holders of patents in the national territory and also prevents those holders from freely choosing the manner in which their patents are to be monitored.

Case C-76/90 Säger [1991] ECR I-4221 § 14

The general interest in the proper appreciation of the artistic and archaeological heritage of a country and in consumer protection can constitute an overriding reason justifying a restriction on the freedom to provide services. However, the requirement in question contained in the Greek legislation goes beyond what is necessary to ensure the safeguarding of that interest *inasmuch as it makes the activities* of a tourist guide accompanying groups of tourists from another Member State *subject to possession of a licence.*

Case C-198/89 Commission v Greece [1991] ECR I-727 §21

Case C-154/89 Commission v France [1991] ECR I-659 §17

In those circumstances *a licence requirement imposed by the Member State of destination* has the effect of reducing the number of tourist guides qualified to accompany tourists in a closed group, which may lead a tour operator to have recourse instead to local guides employed or established in the Member State in which the service is to be performed. However, that consequence may have the drawback that tourists who are the recipients of the services in question do not have a guide who is familiar with their language, their interests and their specific expectations.

Case C-198/89 Commission v Greece [1991] ECR I-727 §23

Case C-180/89 Commission v Italy [1991] ECR I-709 §22

Case C-154/89 Commission v France [1991] ECR I-659 §19

In that respect it should be noted that in all the Member States the supervision of insurance undertakings *is organized in the form of an authorization procedure* and that the necessity of such a procedure is *recognized in the two first* coordination *directives* as regards the activities to which they refer. In each of those directives Article 6 thereof provides that each Member State must make *the taking-up of the business* of insurance in its territory subject to an *official authorization*. An undertaking which sets up branches and agencies in Member States other than that in which its head office is situated must therefore obtain an authorization from the supervisory authority of each of those States.

In those circumstances the German Government's argument to the effect that only the requirement of *an authorization can provide an effective means of ensuring the supervision* which, having

regard to the foregoing considerations, is justified on grounds relating to the protection of the consumer both as a policy-holder and as an insured person, must be accepted.

It should however be emphasized that *the authorization must be granted* on request to any undertaking established in another Member State which meets the conditions laid down by the legislation of the State in which the service is provided, that those conditions may *not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established* and that the supervisory authority of *the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment*. According to the German Government, which has not been contradicted on that point by the Commission, the German authorization procedure conforms fully to those requirements.

It follows from the foregoing that *the requirement of authorization may be maintained only in so far as it is justified on the grounds relating to the protection of policy-holders and insured persons* relied upon by the German Government. It must also be recognized that those grounds are not equally important in every sector of insurance and that there may be cases where, because of the nature of the risk insured and of the party seeking insurance, *there is no need* to protect the latter by the application of the mandatory rules of his national law.

That has not been shown to be the case. As has been stated above, Community law on insurance does not, as it stands at present, prohibit the State in which the service is provided from requiring that the assets representing the technical reserves covering business conducted on its territory be localized in that State. In that case the presence of such assets may be verified in situ, even if the undertaking does not have any permanent establishment in the State. As regards the other conditions for the conduct of business which are subject to supervision, it appears to the Court that such supervision may be effected on the basis of copies of balance sheets, accounts and commercial documents, including the conditions of insurance and schemes of operation, sent from the State of establishment and duly certified by the authorities of that Member State. *It is possible under an authorization procedure to subject the undertaking to such conditions of supervision by means of a provision in the certificate of authorization* and to ensure compliance with those conditions, if necessary by withdrawing that certificate.

Case 205/84 Commission v Germany [1986] ECR 3755 §44, 46, 47, 49, 55,

With regard to the first complaint, it must be stated that no provision of Community law prevents a Member State from requiring insurance undertakings and their branches which are established on its territory to obtain an *authorization* not only in respect of business conducted on its territory but also for business conducted in other Member States in the context of the provision of services. On the contrary, such a requirement is consistent with the principles laid down in Directive 73/239. Article 7 (1) of that directive provides that an insurance undertaking may request and obtain an official authorization to carry on its business only in a part of the national territory. In that case, if it wishes to extend its business beyond such part, it is required under Article 6 (2) (d) to request further authorization and, in accordance with Article 8 (2), a new scheme of operations must be submitted with that request.

Case 252/83 Commission v Denmark [1986] ECR 3713 §28

It follows in particular that it *is permissible* for Member States, and amounts for them to a legitimate choice of policy pursued in the public interest, to subject the provision of manpower within their borders to *a system of licensing* in order to be able to refuse licences where there is reason to fear that such activities may harm good relations on the labour market or that the interests of the workforce affected are not adequately safeguarded. In view of the differences there may be in conditions on the labour market between one Member State and another, on the one hand, and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature on the other hand, the Member State in which the services are to be supplied has unquestionably the right to require possession of a licence issued on the same conditions as in the case of its own nationals.

The reply to the second and third questions raised by the Hoge Raad is therefore that *Article 59 does not preclude a Member State which requires agencies for the provision of manpower to hold a licence from requiring a provider of services established in another Member State and pursuing such activities on the territory of the first Member State to comply with that condition even if he holds a licence issued by the State in which he is established*, provided however, that in the first place when considering applications for licences and in granting them the Member State in which the service is provided makes no distinction based on the nationality of the provider of the services or his place of establishment, and in the second place that it takes into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established.

Case 279/80 Webb [1981] ECR 3305 §19, 21

However, when the pursuit of the employment agency activity at issue is made subject in the State in which the service is provided to the issue of *a licence* and to supervision by the competent authorities, that State may not, without failing to fulfil the essential requirements of Article 59 of the Treaty, impose on the persons providing the service who are established in another Member State any obligation either to satisfy such requirements or to act through the holder of a licence, except where such requirement is objectively justified by the need to ensure observance of the professional rules of conduct and to ensure the said protection.

*Such a requirement is not objectively justified when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the service is established in another Member State and in that State holds a licence issued under conditions comparable to those required by the State in which the service is provided and his activities are subject in the first State to proper supervision covering all employment agency activity whatever may be the Member State in which the service is provided.*

For all these reasons, the answer should be that *when the pursuit of the activity of fee-charging employment agencies for entertainers is made subject in the State in which the service is provided to the issue of a licence, that State may not impose on the persons providing the service who are established in another Member State any obligation either to satisfy that requirement or to act through a fee-charging employment agency which holds such a licence when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the services holds in the*

*Member State in which he is established a licence issued under conditions comparable to those required by the State in which the service is provided and his activities are subject in the first State to proper supervision covering all employment agency activity whatever may be the Member State in which the service is provided.*

Joined cases 110 and 111/78 Van Wesemael [1979] ECR 35 §29, 30, 39

### 3.5 LEGAL FORM OF THE PROVIDER AND OTHER OBLIGATIONS

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Articles 43 EC and 49 EC must be interpreted as precluding a provision such as that at issue in the main proceedings, under which:

- *economic operators, except companies in which all or a majority of the share capital is in public ownership, are required, if necessary, to increase their fully paid up capital to a minimum of EUR 10 million in order to be entitled to pursue the activities of assessment, verification and collection of taxes and other local authority revenue;*
- the award of those services to operators who fail to satisfy *the minimum requirement of share capital* is to be null and void, and
- it is prohibited to obtain new contracts or participate in tender procedures for the operation of those services until the abovementioned requirement to adjust share capital has been met.

Joined Cases C-357/10, C-358/10, 359/1 Duomo Gpa and Others [2012] not published yet §46

*(available only in French)*

Il y a lieu de rappeler que, selon une jurisprudence constante, *l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se présentait au terme du délai fixé dans l'avis motivé* (voir, notamment, arrêts du 27 octobre 2005, Commission/Luxembourg, C-23/05, Rec. p. I-9535, point 9, et du 3 février 2011, Commission/Belgique, C-391/10, point 8).

En l'espèce, il est constant que, à l'expiration du délai imparti dans l'avis motivé complémentaire, *les agences de travail intérimaire installées dans les États membres autres que le Royaume de Belgique et souhaitant fournir des services sur le territoire de la Région de Bruxelles-Capitale devaient exercer à titre exclusif l'activité de mise à disposition de travailleurs.*

Or, il ressort de l'arrêt du 15 janvier 2002, *Commission/Italie* (C-439/99, Rec. p. I-305, point 32), que *l'obligation d'exercer une activité à titre exclusif constitue une restriction importante à la libre prestation de services et que des motifs d'intérêt général de nature à justifier une telle restriction sont difficilement envisageables.*

Case C-397/10 Commission v Belgium [2011] ECR I-95 §13, 14, 15

*The condition* that persons wishing to operate gaming establishments must adopt *the legal form of a public limited company* is *a restriction* on freedom of establishment within the meaning of Article 43 EC. Such a condition prevents, inter alia, operators who are natural persons and undertakings which, in the country in which they are established, have chosen another corporate form from setting up a secondary establishment in Austria (see, to that effect, Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19; Case 143/87 *Stanton and L'Étoile* 1905 [1988] ECR 3877, paragraph 11; and Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraph 42).

**Case C-64/08 Engelmann [2010] ECR I-8219 §28**

In the light of the foregoing, it must be held, in relation to the Consolidated Law, that:

- by providing that it is obligatory to *swear an oath* of allegiance to the Italian Republic in order to work as a private security guard, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;
- by providing that private security activities may be pursued by service providers established in other Member States only after *authorisation of limited territorial validity has been granted* by the Prefetto, without requiring account to be taken of the obligations to which those service providers are already subject in the Member States of origin, the Italian Republic has failed to fulfil its obligations under Article 49 EC;
- by providing that that authorisation is to have limited territorial validity and that the granting of such authorisation is to be subject to consideration of the number and size of security undertakings already operating in the area in question, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;
- by providing that private security undertakings must have a *place of business in each province* in which they operate, the Italian Republic has failed to fulfil its obligations under Article 49 EC;
- by providing that *the staff of those undertakings must be individually authorised* to undertake private security work, without requiring account to be taken of the controls and verifications already carried out in the Member State of origin, the Italian Republic has failed to fulfil its obligations under Article 49 EC;
- by providing that private security undertakings *must have a minimum and/or a maximum number of employees* in order to obtain authorisation, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC;
- by providing that those undertakings must *lodge a guarantee with the local Cassa depositi e prestiti*, the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC; and

- by providing that *the prices for private security services are to be fixed*, with the approval of the Prefetto, within the limits of a predetermined margin for variation, the Italian Republic has failed to fulfil its obligations under Article 49 EC.

Case C-465/05 Commission v Italy [2007] ECR I-11091 §130

In the present case, to justify that restriction, *the Spanish Government puts forward the protection of the safety of the recipients of the services* in question and the remainder of the population. For reasons set out more fully by the Advocate General in point 52 of her Opinion, *the requirement of legal personality is not a measure suitable for attaining the objectives pursued*. None of the practical problems listed by that government is directly connected to the legal form of the undertaking.

Declares that, by maintaining in force provisions of Law No 23/1992 of 30 July 1992 on private security services and Royal Decree No 2364/1994 of 9 December 1994 approving the Regulation on private security services which impose a series of requirements on foreign private security undertakings for the pursuit of their activities in Spain, namely the obligation:

- *to be constituted as legal persons;*
- *to have a specific minimum share capital;*
- *to pay a security to a Spanish body;*
- *to employ a minimum number of workers*, insofar as the undertaking in question carries out its activities in fields other than the transport and distribution of explosives;
- generally, for members of their staff, *to hold a special administrative authorisation issued by the Spanish authorities*, and by failing to adopt the provisions necessary to ensure recognition of attestations of professional competence for the pursuit of the activity of private detective, the Kingdom of Spain has failed to fulfil its obligations under, firstly, Articles 43 EC and 49 EC and, secondly, Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration;

Case C-514/03 Commission v Spain [2006] ECR I-963 §32 and Operative part

*The requirement that a trade-fair organiser must have a particular legal form or status, the requirement that he conduct his business of trade-fair organiser on an exclusive basis and the prohibition of pursuing profit also constitute significant restrictions* on the freedom to provide services. *It is difficult to envisage reasons in the public interest which might justify such restrictions*. Moreover, since no reason has been put forward by the Italian Government, the first charge must be considered well founded in so far as it relates to the regional and provincial provisions mentioned in the third to fifth indents of paragraph 25 of this judgment, with the exception, however, of Article 19, first paragraph, of Provincial Law No 35/78 of Trento. *The Commission has not succeeded in showing that that provision, allowing for the grant of*



*subsidies to certain operators in the trade-fair sector, undermines the freedom to provide services.*

Case C-439/99 Commission v Italy [2002] ECR I-305 §32

## 3.6 PURSUIT OF AN ECONOMIC ACTIVITY

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### 3.6.1 Restrictions on the conditions of this pursuit

As regards *compulsory minimum fees*, the Court has already held that legislation which *unconditionally prohibits derogation, by agreement, from the minimum fees set* by a scale for legal services consisting in court services, on the one hand, and services reserved to lawyers, on the other, constitutes a restriction on the freedom to provide services laid down in Article 49 EC (see Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 70, and Case C-134/05 *Commission v Italy*, paragraph 71).

The *limitation thus imposed on the freedom to set fees* is likely to restrict access to the Italian private security services market for operators, established in other Member States, wishing to offer their services in Italy. In the first place, the effect of that limitation is to *deprive economic operators established in other Member States of the opportunity to compete more effectively – by quoting fees lower than those fixed by the imposed scale – with the economic operators traditionally established* in Italy, which have greater opportunities than economic operators established abroad to build up their clientele (see, to that effect, Case C-134/05 *Commission v Italy*, paragraph 72 and the case-law cited).

Secondly, that limitation *is likely to prevent operators established in other Member States from incorporating in the fees for their services certain costs that operators established in Italy do not have to bear.*

Case C-465/05 Commission v Italy [2007] ECR I-11091 §123, 125

As regards the national and regional provisions which *require trade fairs to be held periodically, the requirement that trade fairs conform with the aims decided upon by a region as part of its regional programming, the observance of strict time-limits in the procedure for authorising trade fairs*, and also the provisions *prohibiting the organisation of trade fairs other than those included on the official calendar, there is no doubt that provisions of that kind are liable to render the exercise of the freedom to provide services more difficult*. Whilst it is not impossible that there may be reasons in the general interest capable of justifying restrictions of that kind, the Italian Government has not put forward any with sufficient precision to enable the Court to assess such merits as they might have and to verify whether the conditions of necessity and proportionality are fulfilled. The first charge therefore appears also to be well founded in so far as it relates to the provisions indicated in the sixth to ninth indents of paragraph 25 of this judgment.

Case C-439/99 Commission v Italy [2002] ECR I-305 §33

*An obligation of the kind imposed by the Belgian legislation, requiring certain additional documents to be drawn up and kept in the host Member State, gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State.*

Joined cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453 §58

*The provider of services, within the meaning of the Treaty, may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question.*

Case C-55/94 Gebhard [1995] ECR I-4165 §39

(see also §27, 28, 37 & 38)

The Commission is therefore correct to argue that the French legislation prohibiting any doctor or dentist established in another Member State from practising in France *as a locum, as a principal in a practice or as an employee* is contrary to the provisions of the Treaty on freedom of movement for persons. The French Government's argument that the freedom of doctors established in other Member States to provide services is recognized in France on the basis of Article 356-1 of the code de la santé publique is not relevant. In both its reasoned opinion and its application to the Court the Commission merely contended that because of its generality the French system was contrary to the freedom to provide services inasmuch as it never permitted a doctor established in another Member State to act *as locum* for a doctor established in France.

The application of Article 356-1 is subject to the requirements set out in the implementing decree, according to which a doctor established in another Member State can provide medical treatment to only a single patient for a period of not more than two days. Such a limited possibility of carrying out medical treatment does not allow that doctor to act as locum for a French colleague.

Case 96/85 Commission v France [1986] ECR 1475 §15, 16

### *3.6.2 Useful facilities for the pursuit of this activity*

Similarly, with regard to freedom to provide services, *access to ownership and the use of immovable property* is guaranteed by Article 59 of the Treaty in so far as such access is appropriate to enable that freedom to be exercised effectively.

Among the examples mentioned in the *General programme* for the abolition of restrictions on freedom to provide services of 18 December 1961 (Official Journal, English Special Edition, Second Series IX, p. 3 ) *is the right to acquire, use or dispose of immovable property or rights therein.*

In that regard, the Court has already decided ( judgment in Case 63/86, cited above ) that *persons providing services cannot be excluded from the benefit of the fundamental principle of non-discrimination in regard to access to ownership and the use of immovable property* . That is the

case, in particular, in the circumstances envisaged in the third paragraph of Article 60 of the Treaty.

Case C-305/87 Commission v Greece [1989] ECR 1461 §24, 25, 26

As is apparent from the general programmes which were adopted by the Council on 18 December 1961 (Journal Officiel 1962, pp. 32 and 36) and which, as the Court has pointed out on numerous occasions, provide useful guidance with a view to the implementation of the provisions of the Treaty relating to the right of establishment and the freedom to provide services, the aforesaid prohibition is concerned not solely with the specific rules on the pursuit of occupational activities but also with the rules relating to the *various general facilities which are of assistance in the pursuit of those activities*. Among the examples mentioned in the two programmes are the right to purchase, exploit and transfer real and personal property and the right to obtain loans and in particular to have access to the various forms of credit.

For a natural person the pursuit of an occupation does not presuppose solely the possibility of access to premises from which the occupation can be pursued, if necessary by borrowing the amount needed to purchase them, *but also the possibility of obtaining housing*. It follows that restrictions contained in the housing legislation applicable to the place where the occupation is pursued are liable to constitute an obstacle to that pursuit.

If complete equality of competition is to be assured, the national of a Member State who wishes to pursue an activity as a self-employed person in another Member State must therefore be able to obtain housing in conditions equivalent to those enjoyed by those of his competitors who are nationals of the latter State. Accordingly, *any restriction* placed not only on the right of access to housing but also on the various facilities granted to those nationals in order to *alleviate* the financial burden must be regarded as an obstacle to the pursuit of the occupation itself.

It is true, as the Italian Government has contended, that in practice not all instances of establishment give rise to the same need to find permanent housing and that as a rule that need is not felt in the case of the provision of services. It is also true that in most cases the provider of services will not satisfy the conditions, of a non-discriminatory nature, bound up with the objectives of the legislation on social housing.

However, it cannot be held to be a priori out of the question that a person, whilst retaining his principal place of establishment in one Member State, may be led to pursue his occupational activities in another Member State for such an extended period that he needs to have permanent housing there and that he may satisfy the conditions of a non-discriminatory nature for access to social housing. It follows that no distinction can be drawn between different forms of establishment and *that providers of services cannot be excluded from the benefit of the fundamental principle of national treatment*.

Case 63/86 Commission v Italy [1988] ECR 29 §14, 15, 16 18, 19

### 3.6.3 Involvement of competing operators

As regards, finally, the provisions which *make the organisation of trade fairs subject to the involvement of bodies made up of operators already in the territory concerned or representatives of such operators* for the purposes of recognition and approval of the organiser and granting public financing to the latter, it must be observed that *the requirement of approval or official recognition constitutes a restriction on the freedom to provide services or freedom of establishment*. Similarly, and for the reasons given by the Advocate General in point 165 of his Opinion, *an adverse effect of that kind may derive from provisions* requiring the involvement of bodies made up of *competing operators* already present in the territory concerned.

Case C-439/99 Commission v Italy [2002] ECR I-305 §39

### 3.6.4 Special card for the firm's workers (members of the staff)

In that regard, it is appropriate to note that the objectives relied on in the present case by the Kingdom of Belgium can be taken into consideration as overriding requirements in the public interest which are capable of justifying a restriction on the freedom to provide services. On that point, it is sufficient to state that *the objective of combating fraud, particularly social security fraud, and preventing abuse, in particular detecting 'bogus self-employed persons' and combating undeclared work, can form part not only of the objective of the financial balance of social security systems, but also of the objectives of preventing unfair competition and social dumping and protecting workers, including self-employed service providers*.

C-577/10 Commission v Belgium [2012] not published yet §45

In view of all the foregoing, it must be declared that, by adopting, in the framework of the Law of 1997, provisions which require that:

- undertakings that wish to provide services in the Netherlands and their managers must have a permit, without taking into account the obligations to which foreign service providers are already subject in the Member State where they are established, and by charging fees for this permit, and
- *members of the staff* of these firms *seconded* from the Member State where they are established to work in the Netherlands *have a proof of identity card* issued by the Netherlands authorities, *in so far as the checks to which cross-frontier providers of services are already subject in their Member State* of origin are *not taken into account* for the requirement in question, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 49 EC.

Case C-189/03 Commission v Netherlands [2004] ECR I-9289 §33

### 3.6.5 Professional Fees

Having regard to the foregoing, the answer to the fourth and fifth questions referred in Case C-94/04 must be that *legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyer's fees such as that at issue in the main*

*proceedings for services which are (a) court services and (b) reserved to lawyers constitutes a restriction on freedom to provide services laid down in Article 49 EC.* It is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives.

Joined cases C-94/04 and C-202/04 Cipolla [2006] ECR I-11421 §70

### 3.6.6 Canvassing

That conclusion is consistent with that directive objective's which is, as noted in paragraph 26 of the present judgment, the removal of restrictions on the free movement of services between Member States. Indeed, *legislation of a Member State forbidding qualified accountants from any canvassing could affect professionals from other Member States more, by depriving them of an effective means of penetrating the national market in question. Such a prohibition constitutes, therefore, a restriction on the freedom to provide cross-border services* (see, by analogy, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 28 and 38).

Case C-119/09 Société fiduciaire nationale d'expertise comptable [2011] ECR I-2551 §43

## 3.7 SOCIAL SECURITY

### 3.7.1 Social security contributions

Whilst *it is established that EU law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at European Union level, it is for the legislation of each Member State to determine the conditions for the grant of social security benefits, the fact nevertheless remains that, when exercising that power, Member States must comply with EU law and, in particular, with the provisions on the freedom to provide services* (see, in particular, *Watts*, paragraph 92 and the case-law cited).

In its capacity as the Member State of affiliation, *every Member State is free, within the framework of its powers under Articles 153 TFEU and 168 TFEU to organise its public health and social security system* (see to that effect, *Watts*, paragraphs 92 and 146, and Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-0000, paragraph 43), to adopt measures affecting the extent and the conditions – especially regarding time-limits – of the offer of hospital treatment in its own territory, so as to be able to control the number of authorisations to be issued, under Article 22(1)(c) of Regulation No 1408/71, for treatment in another Member State which has been scheduled by persons insured under its own system.

Case C-211/08 Commission v Spain [2010] ECR I-5267 §53, 75

As regards the interpretation of Articles 49 EC and 50 EC, it should be noted that, as previously stated in paragraph 37 of this judgment, *since Community law does not detract from the powers of the Member States to organise their social security, in the absence of harmonisation at Community level it is for the legislation of the Member State concerned to determine the conditions governing the right or duty to be insured with a social security scheme* (see, in particular, *Kohll*, paragraph 18, *Smits and Peerbooms*, paragraph 45, and *Watts*, paragraph 92).

While it is true that, according to the consistent case-law cited in paragraph 71 of this judgment, *in the absence of Community harmonisation, it is for the legislation of each Member State to determine, in particular, the conditions concerning the requirement to be insured with a social security scheme and, consequently, the method of financing that scheme, the Member States must nevertheless comply with Community law when exercising those powers* (see, in particular, *Kohll*, paragraph 19, *Smits and Peerbooms*, paragraph 46). It follows that that power of the Member States is not unlimited (Case C-103/06 *Derouin* [2008] ECR I-0000, paragraph 25).

Case C-350/07 Kattner [2009] ECR I-1513 §71, 74

Firstly, with regard to social protection of the performing artists in question, it is certainly not inconceivable that, in the same way as employed persons, self-employed workers, such as service providers, may need specific measures to afford them a certain degree of social protection (see, to that effect, with regard to freedom of establishment, Case C-53/95 *Kemmler* [1996] ECR I-703, paragraph 13). Thus, the social protection of service providers may, in principle, be one of the overriding requirements of public interest which may justify a restriction on the freedom to provide services.

Whilst the matter of paid leave for the performing artists in question has not therefore been harmonised at Community level and the French Republic thus retains, in principle, the right to provide for such a form of protection, it must nevertheless be stated that *a right to paid leave on the part of a service provider (established either indirectly by a presumption of salaried status or directly) is difficult to reconcile with the concept of self-employment. Entitlement to leave paid by an employer is one of the most fundamental characteristic rights of salaried employment. By contrast, self-employed activity is characterised precisely by the absence of a right to paid leave.*

Case C-255/04 Commission v France 2006 I-5251 §47, 51

*National rules which require an employer, as a provider of services within the meaning of the Treaty, to pay employers' contributions to the host Member State's fund, in addition to those which he has already paid to the fund of the Member State in which he is established, constitute a restriction on freedom to provide services.* Such an obligation gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State, and may thus be deterred from providing services in the host Member State.

It must be acknowledged that *the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may*

*constitute an overriding requirement justifying the imposition on an employer established in another Member State who provides services in the host Member State of obligations capable of constituting restrictions on freedom to provide services. However, that is not the case where the workers employed by the employer in question are temporarily engaged in carrying out works in the host Member State and enjoy the same protection, or essentially similar protection, by virtue of the obligations to which the employer is already subject in the Member State in which he is established* (see, to that effect, *Guiot*, paragraphs 16 and 17).

Moreover, *an obligation requiring a provider of services to pay employers' contributions to the host Member State's fund cannot be justified where those contributions confer no social advantage on the workers in question* (*Seco*, paragraph 15).

*Only if the employer's contributions to the host Member State's fund confer on workers an advantage capable of providing them with real additional protection which they would not otherwise enjoy will it be possible to justify the payment of the contributions in question*, and, even then, those contributions will be justifiable only if they are payable by all providers of services operating within the national territory in the industry concerned.

**Joined cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453 §50, 51, 52, 54**

*National legislation which requires an employer, as a person providing a service within the meaning of the Treaty, to pay employer's contributions to the social security fund of the host Member State in addition to the contributions already paid by him to the social security fund of the State where he is established places an additional financial burden on him*, so that he is not, so far as competition is concerned, on an equal footing with employers established in the host State.

*Such legislation, even if it applies without distinction to national providers of services and to those of other Member States, is liable to restrict the freedom to provide services within the meaning of Article 59 of the Treaty.*

The reply to the question put by the national court must therefore be that Articles 59 and 60 of the Treaty *preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out works in the first-mentioned Member State to pay employer's contributions in respect of timbres - fidélité and timbres - intempéries* with respect to workers assigned to carry out those works, *where that undertaking is already liable for comparable contributions*, with respect to the same workers and for the same period of work, in the State where it is established.

**Case C-272/94 Guiot [1996] ECR I-1905 §14, 15, 22**

Such is the case with national legislation of the kind in question when *the obligation to pay the employer's share of social security contributions* imposed on persons providing services within the national territory is extended to employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same periods of employment. In such a case the legislation of the State in which the service is provided *proves in economic terms to be more onerous for employers established*

*in another Member State, who in fact have to bear a heavier burden than those established within the national territory.*

Furthermore, legislation which requires employers to pay in respect of their workers social security contributions not related to any social security benefit for those workers, who are moreover exempt from insurance in the Member State in which the service is provided and remain compulsorily affiliated, for the duration of the work carried out, to the social security scheme of the Member State in which their employer is established, may not reasonably be considered justified on account of the general interest in providing workers with social security.

The answer to the questions submitted by the Cour de Cassation of the Grand Duchy of Luxembourg must therefore be that Community law precludes a Member State from requiring an employer who is established in another Member State and temporarily carrying out work in the first-named Member State, using workers who are nationals of non-member countries, *to pay the employer's share of social security contributions in respect of those workers when that employer is already liable under the legislation of the State in which he is established for similar contributions in respect of the same workers and the same periods of employment and the contributions paid in the State in which the work is performed do not entitle those workers to any social security benefits. Nor would such a requirement be justified if it were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the State in which the work is performed.*

Joined cases 62 and 63/81 Seco [1982] ECR 223 §9, 10, 15

### 3.7.2 Other social security considerations

*By making payment of the recruitment voucher subject to the condition that the person seeking employment be employed in a post which is subject to compulsory social security contributions in the national territory, legislation such as the legislation at issue in the main proceedings gives rise to a restriction on the freedom to provide services based on the place where that service is provided.*

In the light of the foregoing considerations, [...], Articles 49 EC and 50 EC prohibit national legislation, [...], *which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that person's recruitment is subject to the condition that the job found by that agency be subject to compulsory social security contributions in that State.*

Case C-208/05 ITC [2007] ECR I-181 §57, 62

As regards the factors mentioned in Questions 1(a) and 3(d), to the findings set out in paragraphs 59 to 77 of the present judgment should be added the point that, *although Community law does not detract from the power of the Member States to organise their social security systems and decide the level of resources to be allocated to their operation, the achievement of the fundamental freedoms guaranteed by the Treaty nevertheless inevitably requires Member States*



to make adjustments to those systems. It does not follow that this undermines their sovereign powers in the field (see Müller-Fauré and van Riet, paragraphs 100 and 102).

Case C-372/04 Watts [2006] ECR I-4325 §121

Case C-158/96 Kohll [1998] ECR I-1931 § 17

*In the absence of harmonisation at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme (Case 110/79 Coonan v Insurance Officer [1980] ECR 1445, paragraph 12, and Case C-349/87 Paraschi v Landesversicherungsanstalt Württemberg [1991] ECR I-4501, paragraph 15) and, second, the conditions for entitlement to benefits (Joined Cases C-4/95 and C-5/95 Stöber and Piosa Pereira v Bundesanstalt für Arbeit [1997] ECR I-511, paragraph 36).*

The Court has held *that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement (Case 279/80 Webb [1981] ECR 3305, paragraph 10).*

Consequently, *the fact that the national rules at issue in the main proceedings fall within the sphere of social security cannot exclude the application of Articles 59 and 60 of the Treaty.*

Case C-158/96 Kohll [1998] ECR I-1931 § 18, 20, 21

### 3.7.3 Collective agreements and actions

Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision (Laval un Partneri, paragraph 81). However, such does not appear to be the case in the main proceedings.

It follows that *a Member State is not entitled to impose, pursuant to Directive 96/71, on undertakings established in other Member States, by a measure such as that at issue in the main proceedings, a rate of pay such as that provided for by the ‘Buildings and public works’ collective agreement.*

That interpretation of Directive 96/71 is confirmed by reading it in the light of Article 49 EC, since that directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty.

Case C-346/06 Rüffert [2008] ECR I-1989 §34, 35, 36

In the light of the foregoing, the answer to the first question must be that *Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which*

the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, *from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions* than those resulting from the relevant legislative provisions, *while other terms relate to matters not referred to in Article 3 of the directive.*

It is also settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (See, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-383/05 *Talotta* [2007] ECR I-0000, paragraph 18, and Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-0000, paragraph 27).

In that regard, it must be pointed out that *national rules, such as those at issue in the case in the main proceedings, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to discrimination* against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.

It follows from Article 46 EC, which must be interpreted strictly, that discriminatory rules may be justified only on grounds of public policy, public security or public health (see *Commission v Germany* [2007] paragraph 86).

It is clear from the order for reference that the application of those rules to foreign undertakings which are bound by collective agreements to which Swedish law does not directly apply is intended, first, to allow trade unions to take action to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and secondly, to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States.

Since none of the considerations referred to in the previous paragraph constitute grounds of public policy, public security or public health within the meaning of Article 46 EC, applied in conjunction with Article 55 EC, it must be held that discrimination such as that in the case in the main proceedings cannot be justified.

In the light of the foregoing, the answer to the second question must be that, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.

### 3.8 EXCLUSIVE RIGHTS AND MONOPOLIES

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In the light of all the foregoing, the answer to the third question is that Article 16 of Directive 2006/123, and Articles 56 TFEU and 102 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which *reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single collecting society and thereby prevents users of such works, such as the spa establishment in the main proceedings, from benefiting from the services provided by another collecting society established in another Member State.*

However, *Article 102 TFEU must be interpreted as meaning that the imposition by the collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position.*

Case C-351/12 OSA [2014] not published vet § 91, 92

The Court has already held in that regard that the establishment of a measure as restrictive as a monopoly *must be accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, the objective thus determined by means of a supply that is quantitatively measured and qualitatively designed by reference to the said objective and subject to strict control by the public authorities* (Stoß and Others, paragraph 83).

Case C-212/08, Zeturf [2011] ECR I-5633 §58

Having regard to all of the above, the answer to the first question referred must be that, by reason of the primacy of directly-applicable Union law, *national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services*, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, *cannot continue to apply during a transitional period.*

Case C-409/06 Winner Wetten [2010] ECR I-8015 §69

*The exclusive rights over a geographical area conferred on authorised insemination centres restricting the overall number of operators permitted to open and manage such centres in French territory and the unlimited duration of those exclusive rights hamper the access of other operators*, including those from other Member States, to the insemination market. The fact that the geographical areas covered by those exclusive rights can, as the French Republic claims, be adjusted or divided cannot affect that assessment.

In the absence of the possibility of acquiring rights over a determined geographical area, an operator who seeks to carry on an activity in the artificial insemination sector is required to conclude an agreement with the territorially competent insemination centre in order to obtain an inseminator's licence. Since the conclusion of such an agreement depends on the managing directors of authorised centres, that requirement is likely to prevent such an objective from being attained.

It must therefore be found that, as the Commission maintains, the national measures at issue, on account of their nature, render it difficult, if not impossible or, in any event, less attractive, to exercise freedom of establishment with a view to carrying on, in French territory, the distribution and insemination of bovine semen.

The fact that those measures are applicable without distinction to national operators and to those of other Member States does not preclude that finding, given that such national measures, even though applicable without discrimination on grounds of nationality, are liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of a fundamental freedom guaranteed by the Treaty (see, to that effect, *Kraus*, paragraph 32).

Moreover, after obtaining that licence, those operators may carry out the insemination of bovine semen only under the authority of a territorially competent insemination centre.

In those circumstances, it must be held that the French legislation, inasmuch as it grants authorised centres the *exclusive right* to provide the service of artificial insemination of bovine animals in a determined area and makes the activity of insemination subject to the issue of an inseminator's licence, constitutes a restriction on freedom of establishment and the freedom to provide services.

Such measures can be allowed only if they pursue a legitimate aim compatible with the Treaty and are justified by overriding reasons in the public interest, in so far as there is no harmonising measure of Community law providing for the necessary measures to protect those interests. Furthermore, it is settled case-law of the Court that those restrictive measures can be justified by those reasons only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see judgment of 14 December 2006 in Case C-257/05 *Commission v Austria*, paragraph 23 and the case-law cited).

Case C-389/05 Commission v France [2008] ECR I-5337 §53, 54, 55, 56, 65, 66, 67

In order to provide an answer which is of use to the national court, it should be recalled that *the Treaty does not require national monopolies* having a commercial character *to be abolished completely*, but requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States (Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 38 and the case-law cited).

However, *Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State* (Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 30).

Case C-380/05 Centro Europa 7 [2008] ECR I-349 §78, 79

It should be observed at the outset that the system set up by Article 61 of the Mediawet does in fact result in *a restriction on the freedom to provide services* within the Community within the meaning of Article 59 of the Treaty.

*The obligation imposed on all national broadcasting bodies established in a Member State to use exclusively or to some extent the technical resources provided by a national undertaking prevents those bodies from using the services of undertakings established in other Member States* or, in any event, limits their opportunities of doing so. It therefore has a *protective effect* for the benefit of a service undertaking established in the national territory and, to that extent, disadvantages undertakings of the same kind established in other Member States.

The Netherlands Government maintains that the restrictive effects of that preferential system affect service undertakings established in the Netherlands other than the NOPB and undertakings established in other Member States to the same extent.

In any event, that fact is not such as to exclude the preferential system enjoyed by the NOPB from the field of application of Article 59 of the Treaty. Moreover, it is not necessary for all undertakings in a Member State to be advantaged in comparison with foreign undertakings. *It is sufficient that the preferential system set up should benefit a national provider of services.*

Case C-353/89 Mediawet II [1991] ECR I-4069 §22, 23, 24, 25

As has been indicated in paragraph 12 of this judgment, although *the existence of a monopoly in the provision of services is not as such incompatible with Community law, the possibility cannot be excluded that the monopoly may be organized in such a way as to infringe the rules relating to the freedom to provide services.* Such a case arises, in particular, where the monopoly leads to *discrimination* between national television broadcasts and those originating in other Member States, to the detriment of the latter.

Accordingly the reply to the national court must be that Article 59 of the Treaty prohibits national rules which create a monopoly comprising exclusive rights to transmit the broadcasts of the holder of the monopoly and to retransmit broadcasts from other Member States, *where such a monopoly gives rise to discriminatory effects* to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers.

Case C-260/89 ERT [1991] ECR I-2925 §20, 26

### 3.9 MANDATORY LEGAL FORM OF EMPLOYMENT RELATIONSHIP

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In the present case, it must be held that the *presumption of salaried status* at issue, irrespective of whether it is more or less difficult to rebut, constitutes a restriction on freedom to provide services within the meaning of Article 49 EC. Even if it does not deprive, in the true meaning of the word, the performing artists in question of the opportunity to pursue their activities in France in a self-employed capacity, it none the less places them at a disadvantage that may impede their activities as service providers. In order to avoid their contract being accorded the status of employment contract, which would entail additional costs because of the obligation, in France, to pay contributions as affiliates of the social security scheme for employed persons, and bring them under the scheme for annual paid leave, they must prove that they do not work as employees but, on the contrary, are self-employed. Thus, *the presumption of salaried status at issue is likely*

*both to discourage the artists in question from providing their services in France and discourage French organisers of events from engaging such artists.*

Case C-255/04 Commission v France [2006] ECR I-5251 §38

The mere fact that tourist guides from another Member State do not need such a licence when they accompany a group of tourists to Greece does not mean that they cannot have an interest in acquiring the said diploma, in order to secure a higher qualification, and thus obtaining the licence to pursue the profession in that State. In those circumstances, the rules in question apply to them.

It follows that *such rules may affect the right of self-employed tourist guides from another Member State freely to provide services* where they are licensed to pursue the profession in the first State and offer their services in connection with the operation of tourist programmes organized in that State by tourist or travel agencies, wherever those agencies are established within the Community.

The answer to the first question must therefore be that *the rules* of a Member State *which, by prescribing a mandatory legal form of employment relationship between the parties, prevent tourist and travel agencies*, wherever they are established, *from concluding*, in connection with the operation of tourist programmes organized by them in that Member State, *a contract for the provision of services* with a tourist guide from another Member State who is licensed to pursue his profession in the first State *constitute a barrier for the purposes of Article 59 of the Treaty.*

Case C-398/95 SETTG [1997] ECR I-3091 §12, 13, 19

### 3.10 GUARANTEES

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The Court has already ruled that, in the private security sector, the obligation *to lodge a guarantee with a deposits and loans office* is likely to hinder or make less attractive the exercise of freedom of establishment and freedom to provide services within the meaning of Articles 43 EC and 49 EC, in so far as it makes the provision of services or the formation of a subsidiary or secondary establishment more onerous for private security undertakings established in other Member States than for those established in the Member State of destination (see Case C-514/03 *Commission v Spain*, paragraph 41).

Case C-465/05 Commission v Italy [2007] ECR I-11091 §109

It follows from all the preceding considerations that, *by requiring undertakings engaged in the provision of temporary labour which are established in other Member States to maintain their registered office or a branch office on Italian territory, and to lodge a guarantee of ITL 700 million with a credit institution having its registered office or a branch office on Italian territory*, the Italian Republic has failed to fulfil its obligations under Articles 49 EC and 56 EC.

Case C-279/00 Commission v Italy [2002] ECR I-1425 §41

However, it is established case-law *that such an obstacle may be justified only in so far as the public interest relied on is not safeguarded by the rules to which the provider of the service is*

*subject in the Member State in which he is established* (see *Corsten*, paragraph 35). The Spanish legislation at issue *requires the security to be lodged with a Spanish body*, the Caja General de Depósitos, *without taking into account any security lodged in the Member State of origin*. Furthermore, in the current state of development of the systems for cross-border debt recovery and execution of foreign judgments within the Union, such strictness appears disproportionate. The requirement to lodge security goes beyond what is necessary to ensure adequate protection of creditors.

Case C-514/03 Commission v Spain [2006] ECR I-963 §43

*Article 7 of Directive 90/314 requires Member States to provide for security for the refund of money paid over, or for the repatriation of consumers, in the event of the insolvency of the operator from whom they bought the travel.*

That provision must be interpreted as prescribing a result whereby package travellers enjoy rights guaranteeing their repatriation and the refund of money that they have paid over, the aim being that of consumer protection (see Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others v Federal Republic of Germany* [1996] ECR I-4845, paragraphs 35 and 42).

It must therefore be concluded that it is contrary to Article 59 of the Treaty and to Directives 89/646 and 92/49 for national rules such as those in issue in the main proceedings to require, with a view to implementing Article 7 of Directive 90/314, that, where financial security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an agreement with a credit institution or insurance company situated in France.

Case C-410/96 Ambry [1998] ECR I-7875 §22, 39

### 3.11 VEHICLE REGISTRATION

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In the present case, Jobra leases lorries to Braunshofer. *The leasing of vehicles is a service within the meaning of Article 50 EC* (see, in particular, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 18).

Case C-330/07 Jobra [2008] ECR I-9099 §22

Taking all the above considerations into account, the answer to the question referred must be that *Articles 43 EC and 49 EC are to be interpreted as precluding national legislation of one Member State, such as that in question in the main proceedings, under which a self-employed person residing in that Member State is required to register there a vehicle leased from a company established in another Member State, when it is not intended that that vehicle should be used essentially in the first Member State on a permanent basis and it is not, in fact, used in that manner.*

Case C-364/08 Vandermeir [2008] ECR I-8087 §36

Having regard to all the foregoing considerations, the reply to the question referred for a preliminary ruling must be that *it is contrary to Article 43 EC* for the domestic legislation of one Member State, such as the legislation at issue in the cases in the main proceedings, *to require a self-employed worker residing in that Member State to register there a company vehicle made available to him by the company for which he works, established in another Member State, when it is not intended that that vehicle should be used essentially in the first Member State on a permanent basis and it is not, in fact, used in that manner.*

Joined cases C-151/04 and C-152/04 Nadin and Nadin-Lux [2005] ECR I-11203 §55

In the light of the above, the answer to the Handelsgericht Wien must be that *the provisions of the Treaty on the freedom to provide services (Articles 49 EC to 55 EC) preclude legislation of a Member State, such as that at issue in the main proceedings, requiring an undertaking established in that Member State which takes a lease of a vehicle registered in another Member State to register it in the first Member State in order to be able to use it there beyond a period that is so short, in this case three days, that it makes it impossible or excessively difficult to comply with the requirements imposed.* The same provisions of the Treaty preclude legislation of a Member State, such as that at issue in the main proceedings, requiring an undertaking established in that Member State which takes a lease of a vehicle registered in another Member State to register it in the first Member State and imposing on it one or more of the following conditions:

- a requirement that the person in whose name the vehicle is registered in the Member State of use reside or have a place of business there, in so far as it obliges a leasing undertaking either to have a principal place of business in that Member State or to accept registration of the vehicle in the name of the lessee and the consequent limitation of its rights over the vehicle;
- a requirement to insure the vehicle with an authorised insurer in the Member State of use, if that requirement implies that the insurer must have its principal place of business in that Member State, as the home State within the meaning of the non-life insurance directives, and have official authorisation there;
- a requirement of a roadworthiness test when the vehicle has already undergone such testing in the Member State where the leasing company is established, save where that requirement is aimed at verifying that the vehicle satisfies the conditions imposed on vehicles registered in the Member State of use that are not covered by the tests carried out in the Member State where the leasing company is established and/or, if the vehicle has in the meantime been used on the public highway, that its condition has not deteriorated since it was tested in that latter Member State, provided similar testing is imposed where a vehicle previously tested in the Member State of use is presented for registration in that State;
- payment, in the Member State of use, of a consumption tax the amount of which is not proportionate to the duration of the registration of the vehicle in that State.



### 3.12 RESTRICTIONS ON TRADE IN SERVICES

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The first paragraph of Article 59 of the Treaty *prohibits restrictions on freedom to provide services within the Community in general*. Consequently, *that provision covers not only restrictions laid down by the State of destination but also those laid down by the State of origin*. As the Court has frequently held, the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State (see Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, paragraph 30; *Peralta*, cited above, paragraph 40, and Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 14).

It follows that the prohibition of cold calling does not fall outside the scope of Article 59 of the Treaty simply because it is imposed by the State in which the provider of services is established.

*Although a prohibition such as the one at issue in the main proceedings is general and non-discriminatory and neither its object nor its effect is to put the national market at an advantage over providers of services from other Member States, it can none the less, as has been held above (see paragraph 28), constitute a restriction on the freedom to provide cross-border services.*

*Such a prohibition is not analogous to the legislation concerning selling arrangements held in Keck and Mithouard to fall outside the scope of Article 30 of the Treaty.*

According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is *that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.*

*A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.*

The answer to the second question is therefore that *rules of a Member State which prohibit providers of services established in its territory from making unsolicited telephone calls to potential clients established in other Member States in order to offer their services constitute a restriction on freedom to provide services* within the meaning of Article 59 of the Treaty.

*Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.*

Consequently, *the prohibition of cold calling by the Member State from which the telephone call is made, with a view to protecting investor confidence in the financial markets of that State, cannot be considered to be inappropriate to achieve the objective of securing the integrity of those markets.*

Case C-384/93 Alpine Investments [1995] ECR I-1141 §30, 31, 35, 36, 37, 38, 39, 44, 49

(see also §56)

Whilst it is true that debt-collection agencies are not subject to legal regulation in France, *the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law* (Case C-348/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paragraph 51).

Case C-3/95 Reisebüro Broede [1996] ECR I-6511 §42

Case C-384/93 Alpine Investments [1995] ECR I-1141 §51

## 4. JUSTIFICATION OF RESTRICTIONS

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### 4.1 JUSTIFICATION OF RESTRICTIONS ON GENERAL INTEREST GROUNDS

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However, it must be stated that the declared objectives pursued by the legislation at issue in the main proceedings, *namely the protection of consumers against gambling addiction and the prevention of crime and fraud linked to gambling, constitute overriding reasons in the public interest capable of justifying restrictions on gambling* (see, to that effect, judgments in *Carmen Media Group*, C-46/08, EU:C:2010:505, paragraph 55, and in *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraphs 48 and 49 and the case-law cited).

However, *the fact that a restriction on gambling activities incidentally benefits the budget of the Member State concerned does not prevent that restriction from being justified in so far as it actually pursues objectives relating to overriding reasons in the public interest* (see, to that effect, judgments in *Zenatti*, C-67/98, EU:C:1999:514, paragraph 36, and *Gambelli and Others*, C-243/01, EU:C:2003:597, paragraph 62), which is for the national court to determine.

Case C-98/14 Burlington Hungary and Others [2015] not published vet §58, 61

However, *where national legislation falling within an area which has not been harmonised at Community level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets an overriding requirement in the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it* (*Commission v Germany*, paragraph 31, and case-law cited).

Case C-219/08 Commission v Belgium [2009] ECR I-9213 §14

However, it clear from settled case-law that, where such domestic legislation is applicable to all persons and undertakings operating in the territory of *the Member State* in which the service is provided, *it may be justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established* (Case C-164/99 *Portugaia Construções* [2002] ECR I-00787 §19)

Case C-244/04 Commission v Germany [2006] ECR I-885 §31

By contrast, *the provisions* of the national legislation at issue *which apply to any person or undertaking carrying on an activity in the territory of the host Member State may be justified where they serve overriding requirements relating to the public interest*, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order

to attain it (see Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 28, and the case-law there cited).

Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941 §37

In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, *for reasons of overriding general interest*.

According to those decisions, *the restrictions must be justified by imperative requirements in the general interest*, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. *They must in any event be applied without discrimination*.

Case C-243/01 Gambelli and Others [2003] ECR I-13031 §60, 65

The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules *justified by the public interest* and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (Case 279/80 *Webb* [1981] ECR 3305, paragraph 17).

Case C-355/98 Commission v Belgium [2000] ECR I-1221 §37

However, in view of the special nature of certain professional activities, *the imposition of specific requirements* pursuant to the rules governing such activities *cannot be considered incompatible with the Treaty*. Nevertheless, as one of the fundamental principles of the Treaty, freedom of movement for persons *may be restricted only by rules which are justified in the general interest* and are applied to all persons and undertakings pursuing those activities in the territory of the State in question, in so far as that interest is not already safeguarded by the rules to which a Community national is subject in the Member State where he is established (see the judgment in Case C-180/89 *Commission v Italy* [1991] ECR I-709, paragraph 17).

Case C-58/98 Corsten [2000] ECR I-7919 §35

Case C-106/91 Ramrath [1992] ECR I-3351 §29

Case C-76/90 Säger [1991] ECR I-4221 §15

Case C-154/89 Commission v France [1991] ECR I-659 §14, 15

Case C-198/89 Commission v Greece [1991] ECR I-727 §18, 19

Case 252/83 Commission v Denmark [1986] ECR 3713 §17

Case 205/84 Commission v Germany [1986] ECR 3755 §27

(...) *national measures which restrict the exercise of fundamental freedoms guaranteed by the Treaty can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue;*

*and they must not go beyond what is necessary in order to attain that objective.*

Case C-424/97 Haim [2000] ECR I-5123 §57

Case C-55/94 Gebhard [1995] ECR I-4165 §39

(see also: §27, 28, 37 and 38)

In such a case, *it is for the national court to determine whether those provisions are necessary to meet overriding requirements of general public importance or one of the aims laid down in Article 56 of the EC Treaty*, whether they are proportionate for that purpose and whether the aims or overriding requirements could have been met by less restrictive means.

Joined cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843 §52

The Court has consistently held that, *as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by overriding reasons relating to the general interest and which apply to all persons or undertakings pursuing an activity in the State of destination*. In particular, the restrictions must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it (*Säger*, cited above, paragraph 15; Case C-288/89 *Gouda and Others* [1991] ECR I-407, paragraphs 13 to 15; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37).

Case C-398/95 SETTG [1997] ECR I-3091 §21

It is appropriate to point out in the first place that *national rules* which are not applicable to services without distinction as regards their origin and *which are* therefore *discriminatory* are compatible with Community law only if they can be brought within the scope of *an express derogation*.

Case 352/85 Bond van Adverteerders [1988] ECR 2085 §32

Case C-224/97 Ciola [1999] ECR I-2517 §16

However, in view of the special nature of certain professional activities, *the imposition of specific requirements* pursuant to the rules governing such activities *cannot be considered incompatible with the Treaty*. Nevertheless, as one of the fundamental principles of the Treaty, freedom of movement for persons *may be restricted only by rules which are justified in the general interest and are applied to all persons and undertakings pursuing those activities in the territory of the State in question, in so far as that interest is not already safeguarded by the rules to which a Community national is subject in the Member State where he is established* (see the judgment in Case C-180/89 *Commission v Italy* [1991] ECR I-709, paragraph 17).

Case C-106/91 Ramrath [1992] ECR I-3351 §29

The only derogation which may be contemplated in a case such as this is that provided for in *Article 56* of the Treaty, to which Article 66 refers, under which national provisions providing for special treatment for foreign nationals escape the application of Article 59 of the Treaty if they are justified on grounds of public policy.

Case 352/85 Bond van Adverteerders [1988] ECR 2085 §33

It follows that *that requirement may be regarded as compatible with Articles 59 and 60 of the EEC Treaty only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services, that the public interest is not already protected by the rules of the State of establishment and that the same result cannot be obtained by less restrictive rules.*

Case 252/83 Commission v Denmark [1986] ECR 3713 §19

Case 205/84 Commission v Germany [1986] ECR 3755 §29

### 4.1.1 Admissible Justifications

#### 4.1.1.1 Limited number in case of discriminatory restrictions

Having regard to all of the foregoing considerations, the answer to the questions referred is that Articles 49 TFEU and 56 TFEU must be interpreted as meaning that *they do not preclude national legislation, such as that at issue in the main proceedings, which provides that the provision of urgent and emergency ambulance services must be entrusted on a preferential basis and awarded directly, without any advertising, to the voluntary associations covered by the agreements, in so far as the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that legislation is based.*

Case C-113/13 Azienda sanitaria locale n. 5 «Spezzino» and Others [2014] not published yet §65

It follows from Article 46 EC, which must be interpreted strictly, that *discriminatory rules may be justified only on grounds of public policy, public security or public health* (see, inter alia, Case C-490/04 *Commission v Germany*, paragraph 86).

Case C-546/07 Commission v Germany [2010] ECR I-439 §48

Moreover, the justifications put forward by the Belgian Government do not come within any of the grounds for exemption from the freedom to provide services permitted by Article 56, namely *public policy, public security and public health.*

As the Court has consistently held (see, in particular, the judgment in Case 288/89 *Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11), *those exemptions alone can effectively be relied upon to justify national rules which are not applicable to services without distinction as regards their origin.*

Case C-211/91 Commission v Belgium [1992] ECR I-6757 §10, 11

*National rules which are not applicable to services without distinction whatever the place of residence of the recipient, and which are therefore discriminatory, are compatible with Community law only if they can be brought within the scope of an express derogation, such as Article 56 of the EC Treaty (see Case 352/85 *Bond van Adverteerders and Others v Netherlands State* [1988] ECR 2085, paragraph 32); however, economic aims cannot constitute grounds of*

public policy within the meaning of that provision (Case C-288/89 *Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11).

Case C-224/97 Ciola [1999] ECR I-2517 §16

It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects unless those rules fall within the derogating provision contained in Article 56 of the Treaty to which Article 66 refers. ***It follows from Article 56, which must be interpreted strictly, that discriminatory rules may be justified on grounds of public policy, public security or public health.***

Case C-260/89 ERT [1991] I-2925 §24

#### 4.1.1.2 Larger number in case of non-discriminatory measures

In that regard, it is appropriate to note that the objectives relied on in the present case by the Kingdom of Belgium can be taken into consideration as overriding requirements in the public interest which are capable of justifying a restriction on the freedom to provide services. On that point, it is sufficient to state that ***the objective of combating fraud, particularly social security fraud, and preventing abuse, in particular detecting 'bogus self-employed persons' and combating undeclared work, can form part not only of the objective of the financial balance of social security systems, but also of the objectives of preventing unfair competition and social dumping and protecting workers, including self-employed service providers.***

C-577/10 Commission v Belgium [2012] not published yet §45

In the present case, it must be found that, ***notwithstanding its legitimate objective of combating possible collusion between the consortium concerned and its member companies***, the restriction in question cannot be justified since, as is clear from paragraphs 38 to 40 of this judgment, it goes beyond what is necessary to achieve that objective.

Case C-376/08 Serrantoni [2009] ECR I-12169 §45

In that regard, the Court has already accepted that the objective, pursued by a Member State, ***of defending and promoting one or several of its official languages constitutes an overriding reason in the public interest*** (see, to that effect, Case C-379/87 *Groener* [1989] ECR 3967, paragraph 19, and *United Pan-Europe Communications Belgium and Others*, paragraph 43).

Case C-222/07 UTECA [2009] ECR I-1407 §27

(available only in French)

Certes, ***la nécessité d'assurer le bon déroulement de la procédure peut être invoquée au titre des raisons impérieuses d'intérêt général susceptibles de justifier une restriction à la libre prestation des services*** (voir, en ce sens, arrêt du 13 février 2003, *Commission/Italie*, précité, point 44).

Case C-564/07 Commission v Austria [2009] ECR I-100 §49

In this respect, it must be noted that, according to the Court's case-law, *the risk of seriously undermining the financial equilibrium of the social security system may constitute an overriding reason in the public interest capable of justifying an obstacle to the principle of freedom to provide services* (see, in particular, *Kohll*, paragraph 41; *Smits and Peerbooms*, paragraph 72, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 30).

Case C-350/07 Kattner [2009] I-1513 §85

*In this respect, the overriding reasons relating to the public interest which the Court has already recognized include professional rules intended to protect recipients of the service* (Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, paragraph 28); *protection of intellectual property* (Case 62/79 *Coditel* [1980] ECR 881); *the protection of workers* (Case 279/80 *Webb* [1981] ECR 3305, paragraph 19; Joined Cases 62/81 and 63/81 *Seco v EVI* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18); *consumer protection* (Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20; Case 252/83 *Commission v Denmark* [1986] ECR 3713, paragraph 20; Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 30; Case 206/84 *Commission v Ireland* [1986] ECR 3817, paragraph 20; *Commission v Italy*, cited above, paragraph 20; and *Commission v Greece*, cited above, paragraph 21), *the conservation of the national historic and artistic heritage* (*Commission v Italy*, cited above, paragraph 20); *turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country* (*Commission v France*, cited above, paragraph 17, and *Commission v Greece*, cited above, paragraph 21).

Case C-288/89 Mediawet I [1991] ECR I-4007 §14

#### 4.1.1.3 Bypassing the measures applicable to establishment

According to the case-law of the Court, *Community law cannot be relied on for abusive or fraudulent ends* (see, in particular, regarding freedom to supply services, Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13, and Case C-23/93 *TV 10 v Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21).

Case C-367/96 Kefalas [1998] ECR I-2843 §20

Moreover, the Court has already held in connection with Article 59 of the Treaty on the freedom to provide services *that a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State* (see *van Binsbergen*, cited above).

It follows *that a Member State may regard as a domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State's territory, since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by*



*exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law*, in this case those designed to ensure the pluralist and non-commercial content of programmes.

Case C-23/93 TV10 [1994] ECR I-4795 §20, 21

By prohibiting national broadcasting organizations from helping to set up commercial radio and television companies abroad for the purpose of providing services there directed towards the Netherlands, the Netherlands legislation at issue has the specific effect, with a view to safeguarding the exercise of the freedoms guaranteed by the Treaty, *of ensuring that those organizations cannot improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of programmes.*

Case C-148/91 Veronica [1993] ECR I-487 §13

The argument that the Belgian Government seeks to derive from the judgment in Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, according to which a person providing services cannot avoid the rules applicable to providers of services established in the Member State towards which his activity is directed, cannot be accepted. While it is true that, according to paragraph 13 of that judgment, the State in which the service is provided may take measures to prevent a provider of services *whose activity is entirely or principally directed towards its territory* from exercising the freedom guaranteed by Article 59 *for the purpose of avoiding the professional rules* which would be applicable to him if he were established within that State, *it does not follow that it is permissible for a Member State to prohibit altogether* the provision of certain services by operators established in other Member States, as that would be tantamount to abolishing the freedom to provide services.

Case C-211/91 Commission v Belgium [1992] ECR I-6757 §12

Similarly, as the Court held in its judgment of 3 December 1974 (Case 33/74 *van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299) a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 *for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.*

Case 205/84 Commission v Germany [1986] ECR 3755 §22

Although, in the light of the special nature of certain services, it cannot be denied that a Member State is entitled to adopt measures which are intended to prevent the freedom guaranteed by Article 59 being used by a person whose activities are entirely or chiefly directed towards his territory *in order to avoid the professional rules* which would apply to him if he resided in that State, the requirement of residence in the territory of the State where the service is provided can only be *allowed as an exception* where the Member State is unable to apply other, less restrictive, measures to ensure respect for these rules.

Case 39-75 Coenen [1975] ECR 1547 §9

## **4.1.2 Examples of admissible justification**

### *4.1.2.1 Article 51 TFEU (formerly Article 45 EC)*

Moreover, it has consistently been held that the review of the possible application of the exceptions laid down in Articles 45 EC and 55 EC must take into account the fact that the limits imposed by those articles on the exceptions referred to fall within European Union law (see, in particular, Case 2/74 *Reyners*, [1974] ECR 631, paragraph 50, and *Commission v Portugal*, paragraph 35).

According to settled case-law, the derogation provided for under those articles must be restricted ***to activities which, in themselves, are directly and specifically connected with the exercise of official authority*** (see *Reyners*, paragraph 45; Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8; and *Commission v Portugal*, paragraph 36).

As the Advocate General noted at point 58 of her Opinion, such a connection requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official power or powers of coercion.

***In the present case, it must first be observed that a contribution to the protection of public health, which any individual may be called upon to make, in particular by assisting a person whose life or health are in danger, is not sufficient for there to be a connection with the exercise of official authority*** (see, to that effect, Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 37, and *Commission v Italy*, paragraph 38).

As regards the right of ambulance service providers to use equipment such as flashing blue lights or sirens, and their acknowledged right of way with priority under the German Highway Code, they certainly reflect the overriding importance which the national legislature attaches to public health as against general road traffic rules.

However, ***such rights cannot, as such, be regarded as having a direct and specific connection with the exercise of official authority in the absence, on the part of the providers concerned, of official powers or of powers of coercion falling outside the scope of the general law for the purposes of ensuring that those rights are observed, which, as the parties agree, is within the competence of the police and judicial authorities*** (see, to that effect, *Commission v Italy*, paragraph 39, and *Commission v Portugal*, paragraph 44).

Nor can matters such as those raised by the Federal Republic of Germany – concerning special organisational powers in the field of the services delivered, the power to request information from third parties and the deployment of other specialist services, or even involvement in the appointment of civil service administrators in connection with the services at issue – be regarded as reflecting a sufficiently qualified exercise of official powers or of powers falling outside the scope of the general law.

With regard to that last argument, it is clear, as pointed out in paragraph 29 above, that, according to settled case-law, Article 43 EC includes not only a prohibition of discrimination but also a prohibition of all restrictions rendering the exercise of the freedom of establishment less attractive. Article 45 EC containing a general exception clause to the principle of freedom of establishment laid down in Article 43 EC, *its application cannot, consequently, be restricted to discriminatory measures alone.*

On the other hand, it should be borne in mind that, as a derogation from the fundamental rule of freedom of establishment, *Article 45 must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect* (see, inter alia, Case 147/86 *Commission v Greece* [1988] ECR 1637, paragraph 7; Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 34; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45).

Similarly, *it is not contested that the review of exceptions to the freedom of establishment laid down in Article 45 EC must take into account the Community character of the limits imposed by that article on that freedom* (see, to that effect, Case 2/74 *Reyners* [1974] ECR 631, paragraph 50, and *Commission v Greece*, paragraph 8).

Thus, according to settled case-law, *the derogation for which that article provides must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority* (see *Reyners*, paragraph 45; Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8; and Case C-283/99 *Commission v Italy* [2001] ECR I-4363, paragraph 20), *which excludes from being regarded as ‘connected with the exercise of official authority’, within the meaning of that derogation, functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision* (*Thijssen*, paragraph 22; *Commission v Austria*, paragraph 36; and *Commission v Germany*, paragraph 38).

*The Court has defined further the distinction between activities of private bodies constituting simple preparatory tasks and those constituting a direct and specific connection with the exercise of official authority* by finding that, even where private bodies exercise the powers of a public authority, drawing the conclusions from the inspections which they carry out, Article 45 EC cannot be relied on where the applicable legislation lays down that those private bodies are to be supervised by the public authority (see, to that effect, *Commission v Austria*, paragraph 41, and *Commission v Germany*, paragraph 43). *The Court has found that private bodies carrying out their activities under the active supervision of the competent public authority, responsible, ultimately, for inspections and decisions of those bodies, cannot be considered to be ‘connected directly and specifically with the exercise of official authority’ within the meaning of Article 45 EC* (*Commission v Austria*, paragraph 42, and *Commission v Germany*, paragraph 44).

Case C-438/08 *Commission v Portugal* [2009] ECR I-10219 §33, 34, 35, 36, 37

It is clear from the case-law of the Court that the derogation provided for in the first paragraph of Article 45 EC and in Article 55 EC *must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority* (see Case C-114/97

*Commission v Spain* [1998] ECR I-6717, paragraph 35; Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 25; and Case C-283/99 *Commission v Italy* [2001] ECR I-4363, paragraph 20).

For the rest, the Court has already held that *merely making a contribution to the maintenance of public security*, which any individual may be called upon to do, does not constitute exercise of official authority (see Case C-114/97 *Commission v Spain*, paragraph 37).

**Case C-465/05 Commission v Italy [2007] ECR I-11091 §32, 38**

Thus, according to settled case-law, derogation under those articles must be restricted to activities which, in themselves, *are directly and specifically connected with the exercise of official authority* (see *Servizi Ausiliari Dottori Commercialisti*, cited above, paragraph 46 and the case-law cited), which excludes from being regarded as connected with the exercise of official authority, within the meaning of that derogation, functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision (*Thijssen*, cited above, paragraph 22).

**Case C-404/05 Commission v Germany [2007] ECR I-10239 §38**

As regards the primary argument, it must be remembered that, as a derogation from the fundamental rule of freedom to provide services, Article 55 EC, read in conjunction with the first paragraph of Article 45 EC, must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests which it allows the Member States to protect (see, to that effect, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45 and the case-law cited).

Thus, according to settled case-law, derogation under those articles must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority (see *Servizi Ausiliari Dottori Commercialisti*, cited above, paragraph 46 and the case-law cited), which excludes from being regarded as connected with the exercise of official authority, within the meaning of that derogation, functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision (Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 22).

It must be recalled that, as has been held in paragraph 42 of the present judgment, the activities of private bodies as defined by Regulation No 2092/91 *are not, in themselves, activities directly and specifically connected with the exercise of official authority*, with the result that any other additional activity so connected is necessarily separable from them.

**Case C-393/05 Commission v Austria [2007] ECR I-10195 §35, 36, 46**

In that regard, it must be remembered that, as derogations from the fundamental rule of freedom of establishment, *Articles 45 EC and 55 EC must be interpreted in a manner which limits their scope* to what is strictly necessary for safeguarding the interests which those provisions allow the Member States to protect (Case 147/86 *Commission v Greece* [1988] ECR 1637, paragraph 7, and Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 34).

Thus, according to settled case-law, *derogation* under those articles ***must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority*** (Case 2/74 *Reyners* [1974] ECR 631, paragraph 45; Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8; *Commission v Spain*, paragraph 35; and Case C-283/99 *Commission v Italy* [2001] ECR I-4363, paragraph 20).

It must be held that ***checking that the information given in the tax declaration*** is consistent with the documents annexed to it, even though it is in fact rarely questioned by the tax authorities, ***is not directly and specifically connected with the exercise of official authority*** but a measure intended to prepare for or facilitate the accomplishment of the tasks for which the tax authorities are responsible.

***The same is true as regards the other tasks***, set out in Articles 34 and 35 of Legislative Decree No 241/97 and mentioned by the national court in its decision making the reference, ***namely giving the taxpayer a copy of the completed tax declaration and of the tax payment schedule, as well as informing employers responsible for collecting the tax of the effect of the tax declarations, and filing the declarations with the tax authorities.***

It must therefore be held that activities reserved to CAF such as those referred to in the decision making the reference ***are not covered by the derogation under Articles 45 EC and 55 EC.***

**Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] I-2941 §46, 47, 48, 49**

Relying in particular on the Court's judgments in Case C-114/97 *Commission v Spain* [1998] ECR I-6717 and Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, ***the Commission maintains that the justifications provided for in Articles 55 and 66 of the EC Treaty*** (now Articles 45 EC and 55 EC) ***are not applicable to private security activities, on the ground that private security undertakings and sworn private security guards are not directly and specifically involved in the exercise of official authority.*** Moreover, that emerges in any event from Article 134 of the Consolidated Legislation itself, inasmuch as that article provides that the licence required for the exercise of private security activities may not be granted in respect of operations involving the exercise of official authority.

It must therefore be held that the derogation provided for in the first paragraph of Article 55 of the Treaty in conjunction, as the case may be, with Article 66 of the Treaty, does not apply in the present case. Consequently, ***the nationality condition laid down in Article 134 of the Consolidated Legislation with regard to private security activities constitutes an unjustified restriction on freedom of establishment and freedom to provide services.***

**Case C-283/99 Commission v Italy [2001] ECR I-4363 §8, 22**

According to established case-law, ***that derogation must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority*** (Case 2/74 *Reyners* [1974] ECR 631, paragraph 45; *Commission v Spain*, cited above, paragraph 35).

***The activities of security firms, security systems firms and internal security services are not normally directly and specifically connected with the exercise of official authority***, and the Belgian Government has not adduced any evidence to permit the contrary to be established.

The freedom to provide services, being one of the fundamental principles of the Treaty, *may be restricted only by rules justified by the public interest* and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (Case 279/80 *Webb* [1981] ECR 3305, paragraph 17).

Case C-355/98 *Commission v Belgium* [2000] ECR I-1221 §25, 26, 37

As regards the exception provided for in the first paragraph of Article 55 combined, where appropriate, with Article 66 of the Treaty, it must be remembered that, as *a derogation from the fundamental rule of freedom of establishment, it must be interpreted in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect* (Case 147/86 *Commission v Greece* [1988] ECR 1637, paragraph 7).

According to established case-law, *the derogation* for which it provides *must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority* (Case 2/74 *Reyners* [1974] ECR 631, paragraph 45, and Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8).

In the present case, it is clear from the evidence before the Court that *the activity of security undertakings and security staff is to carry out surveillance and protection tasks on the basis of relations governed by private law*.

However, the exercise of that activity does not mean that security undertakings and security staff are vested with powers of constraint. Merely *making a contribution to the maintenance of public security*, which any individual may be called upon to do, *does not constitute exercise of official authority*.

Case C-114/97 *Commission v Spain* [1998] ECR I-6717 §34, 35, 36, 37

On that point, it need only be observed that the grant by the Netherlands State of recognition for the purposes of Article 9g of the WVV to garages established in other Member States involves *the extension outside the national territory of rights and powers pertaining to the exercise of State authority and, consequently, does not fall within the scope of Article 59 of the Treaty*.

Case C-55/93 *Van Schaik* [1994] ECR I-4837 §16

It should be noted that, as the Advocate General showed in points 18 to 23 of his Opinion, the introduction of the computerized system at issue which, according to the invitation to tender relates to the premises, supplies, installations, maintenance, operation and transmission of data and everything else that is necessary for the conduct of the lottery, *does not involve any transfer of responsibility to the concessionaire for the various activities inherent in the lottery*.

Since the activities in question *do not therefore fall under the derogation in Article 55 of the Treaty*, it must be held that the restriction at issue is contrary to Articles 52 and 59 of the Treaty and the complaint of infringement of those articles must be upheld.

Case C-272/91 Commission v Italy [1994] ECR I-1409 §6, 13

Accordingly, the object of the question referred by the court requesting the preliminary ruling is *to ascertain whether activities* of the kind exercised by an approved commissioner pursuant to the Law of 1975 *entail direct and specific participation in the exercise of official authority*. To reply to this question, *it is necessary to consider the nature of the duties carried out* by approved commissioners under that Law, as they have been described by the national court.

Consequently, *the auxiliary and preparatory functions* of an approved commissioner vis-à-vis the Insurance Inspectorate - which itself is the body which exercises official authority by taking the final decision - *cannot be regarded as having a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 55 of the Treaty*.

Case C-42/92 Thijssen [1993] ECR I-4047 §9, 22

Having regard to the fundamental character of freedom of establishment and the rule on equal treatment with nationals in the system of the Treaty, *the exceptions allowed by the first paragraph of Article 55 cannot be given a scope which would exceed the objective for which this exemption clause was inserted*.

The first paragraph of Article 55 must enable Member States to exclude non-nationals from taking up functions *involving the exercise of official authority* which are connected with one of the activities of self-employed persons provided for in Article 52.

*This need is fully satisfied when the exclusion of nationals is limited to those activities which, taken on their own, constitute a direct and specific connexion with the exercise of official authority*.

An extension of the exception allowed by Article 55 *to a whole profession would be possible only* in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.

This extension is on the other hand not possible when, *within the framework of an independent profession*, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole.

The possible application of the restrictions on freedom of establishment provided for by the first paragraph of Article 55 *must therefore be considered separately in connexion with each Member State having regard to the national provisions applicable to the organization and the practice of this profession*.

*Professional activities involving contacts, even regular and organic, with the courts, including even compulsory cooperation in their functioning, do not constitute, as such, connexion with the exercise of official authority.*

*The most typical activities of the profession of avocat, in particular, such as consultation and legal assistance and also representation and the defence of parties in court, even when the intervention or assistance of the avocat is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority.*

*The exercise of these activities leaves the discretion of judicial authority and the free exercise of judicial power intact.*

Case 2-74 Reyners [1974] ECR 631 §43, 44, 45, 46, 47, 49, 51, 52 53

#### 4.1.2.2 Article 52 TFEU (formerly Article 46 EC)

It is true that the *objective of security and public policy*, expressly provided for in Article 52 TFEU, to which the Portuguese Government refers, constitutes a legitimate objective that could, in principle, warrant a restriction of the freedom to provide services. Nevertheless, contrary to what that Government claims, *the condition of residency at issue in the main proceedings cannot be justified by that objective. Recourse to such justification presupposes the existence of a genuine, sufficiently serious threat affecting one of the fundamental interests of society* (Case C-546/07 Commission v Germany [2010] ECR I-439, paragraph 49 and the case-law cited). The Portuguese Government does not, however, claim that such circumstances have been established in the present case.

In addition, the Court finds that a condition, such as the condition of residence at issue in the main proceedings, which bears no relation to the training followed or the ability to sail, is not in itself appropriate for attaining the objective in question, that is, to ensure safety of navigation at sea.

Moreover, and contrary to what the Portuguese Government claims, it is irrelevant that Article 7(1)(b) of Directive 91/439 (now Article 7(1)(e) of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ 2006 L 403, p. 18)) authorises the issuing of European driving licences only to those applicants who have their normal residence in the territory of the Member State issuing the licence, or can produce evidence that they have been studying there for at least six months. Unlike the situation in the main proceedings, *the condition of residency set out in those directives establishes, in a harmonised area of European Union law, the powers of each Member State to issue European driving licences.*

Case C-509/12 Navileme and Nautizende [2014] not published yet §20, 21, 22

In the present case, the objective pursued by Article 72 of the Law of 6 April 2010 is to protect the interests of consumers, as is moreover apparent from the very title of that law. The protection of consumers is recognised in the case-law as an overriding reason of public interest, capable of justifying a restriction on the freedom to provide services (see Case 286/81 Oosthoek's



Uitgeversmaatschappij [1982] ECR 4575, paragraph 16, and Case 220/83 Commission v France [1986] ECR 3663, paragraph 20).

As regards the appropriateness of Article 72 of the Law of 6 April 2010, it must be stated, first, that financial services are, by nature, complex and entail specific risks with regard to which the consumer is not always sufficiently well informed. Secondly, a combined offer is, in itself, such as to generate on the part of the consumer the idea of a price advantage. *It follows that a combined offer of which one component is a financial service is more likely to be lacking in transparency as regards the conditions, the price and the exact content of that service. Accordingly, such an offer may well mislead consumers as to the true content and actual characteristics of the combination offered and, at the same time, deprive them of the opportunity of comparing the price and quality of that offer with other corresponding services from other economic operators.*

*In those circumstances, legislation which prohibits combined offers involving at least one financial service is of such a nature as to contribute to consumer protection.*

Case C-265/12 Citroën Belux [2013] not published yet §38, 39, 40

The prevention of and the *combating of money laundering and terrorist financing* are legitimate aims which the Member States have endorsed both at the international and European Union levels.

As is stated in the first recital in the preamble to Directive 2005/60, which seeks to implement at European Union level the Recommendations of the FATF, '[m]assive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market, and terrorism shakes the very foundations of our society'. Likewise, the third recital in the preamble to that directive notes that '[i]n order to facilitate their criminal activities, money launderers and terrorist financiers could try to take advantage of the freedom of capital movements and the freedom to supply financial services'.

*The Court has moreover already accepted that the combating of money laundering, which is related to the aim of protecting public order, constitutes a legitimate aim capable of justifying a barrier to the freedom to provide services* (see, to that effect, Case C-212/08 Zeturf [2011] ECR I-5633, paragraphs 45 and 46).

Case C-212/11 Jyske Bank Gibraltar [2013] not published yet §62, 63, 64

Article 46(1) EC, applicable in this field by reason of Article 55 EC, *allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the general interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order* (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 46 and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).

Joined cases C-447/08 and C-448/08 Otto Sjöberg [2010] ECR I-6921 §36

It follows from Article 46 EC, which must be interpreted strictly, that discriminatory rules may be justified only on grounds of public policy, public security or public health (see, inter alia, Case C-490/04 *Commission v Germany*, paragraph 86).

None the less, recourse to such justification *presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society* (see, to that effect, inter alia, Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 46, and Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-0000, paragraph 28).

Case C-546/07 *Commission v Germany* [2010] ECR I-439 §48, 49

As regards the subsidiary ground relied upon by the Italian Government to justify that obstacle to the freedoms guaranteed by Articles 43 EC and 49 EC and relating to the maintenance of public order, it should be borne in mind *that the concept of ‘public order’ comes into play where a genuine and sufficiently serious threat affects one of the fundamental interests of society*. Like all derogations from a fundamental principle of the Treaty, *the exception relating to public order must be narrowly construed* (see *Commission v Belgium*, paragraph 28 and the case-law cited).

Case C-465/05 *Commission v Italy* [2007] ECR I-11091 §49

*The freedom to provide services may, however, be restricted by national regulations justified on the grounds set out in Article 46(1) EC in conjunction with Article 55 EC or by overriding reasons in the public interest* (see, to that effect, Case C-262/02 *Commission v France*, paragraph 23), to the extent that there are no Community harmonising measures providing for measures necessary to ensure those interests are protected (see, to that effect, in the context of the free movement of goods, Case C-323/93 *Centre d’insémination de la Crespelle* [1994] ECR I-5077, paragraph 31 and case-law cited).

Case C-255/04 *Commission v France* [2006] ECR I-5251 §43

The Court has likewise acknowledged that *the objective of maintaining a balanced medical and hospital service open to all may also fall within the derogations on grounds of public health under Article 46 EC in so far as it contributes to the attainment of a high level of health protection* (*Kohll*, paragraph 50; *Smits and Peerbooms*, paragraph 73; and *Müller-Fauré and van Riet*, paragraph 67).

The Court has also held that *Article 46 EC permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival, of the population* (*Kohll*, paragraph 51; *Smits and Peerbooms*, paragraph 74; and *Müller-Fauré and van Riet*, paragraph 67).

It is well known that *the number of hospitals, their geographical distribution, the way in which they are organised and the facilities* with which they are provided, and even *the nature of the medical services* which they are able to offer, *are all matters for which planning, generally designed to satisfy various needs, must be possible*.

For one thing, *such planning seeks to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment* in the State concerned. For another thing, *it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources*. Such wastage would be all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for healthcare are not unlimited, whatever the mode of funding applied.

As regards specifically the Netherlands system of health insurance, in issue in the cases giving rise to the *Smits and Peerbooms* judgment, the Court acknowledged in paragraph 81 thereof that, *if patients were at liberty, regardless of the circumstances, to use the services of hospitals* with which their health insurance fund had no agreement, whether those hospitals were situated in the Netherlands or in another Member State, *all the planning* which goes into the system of agreements in an effort *to guarantee a rationalised, stable, balanced and accessible supply of hospital services would be jeopardised at a stroke*.

*Those observations, expressed in relation to a system of social security based on a system of agreements between the public health insurance funds and the suppliers of hospital services, which permit, in the name of overriding planning objectives, limits to be placed on the right of patients to resort at the expense of the national system with which they are registered to hospital treatment not provided by that system, may be adopted in respect of a national health system such as the NHS.*

In the light of the foregoing, and in answer to Question 1(c), Community law, in particular *Article 49 EC*, *does not* therefore *preclude* the right of a patient to receive hospital treatment in another Member State at the expense of the system with which he is registered from being subject *to prior authorisation*.

Nevertheless, the conditions attached to the grant of such authorisation must be justified in the light of the overriding considerations mentioned above and must satisfy the requirement of proportionality referred to in paragraph 106 of the present judgment (see to that effect *Smits and Peerbooms*, paragraph 82, and *Müller-Fauré and van Riet*, paragraph 83).

In relation to the dispute in the main proceedings, it should be noted, as does the Commission, that the regulations on the NHS do not set out the criteria for the grant or refusal of the prior authorisation necessary for reimbursement of the cost of hospital treatment provided in another Member State, and therefore do not circumscribe the exercise of the national competent authorities' discretionary power in that context. The lack of a legal framework in that regard also makes it difficult to exercise judicial review of decisions refusing to grant authorisation.

It should be noted with regard to the circumstances and factors referred to in the third and fourth questions that, given the findings set out in paragraphs 59 to 77 of the present judgment, a refusal to grant prior authorisation cannot be based merely on the existence of waiting lists enabling the supply of hospital care to be planned and managed on the basis of predetermined general clinical priorities, without carrying out in the individual case in question an objective medical assessment of the patient's medical condition, the history and probable course of his illness, the degree of

pain he is in and/or the nature of his disability at the time when the request for authorisation was made or renewed.

Case C-372/04 Watts [2006] ECR I-4325 §104, 105, 108, 109, 111, 112, 113, 114, 118, 119

Finally, with regard to the argument of the Spanish Government concerning the closeness between the field of private security and that of public security, the Court has already held that *the exception laid down in Article 46(1) EC authorising the Member States to maintain special regimes for foreign nationals justified on grounds of public safety did not apply to the general system for private security undertakings* (Commission v Spain, paragraphs 45 and 46, and Case C-355/98 Commission v Belgium [2000] ECR I-1221, paragraphs 28 and 30).

Case C-514/03 Commission v Spain [2006] ECR I-963 §28

In the light of the foregoing, the answer to the fifth, sixth, seventh, eighth and ninth questions should be that *a detention order with a view to deportation in respect of a national of another Member State, imposed on the basis of failure to present a valid identity card or passport even when there is no threat to public policy, constitutes an unjustified restriction on the freedom to provide services and is therefore contrary to Article 49 EC.*

Case C-215/03 Oulane [2005] ECR I-1215 §44

However, *the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation* (Case 41/74 Van Duyn [1974] ECR 1337, paragraph 7). In addition, *the concept of 'public policy' in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions* (see, by analogy with the free movement of workers, Van Duyn, paragraph 18; Case 30/77 Bouchereau [1977] ECR 1999, paragraph 33). Thus, *public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society* (Case C-54/99 Église de Scientologie [2000] ECR I-1335, paragraph 17).

The fact remains, however, that *the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty* (Van Duyn, paragraph 18, and Bouchereau, paragraph 34).

In this case, the competent authorities took the view that *the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity*. According to the Bundesverwaltungsgericht, the national courts which heard the case shared and confirmed the conception of the requirements for protecting human dignity on which the contested order is based, that conception therefore having to be regarded as in accordance with the stipulations of the German Basic Law.

Case C-36/02 Omega [2004] ECR I-9609 §30, 31, 32

Second, the French rules on television advertising pursue an *objective relating to the protection of public health within the meaning of Article 56(1) of the Treaty*, as the Advocate General stated in paragraph 69 of his Opinion. *Measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse* reflect public health concerns (see Case 152/78 *Commission v France* [1980] ECR 2299, paragraph 17; *Aragonesa de Publicidad Exterior and Publivia*, paragraph 15; and Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraph 27).

Third, the French rules on television advertising *are appropriate to ensure their aim of protecting public health*. Furthermore, they *do not go beyond what is necessary* to achieve such an objective. They limit the situations in which hoardings advertising alcoholic beverages may be seen on television and are therefore likely to restrict the broadcasting of such advertising, thus reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages.

Case C-262/02 Commission v France [2004] ECR I-6569 §30, 31

Case C-429/02 Bacardi France SAS [2004] ECR I-6613 §37, 38

As far as concerns the argument that the French rules on television advertising are inconsistent, since they apply only to alcoholic beverages whose alcohol content exceeds 1.2°, concern only television advertising, and do not apply to advertising for tobacco, it is sufficient to reply that *that option lies within the discretion of the Member States to decide on the degree of protection which they wish to afford to public health* and on the way on which that protection is to be achieved (see *Aragonesa de Publicidad Exterior and Publivia*, paragraph 16).

Case C-262/02 Commission v France [2004] ECR I-6569 §33

Accordingly, the answer to the second question is that Article 59 of the Treaty does not preclude a Member State *from prohibiting television advertising for alcoholic beverages marketed in that State*, in the case of *indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other Member States*.

Case C-429/02 Bacardi France [2004] ECR I-6613 §41

First of all, whilst in *Schindler*, *Läärä* and *Zenatti* *the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest*, such as *consumer protection* and the *prevention of both fraud and incitement to squander on gaming*, restrictions based on such grounds and on the need to preserve public order must also *be suitable for achieving those objectives*, inasmuch as they must *serve to limit betting activities in a consistent and systematic manner*.

In so far as *the authorities of a Member State incite and encourage consumers to participate in lotteries*, games of chance and betting to the financial benefit of the public purse, the authorities of *that State cannot invoke public order concerns relating to the need to reduce opportunities for betting* in order to justify measures such as those at issue in the main proceedings.

Case C-243/01 Gambelli [2003] ECR I-13031 §67, 69

As regards the reasons of public policy and public security relied upon in order to justify that requirement, it should be noted, first, that *the concept of public policy assumes a genuine and sufficiently serious threat affecting one of the fundamental interests of society*. Like all derogations from a fundamental principle of the Treaty, the public policy exception must be interpreted restrictively (see Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 21 and 23).

*Moreover, the right of Member States to restrict the free movement of persons and services on grounds of public policy, public security or public health is not intended to exclude economic sectors such as the private security sector from the application of that principle, from the point of view of access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public policy, public security or public health* (see *Commission v Spain*, cited above, paragraph 42).

Case C-355/98 *Commission v Belgium* [2000] ECR I-1221 §28, 29

Under the Court's case-law, *the concept of public policy may be relied upon in the event of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society* (see Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35).

In this respect, it must be accepted *that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, in order to maintain public order*.

It follows *that an expulsion order could be made against a Community national* such as Ms Calfa *only if*, besides her having committed an offence under drugs laws, *her personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society*.

Case C-348/96 *Calfa* [1999] ECR I-11 §21, 22, 25

*The rule* according to which directors and managers of all security undertakings must reside in Spain constitutes an obstacle to freedom of establishment (see, in this regard, Case C-221/89 *Factortame* [1991] ECR I-3905, paragraph 32) and *to the freedom to provide services*.

*This condition is not necessary in order to ensure public security in the Member State concerned and is not therefore covered by the derogation provided for by Article 56(1) combined, where appropriate, with Article 66 of the Treaty*.

*Recourse to this justification presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society* (see, as far as public policy is concerned, *Bouchereau*, cited above, paragraph 35).

Case C-114/97 *Commission v Spain* [1998] ECR I-6717 §44, 45, 46

With regard to the possible existence of a restriction on freedom to provide maritime transport services, it must be observed that the mooring service constitutes a technical nautical service which is essential to the maintenance of safety in port waters and has the characteristics of a

public service (universality, continuity, satisfaction of public-interest requirements, regulation and supervision by the public authorities). Accordingly, provided that the price supplement in relation to the actual cost of the service does indeed correspond to the additional cost occasioned by the need to maintain a universal mooring service, *the requirement to have recourse to a local mooring service*, even if it were capable of constituting a hindrance or impediment to freedom to provide maritime transport services, *could be justified, under Article 56 of the EC Treaty, by the considerations of public security* relied on by the mooring groups, on the basis of which the national legislation on mooring was adopted.

Case C-266/96 Corsica Ferries [1998] ECR I-3949 §60

It should be noted, first of all, that *under Articles 56 and 66 of the EC Treaty Member States may limit freedom to provide services on grounds of public health*.

However, *that does not permit them to exclude the public health sector*, as a sector of economic activity and from the point of view of freedom to provide services, *from the application of the fundamental principle of freedom of movement* (see Case 131/85 *Gül v Regierungspräsident Düsseldorf* [1986] ECR 1573, paragraph 17).

Consequently, *rules* such as those applicable in the main proceedings *cannot be justified on grounds of public health in order to protect the quality of medical services provided* in other Member States.

As to *the objective of maintaining a balanced medical and hospital service open to all*, that objective, although intrinsically linked to the method of financing the social security system, *may also fall within the derogations on grounds of public health under Article 56 of the Treaty, in so far as it contributes to the attainment of a high level of health protection*.

*Article 56 of the Treaty permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of a treatment facility or medical service on national territory is essential for the public health and even the survival of the population* (see, with respect to public security within the meaning of Article 36 of the Treaty, Case 72/83 *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727, paragraphs 33 to 36).

Case C-158/96 Kohll [1998] ECR I-1931 §45, 46, 49, 50, 51

As the Court of Justice held in Joined Cases 115/181 and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, paragraph 7, *the reservations contained in Articles 48 and 56 of the EC Treaty permit Member States to adopt, with respect to the nationals of other Member States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto*.

Joined cases C-65/95 and C-111/95 Shingara and Radiom [1997] ECR I-3343 §28

As stated in paragraph 12 above, *the rule in question entails discrimination based on the place of establishment. Such discrimination can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty, to which Article 66 refers, and which do not include*

*economic aims* (see in particular Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11).

Case C-484/93 Svensson and Gustavsson [1995] ECR I-3955 §15

Apart from the fact that *cultural policy is not one of the justifications set out in Article 56*, it is important to note that the Decree-Law promotes the distribution of national films whatever their content or quality.

In those circumstances, the link between the grant of licences for dubbing films from third countries and the distribution of national films pursues an *objective of a purely economic nature which does not constitute a ground of public policy within the meaning of Article 56 of the Treaty*.

Case C-17/92 Distribuidores Cinematográficos [1993] ECR I-2239 §20, 21

Moreover, the justifications put forward by the Belgian Government do not come within any of the grounds for exemption from the freedom to provide services permitted by Article 56, namely *public policy, public security and public health*.

As the Court has consistently held (see, in particular, the judgment in Case 288/89 *Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11), *those exemptions alone can effectively be relied upon to justify national rules which are not applicable to services without distinction as regards their origin*.

Case C-211/91 Commission v Belgium [1992] ECR I-6757 §10, 11

It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects unless those rules fall within the derogating provision contained in Article 56 of the Treaty to which Article 66 refers. *It follows from Article 56, which must be interpreted strictly, that discriminatory rules may be justified on grounds of public policy, public security or public health*.

In particular, *where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights*. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.

The reply to the national court must therefore be that the limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, *public security and public health must be appraised in the light of the general principle of freedom of expression* embodied in Article 10 of the European Convention on Human Rights.

Case C-260/89 ERT [1991] ECR I-2925 §24, 43, 45



National rules which are *not applicable* to services *without distinction* whatever the place of residence of the recipient, and which are therefore discriminatory, are compatible with Community law only if they can be brought within the scope of an express derogation.

Case C-224/97 Ciola [1999] ECR I-2517 §16

Case 352/85 Bond van Adverteerders [1988] ECR 2085 §32

*The only derogation which may be contemplated in a case such as this is that provided for in Article 56 of the Treaty, to which Article 66 refers, under which national provisions providing for special treatment for foreign nationals escape the application of Article 59 of the Treaty if they are justified on grounds of public policy.*

It is sufficient to observe in that regard that the measures taken by virtue of that article must not be disproportionate to the intended objective. *As an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard.*

Case 352/85 Bond van Adverteerders [1988] ECR 2085 §33, 36

For the implementation of those provisions, Title II of the General Programme for the Abolition of Restrictions on Freedom to Provide Services (Official Journal, English Special Edition, Second Series IX, p. 3), which was drawn up by the Council pursuant to Article 63 of the Treaty on 18 December 1961, envisages inter alia the repeal of provisions laid down by law, regulation or administrative action which in any Member State govern, for economic purposes, the entry, exit and residence of nationals of Member States, where such provisions are not *justified on grounds of public policy*, public security or public health and are liable to hinder the provision of services by such persons.

Joined cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377 §11

#### 4.1.2.3 *The efficient administration of justice*

*The rules in issue cannot be justified by the requirements of the proper administration of justice.* The German Government submits in this regard that it is necessary to protect the unsuccessful party to a dispute against claims for reimbursement that are exaggerated and unforeseeable. It must be stated that, in the Member State in question, *the fees of a lawyer practising before the court seised are perfectly foreseeable* inasmuch as they are expressly mentioned in Paragraph 24a of the BRAGO. Likewise, in view of the relatively limited activity of that lawyer, the associated costs are significantly lower than those corresponding to the representation by the other lawyer.

Case C-289/02 AMOK [2003] ECR I-15059 §40

The *need to determine which court has territorial jurisdiction over proceedings relating to patents registered in Italy* as well as concern *to ensure the efficient conduct of such proceedings* may be pleaded as *overriding reasons* of public interest *capable of justifying restrictions* on the freedom to provide services.

However, *the requirement to have a residence or place of business in Italy goes*, on any view, *beyond what is necessary* to attain those objectives, since the Italian Republic could have adopted less restrictive measures to achieve those objectives.

Case C-131/01 Commission v Italy [2003] ECR I-1659 §44, 45

Consequently, the fact, pointed out by the Commission, *that a creditor or a non-professional adviser acting on his behalf can lodge an application for an attachment order does not preclude legislative provisions* such as those at issue in the main proceedings from being regarded as *justified in the general interest on the ground that* they protect creditors *or safeguard the sound administration of justice* in relation to the provision of litigation services on a professional basis.

Case C-3/95 Reisebüro Broede [1996] ECR I-6511 §36

In accordance with these principles, the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes within the jurisdiction of certain courts or tribunals cannot be considered incompatible with the provisions of Articles 59 and 60, *where such requirement is objectively justified by the need* to ensure observance of professional rules of conduct connected, in particular, with the *administration of justice* and with respect for professional ethics.

In relation to a professional activity the exercise of which is similarly unrestricted within the territory of a particular Member State, the requirement of residence within that State constitutes a restriction which is incompatible with Articles 59 and 60 of the Treaty *if the administration of justice can satisfactorily be ensured by measures which are less restrictive*, such as the choosing of an address for service.

Case 33-74 Van Binsbergen [1974] ECR 1299 §14, 16

#### 4.1.2.4 Cohesion of the tax system and effectiveness of fiscal supervision

With regard to the grounds of justification thus mentioned, it must be pointed out that *the Court has already acknowledged that the need to maintain the coherence of a tax system can justify a restriction on the exercise of fundamental freedoms guaranteed by the Treaty* (Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 43).

Secondly, *the Court has acknowledged that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty* (see, to that effect, *X and Passenheim-van Schoot*, paragraph 45 and the case-law cited).

Case C-233/09 Dijkman [2010] ECR I-6649 §54, 58

In that regard, it should be borne in mind that the Court has acknowledged that *the need to preserve the cohesion of a tax system may justify a restriction on the fundamental freedoms guaranteed by the Treaty, but has pointed out that such a justification requires a direct link*

*between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question* (see, inter alia, Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-0000, paragraphs 71 and 72).

**Case C-169/08 Presidente del Consiglio dei Ministri v Regione Sardegna [2009] ECR I-10821 §47**

The latter relies *on the need to ensure payment of taxes and effective fiscal supervision*. It is true that the Court has repeatedly held that the prevention of tax avoidance and the need for effective fiscal supervision may be relied upon to justify restrictions on the exercise of fundamental freedoms guaranteed by the Treaty (see Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 18, and *Commission v Belgium*, cited above, paragraph 39). **However, a general presumption of tax avoidance or fraud is not sufficient to justify a fiscal measure which compromises the objectives of the Treaty** (see, to that effect, the judgment in *Commission v Belgium*, cited above, paragraph 45).

In the present case, *deduction at source*, operated directly by debtors resident in France, will admittedly be a straightforward process for the tax authorities. Where *debtors are resident in other Member States*, it may prove *more difficult to ascertain whether all the conditions necessary for the application of a particular rate of levy have been met. However, that involves disadvantages of a purely administrative nature which are not*, as the Advocate General has noted at points 29 and 30 of his Opinion, *sufficient to justify a restriction on the freedom to provide services and on the free movement of capital of the type which the legislation in question gives rise to*.

As regards *less restrictive solutions that may be available*, the French Government has itself recognised that the practical difficulties could be avoided by, for example, providing for a *voluntary annual declaration of income received from companies established in other Member States to be included in tax returns, for the purpose of the operation of the fixed levy*. A solution of that kind would fully resolve issues of supervision and, for the reasons given at point 31 of the Advocate General's Opinion, it would not affect the stability of the tax system in question.

**Case C-334/02 Commission v France [2004] ECR I-2229 §27, 29, 30**

It is true that in the past *the Court has accepted that the need to maintain the cohesion of tax systems could, in certain circumstances, provide sufficient justification for maintaining rules restricting fundamental freedoms* (see, to this effect, Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission v Belgium* [1992] ECR I-305). Nevertheless, in the cases cited, there was a direct link between the deductibility of contributions from taxable income and the taxation of sums payable by insurers under old-age and life assurance policies, and that link had to be maintained in order to preserve the cohesion of the tax system in question. In the present case, there is no such direct link between the consortium relief granted for losses incurred by a resident subsidiary and the taxation of profits made by non-resident subsidiaries.

**Case C-264/96 ICI [1998] ECR I-4695 §29**

As is apparent from the foregoing analysis, this is the case as far as pensions and life assurance are concerned for the period after 1975. As regards the preceding years, and as far as sickness and invalidity insurance are concerned, it must be left to the national court to assess whether the provisions to which it refers *were* also *necessary in order to ensure the cohesion of the tax system* of which they form part.

It follows that, as *Community law stands at present, it is not possible to ensure the cohesion of such a tax system by means of measures which are less restrictive* than those provided for by the rules in question, and that the consequences of any other measure ensuring the recovery by the Belgian State of the tax due under its legislation on sums payable by insurers pursuant to the contracts concluded with them would ultimately be similar to those resulting from the non-deductibility of contributions.

Case C-204/90 Bachmann [1992] ECR I-249 §28, 33

In view of the foregoing, it must be accepted that the contested provisions of Belgian law *are justified by the need to safeguard the cohesion of the tax system* at issue and, consequently, that they do not infringe Article 48 of the Treaty. This is also the case as regards Article 7 of Regulation No 1612/68.

Case C-300/90 Commission v Belgium [1992] ECR I-305 §21

#### 4.1.2.5 Protection of the recipients of services

In the present case, the documents placed before the Court indicate that the objective pursued by the regional legislation at issue is that of ensuring that *the post-graduate education to which access for young, unemployed graduates is made easier through the award of a study grant is of a high standard, in order to facilitate the access of such students to the labour market*. It is indisputable that making the financing of post-graduate education subject to a condition which is intended to guarantee the quality of that education is based on an overriding reason in the public interest. *The aim of ensuring high standards of university education appears to be a legitimate objective capable of justifying restrictions on fundamental freedoms* (see, to that effect, Case C-153/02 *Neri* [2003] ECR I-13555, paragraph 46).

Case C-523/12 Dirextra Alta Formazione [2013] not published yet §25

In that regard, it must be observed *that the public interest in the protection of recipients of the services* in question against harm which they could suffer as a result of services provided by persons without the necessary professional or personal qualifications can justify a restriction on the freedom of establishment and on the freedom to provide services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraphs 15 to 17).

As the Advocate General pointed out in point 49 of his Opinion, some of the services reserved to CAF, such as delivery of a copy of the tax declaration and of the tax payment schedule, filing the tax declarations with the tax authorities and informing employers responsible for the collection of tax of the effect of the tax declaration, are essentially simple and do not require any specific professional qualifications.

***It is obvious that the nature of those services cannot justify their provision being limited solely to holders of a particular professional qualification.***

Although some tasks reserved to CAF are, by contrast, more complex, that is, particularly, checking that the information given in the tax declaration is consistent with the documents annexed to it, the organisations authorised to set up CAF do not appear to offer any guarantees of particular professional abilities to accomplish those tasks.

Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941 38, 39, 40, 41

***It should next be stated that the public interest in the protection of the recipients of the services in question against such harm justifies a restriction of the freedom to provide services.*** However, such a provision goes beyond what is necessary to protect that interest if it makes the pursuit, by way of business, of an activity such as that at issue, subject to the possession by the persons providing the service of a professional qualification which is quite specific and disproportionate to the needs of the recipients.

Case C-76/90 Säger [1991] ECR I-4221 §17

(see also: Case C-288/89 Mediawet I [1991] ECR I-4007 §14)

#### 4.1.2.6 Consumer protection

In light of the foregoing, the answer to the question referred is that ***Article 56 TFEU must be interpreted as not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State.***

Case C-176/11 HIT and HIT LARIX [2012] not published yet §36

In that context, ***moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order*** (*Gambelli and Others*, paragraph 63).

As regards the objectives capable of justifying those obstacles, ***a distinction must be drawn in this context between, on the one hand, the objective of reducing gambling opportunities and, on the other hand – in so far as games of chance are permitted – the objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled.***

With regard to the first type of objective, it is clear from the case-law that although restrictions on the number of operators are in principle capable of being justified, those restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities and to limit

activities in that sector *in a consistent and systematic manner* (see, to that effect, *Zenatti*, paragraphs 35 and 36, and *Gambelli and Others*, paragraphs 62 and 67).

Joined cases C-338/04, C-359/04 and C-360/04 Placanica [2007] ECR I-1891 §47, 52, 53

On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in *Schindler*, *Läärä* and *Zenatti* that *moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society* associated with gaming and betting, *could* serve to *justify* the existence on the part of the national authorities of *a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require*.

Case C-243/01 Gambelli [2003] ECR I-13031 §63

It must, however, be pointed out that *the protection of consumers against abuses of advertising* or, as an aim of cultural policy, the maintenance of a certain level of programme quality *constitute overriding reasons relating to the general interest which may justify restrictions on freedom to provide services* (see, in particular, Case C-288/89 *Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 27).

Case C-6/98 ARD [1999] ECR I-7599 §50

Further, according to settled case-law, fair trading and *the protection of consumers* in general *are overriding requirements of public interest which may justify restrictions on freedom to provide services* (see, in particular, *Collectieve Antennevoorziening Gouda*, cited above, paragraph 14, and Case C-384/93 *Alpine Investments* [1995] ECR I-1141).

Joined cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843 §53

As the Court has held on several occasions, in the absence of coordination at a Community level *the Member States may*, subject to certain conditions, *impose national measures pursuing a legitimate aim that is compatible with the Treaty and is justified on overriding public interest grounds, which include the protection of consumers* (see, in particular, Case 205/84 *Commission v Germany* [1986] ECR 3755).

Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405 §16

In this respect, it must be observed in the first place that restrictions on the broadcasting of advertisements, such as a prohibition on advertising particular products or on certain days, a limitation of the duration or frequency of advertisements or restrictions designed to enable listeners or viewers not to confuse advertising with other parts of the programme, may be justified by overriding reasons relating to the general interest. Such restrictions may be imposed in order *to protect consumers* against excessive advertising or, as an objective of cultural policy, in order to maintain a certain level of programme quality.

Case C-288/89 Mediawet I [1991] ECR I-4007 §27

***The general interest in*** the proper appreciation of the artistic and archaeological heritage of a country and in ***consumer protection can constitute an overriding reason justifying a restriction on the freedom to provide services.***

However, the requirement in question contained in the Greek legislation goes beyond what is necessary to ensure the safeguarding of that interest inasmuch as it makes the activities of a tourist guide accompanying groups of tourists from another Member State subject to possession of a licence.

Case C-198/89 Commission v Greece [1991] ECR I-727 §21

Case C-180/89 Commission v Italy [1991] ECR I-709 §20

Case C-154/89 Commission v France [1991] ECR I-659 §17

Moreover, the profitable operation of such group tours depends on the commercial reputation of the operator, who faces competitive pressure from other tour companies; the need to maintain that reputation and the competitive pressure themselves compel companies to be selective in employing tourist guides and exercise some control over the quality of their services. Depending on the specific expectations of the groups of tourists in question, that factor is likely to contribute to the proper appreciation of the artistic and archaeological heritage and the ***protection of consumers***, in the case of conducted tours of places other than museums or historical monuments which may be visited only with a professional guide.

Case C-198/89 Commission v Greece [1991] ECR I-727 §24

Case C-154/89 Commission v France [1991] ECR I-659 §20

In the course of the proceedings before the Court, the German Government and the governments intervening in its support have shown that considerable differences exist in the national rules currently in force concerning technical reserves and the assets which represent such reserves. In the absence of harmonization in that respect and of any rule requiring the supervisory authority of the Member State of establishment to supervise compliance with the rules in force in the State in which the service is provided, it must be recognized that the latter State is justified in requiring and supervising compliance with its own rules on technical reserves with regard to services provided within its territory, provided that such rules do not exceed ***what is necessary for the purpose of ensuring that policy-holders and insured persons are protected.***

It must therefore be recognized that, in the present state of Community law, ***the considerations described above relating to the protection of policy-holders and insured persons*** justify the application by the Member State in which the service is provided of its own legislation concerning technical reserves and the conditions of insurance, provided that the requirements of that legislation do not exceed what is necessary to ensure the protection of policy-holders and insured persons. It therefore remains to consider whether it is necessary for such supervision to be effected under an authorization procedure and on the basis of a requirement that the insurance undertaking should have a permanent establishment in the State in which the service is provided.

Case 205/84 Commission v Germany [1986] ECR 3755 §39, 41

In its judgment delivered this day in Case 205/84 *Commission v Federal Republic of Germany* [1986] ECR 3793, the Court held that ***in the insurance sector in general there were imperative reasons relating to the protection of the consumer both as a policy-holder and as an insured person which might justify restrictions on the freedom to provide services.*** The Court also recognized that in the present state of Community law, in particular with regard to the coordination of the relevant national rules, the protection of that interest was not necessarily guaranteed by the rules of the State of establishment. The Court concluded therefrom that, as regards the field of direct insurance in general, the requirement of a separate authorization granted by the authorities of the State in which the service was provided remained justified subject to certain conditions. On the other hand, the Court considered that the requirement of an establishment, which represented the very negation of the freedom to provide services, exceeded what was necessary to attain the objective pursued and that, accordingly, that requirement was contrary to Articles 59 and 60 of the Treaty.

Case 252/83 *Commission v Denmark* [1986] ECR 3713 §20

It must first be pointed out that nationals of a Member State who pursue their occupation in another Member State are obliged to comply with the rules which govern the pursuit of the occupation in question in that Member State. As the French Government rightly observes, in the case of the medical and dental professions those rules reflect in particular a concern to ensure that individuals enjoy the most effective and complete ***health protection*** possible.

Case 96/85 *Commission v France* [1986] ECR 1475 §10

#### 4.1.2.7 *Protection of workers*

Secondly, it is nevertheless necessary to recall that Paragraph 2(3) of the AEntG pursues a general-interest objective linked to the social protection of workers in the construction industry and the monitoring of that protection. The Court has already recognised this objective as among the overriding requirements which justify such restrictions on the freedom to provide services (Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18; *Guiot*, paragraph 16, and *Arblade and Others*, paragraph 51).

By requiring ***the relevant documents in the language of the host Member State to be kept on the building site***, Paragraph 2(3) of the AEntG is designed to enable the competent authorities of that Member State to carry out ***the monitoring***, at the building site, ***necessary to ensure compliance with the national provisions regarding worker protection, in particular those relating to pay and working hours.*** This type of on-site supervision would become extremely difficult, even impossible, in practice, if those documents could be presented in the language of the Member State in which the undertaking is established, as that language would not necessarily be understood by the civil servants of the host Member State.

Case C-490/04 *Commission v Germany* [2007] ECR I-6095 §70, 71



Secondly, as regards making *the issue of the EU Posting Confirmation subject to the requirement that there must be an employment contract of at least one year or of indefinite duration*, such a measure *goes beyond* what is required for the objective of social protection as a necessary condition for providing services through the posting of workers who are nationals of non-Member States (*Commission v Luxembourg*, paragraphs 32 and 33, and *Commission v Germany*, paragraph 58).

Case C-168/04 Commission v Austria [2006] ECR I-9041 §50

Firstly, with regard to social protection of the performing artists in question, it is certainly not inconceivable that, in the same way as employed persons, self-employed workers, such as *service providers, may need specific measures to afford them a certain degree of social protection* (see, to that effect, with regard to freedom of establishment, Case C-53/95 *Kemmler* [1996] ECR I-703, paragraph 13). Thus, the social protection of service providers may, in principle, be one of the overriding requirements of public interest which may justify a restriction on the freedom to provide services.

However, with regard, firstly, to ensuring social security provision, it should be noted that there are Community measures in place specifically for the coordination of the legislation applicable to the social security of service providers. It is clear from Article 13(1) of Regulation No 1408/71, in conjunction with Articles 4 and 14a(1)(a) of that regulation, that *individuals who normally pursue activities as self-employed persons in a Member State and who work on a temporary basis in another Member State remain subject to the legislation of the former Member State*. Under the system established by that regulation, the performing artists in question are therefore entitled to the social security provided by their Member State of origin and not that provided by the Member State of destination, a form of protection which they can, moreover, prove by a model certificate, known as Form E 101 (see, to that effect, Case C-178/97 *Banks and Others* [2000] ECR I-2005, paragraphs 33 and 34).

With regard, secondly, to the objective of combating concealed employment, *the fact that performing artists are normally engaged on an intermittent basis and for short periods by different show organisers cannot, of itself, mean that a general assumption of concealed employment is well founded*. That is particularly so in this case because the performing artists in question are recognised as service providers, established in their Member State of origin, where they usually provide similar services.

In those circumstances, as the Commission suggests, the establishment of a system of ex post facto control, together with deterrent penalties to prevent and identify individual instances of the use of bogus amateur or unpaid status, would suffice to combat concealed employment effectively.

It must therefore be held that:

- by making *the grant of a licence to performing artists' engagements agencies*, established in another Member State, subject to the need to engage performers, and

- by imposing *the presumption of salaried status on performing artists* who are recognised as service providers and established in their Member State of origin, where they usually provide similar services, the French Republic has failed to fulfil its obligations under Article 49 EC.

Case C-255/04 Commission v France [2006] ECR I-5251 §47, 48, 52, 53, 55

In that regard, while the Court has already held that the overriding reasons relating to the public interest capable of justifying restrictions on the freedom to provide services include the protection of workers (Arblade and Others, paragraph 36), it must be observed that *Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established*, just as Community law does not prohibit Member States from enforcing those rules by appropriate means, when it is established that the protection conferred thereunder is not guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established (*Commission v Luxembourg*, paragraph 21).

In that regard, [...] , it has already been held *that legislation imposing a requirement of a period of only six months' prior employment exceeds what can be required in the name of the objective of the social welfare protection* of workers who are nationals of non-member countries (*Commission v Luxembourg*, paragraph 32).

Case C-244/04 Commission v Germany [2006] ECR I-885 §44, 58

In those circumstances the reply to the question referred must be that *Article 5 of Directive 96/71, interpreted in the light of Article 49 EC, does not preclude*, in a case such as that in the main proceedings, a national system whereby, when *subcontracting the conduct of building work to another undertaking*, a building contractor becomes liable, in the same way as a guarantor who has waived the defence of prior recourse, *for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker* or to pay contributions to a joint scheme for parties to a collective agreement where *the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment* or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective.

Case C-60/03 Wolff & Müller [2004] ECR I-9553 §45

*The overriding reasons* relating to the public interest which have been acknowledged by the Court include *the protection of workers* (see Webb, cited above, paragraph 19, Joined Cases 62/81 and 63/81 *Seco v EVI* [1982] ECR 223, paragraph 14, and Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18), and in particular the social protection of workers in the construction industry (*Guiot*, paragraph 16).

Furthermore, in the absence of an organised system for cooperation or exchanges of information of the kind referred to in the preceding paragraph, *the obligation to draw up and keep on site, or*

*at least in an accessible and clearly identified place in the territory of the host Member State, certain of the documents* required by the rules of that State *may constitute the only appropriate means of control*, having regard to the objective pursued by those rules.

Joined cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453 §36, 62

That finding is borne out by the case-file and the information provided in response to the written questions put by the Court, as well as by the arguments presented at the hearing. It appears that although the Luxembourg legislation differs from the Belgian legislation, in particular as regards the percentage of the premiums and the procedure for their payment, they *both provide mechanisms intended, on the one hand, to protect workers* in the construction industry against the risk of suspension of the work and, therefore, of loss of remuneration because of bad weather and, on the other hand, to reward their loyalty to the sector in question.

*Since social protection of workers constitutes the only consideration of public interest capable of justifying restrictions on the freedom to provide services such as those at issue, any technical differences in the operation of the two schemes cannot justify such a restriction.*

Case C-272/94 Guiot [1996] ECR I-1905 §20, 21

The reply to the question put by the national court must therefore be that *Articles 59 and 60 of the Treaty preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out works in the first-mentioned Member State to pay employer's contributions in respect of timbres - fidélité and timbres - intempéries* with respect to workers assigned to carry out those works, *where that undertaking is already liable for comparable contributions*, with respect to the same workers and for the same period of work, in the State where it is established.

Case C-272/94 Guiot [1996] ECR I-1905 §22

(see also: Case C-288/89 Mediawet I [1991] ECR I-4007 §14)

In that connection, it should be observed first of all that the freedom to provide services laid down in Article 59 of the Treaty entails, according to Article 60 of the Treaty, that the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided "under the same conditions as are imposed by that State on its own nationals".

Articles 59 and 60 of the Treaty therefore preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and *preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit*. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.

Finally, it should be stated, in response to the concern expressed in this connection by the French Government, *that Community law does not preclude Member States from extending their*

*legislation*, or collective labour agreements entered into by both sides of industry, *to any person who is employed, even temporarily, within their territory*, no matter in which country the employer is established; *nor does Community law prohibit Member States from enforcing those rules by appropriate means* ( judgment of 3 February 1982 in Joined Cases 62 and 63/81 *Seco SA and Another v EVI* (( 1982 )) ECR 223 ).

Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417 §11, 12, 18

Furthermore, legislation which requires employers to pay in respect of their workers social security contributions not related to any social security benefit for those workers, who are moreover exempt from insurance in the Member State in which the service is provided and remain compulsorily affiliated, for the duration of the work carried out, to the social security scheme of the Member State in which their employer is established, may not reasonably be considered justified on account of *the general interest in providing workers with social security*.

It is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry *relating to minimum wages*, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means. However, it is not possible to describe as an appropriate means any rule or practice which imposes a general requirement to pay social security contributions, or other such charges affecting the freedom to provide services, on all persons providing services who are established in other Member States and employ workers who are nationals of non-member countries, irrespective of whether those persons have complied with the legislation on minimum wages in the Member State in which the services are provided, because such a general measure is by its nature unlikely to make employers comply with that legislation or to be of any benefit whatsoever to the workers in question.

Joined cases 62 and 63/81 *Seco* [1982] ECR 223 §10, 14

It follows in particular that it is permissible for Member States, and amounts for them to a legitimate choice of policy pursued in the public interest, to subject the provision of manpower within their borders to a system of licensing in order to be able to refuse licences where *there is reason to fear that such activities may harm good relations on the labour market or that the interests of the workforce affected are not adequately safeguarded*. In view of the differences there may be in conditions on the labour market between one Member State and another, on the one hand, and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature on the other hand, the Member State in which the services are to be supplied has unquestionably the right to require possession of a licence issued on the same conditions as in the case of its own nationals.

Case 279/80 *Webb* [1981] ECR 3305 §19

#### 4.1.2.8 *Protection of creditors*

Consequently, the fact, pointed out by the Commission, that a creditor or a non-professional adviser acting on his behalf can lodge an application for an attachment order does not preclude

legislative provisions such as those at issue in *the main proceedings from being regarded as justified in the general interest on the ground that they protect creditors* or safeguard the sound administration of justice in relation to the provision of litigation services on a professional basis.

Case C-3/95 Reisebüro Broede [1996] ECR I-06511 §36

#### 4.1.2.9 Professional ethics

Accordingly, the lawyer providing services and the local lawyer, *both being subject to the ethical rules applicable in the host Member State*, must be regarded as being capable, in compliance with those ethical rules and in the exercise of their professional independence, of agreeing upon a form of cooperation appropriate to their client's instructions.

Case C-294/89 Commission v France [1991] ECR I-3591 §31

(see also: Case C-288/89 Mediawet I [1991] ECR I-4007 §14)

The Court has nevertheless accepted, in particular in its judgments of 18 January 1979 (Joined Cases 110 and 111/78 *Ministère public and Another v van Wesemael and Others* [1979] ECR 35) and 17 December 1981 (Case 279/80 *Webb* [1981] ECR 3305), that regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered to be incompatible with, the Treaty where they have as their purpose the application of rules governing such activities. *However, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by the general good and which are applied to all persons or undertakings operating within the territory of the State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment.* In addition, such requirements must be objectively justified by the need to ensure that *professional rules* of conduct are complied with and that the interests which such rules are designed to safeguard are protected.

Case 252/83 Commission v Denmark [1986] ECR 3713 §17

see also: Case 205/84 Commission v Germany [1986] ECR 3755 §27

Similarly, as the Court held in its judgment of 3 December 1974 (Case 33/74 *van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299) *a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State.* Such a situation may be *subject to judicial control* under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.

Case 205/84 Commission v Germany [1986] ECR 3755 §22

However, in so far as those rules have the effect of restricting freedom of movement for workers, the right of establishment and the freedom to provide services within the Community, they are

compatible with the Treaty only *if the restrictions which they entail are actually justified in view of the general obligations inherent in the proper practice of the professions in question* and apply to nationals and foreigners alike. That is not the case where the restrictions are such as to create discrimination against practitioners established in other Member States or raise obstacles to access to the profession which go beyond what is necessary in order to achieve the intended goals.

Those considerations show that the prohibition on the enrolment in a register of the Ordre in France of any doctor or dental surgeon who is still enrolled or registered in another Member State is too absolute and general in nature to be justified by the need to ensure continuity of medical treatment or of applying French *rules of medical ethics* in France.

Case 96/85 Commission v France [1986] ECR 1475 §11, 14

However, when the pursuit of the employment agency activity at issue is made subject in the State in which the service is provided to the issue of a licence and to supervision by the competent authorities, that State may not, without failing to fulfil the essential requirements of Article 59 of the Treaty, impose on the persons providing the service who are established in another Member State any obligation either to satisfy such requirements or to act through the holder of a licence, except *where such requirement is objectively justified by the need to ensure observance of the professional rules of conduct* and to ensure the said protection.

Joined cases 110 and 111/78 Van Wesemael [1979] ECR 35 §29

Although, in the light of the special nature of certain services, it cannot be denied that a Member State is entitled to adopt measures which are intended to prevent the freedom guaranteed by Article 59 being used by a person whose activities are entirely or chiefly directed towards his *territory in order to avoid the professional rules which would apply to him if he resided in that State*, the requirement of residence in the territory of the State where the service is provided can only be allowed as an exception where the Member State is unable to apply other, less restrictive, measures to ensure respect for these rules.

On these grounds it must be concluded that the provisions of the EEC Treaty, in particular Articles 59, 60 and 65, must be interpreted as meaning that national legislation may not, by means of a requirement of residence in the territory, make it impossible for persons residing in another Member State to provide services *when less restrictive measures enable the professional rules to which provision of the service is subject in that territory to be complied with*.

Case 39-75 Coenen [1975] ECR 1547 §9, 12

However, taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good — in particular rules relating to organization, qualifications, professional ethics, supervision and liability — which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member State.

In accordance with these principles, the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes within the jurisdiction of certain courts or tribunals cannot be considered incompatible with the provisions of Articles 59 and 60, where such requirement is objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with *respect for professional ethics*.

These directives also have the task of resolving the specific problems resulting from the fact that where the person providing the service is not established, on a habitual basis, *in the State where the service is performed he may not be fully subject to the professional rules of conduct in force in that State*.

Case 33-74 Van Binsbergen [1974] ECR 1299 §12, 14, 22

#### 4.1.2.10 Intellectual property

In the light of all the foregoing, the answer to the third question is that Article 16 of Directive 2006/123, and Articles 56 TFEU and 102 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which *reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single collecting society and thereby prevents users of such works, such as the spa establishment in the main proceedings, from benefiting from the services provided by another collecting society established in another Member State*.

However, *Article 102 TFEU must be interpreted as meaning that the imposition by the collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position*.

Case C-351/12 OSA [2014] not published vet § 91, 92

Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, *it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States*. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States.

Case 62/79 Coditel [1980] ECR 881 §15

(See also: Case C-288/89 Mediawet I [1991] ECR I-4007 §14)

*The exclusive assignee of the performing right in a film for the whole of a Member State may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another Member State, without thereby infringing Community law*.

Consequently the answer to the second question referred to the Court by the Cour d'Appel, Brussels, should be that the provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.

Case 62/79 Coditel [1980] ECR 881 §17, 18

#### 4.1.2.11 Cultural policy

It must, however, be pointed out that the protection of consumers against abuses of advertising or, ***as an aim of cultural policy, the maintenance of a certain level of programme quality constitute overriding reasons relating to the general interest which may justify restrictions on freedom to provide services*** (see, in particular, Case C-288/89 *Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 27).

Case C-6/98 ARD [1999] ECR I-7599 §50

The Court has held in Case C-288/89 *Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, paragraphs 22 and 23, Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraphs 3, 29 and 30, and Case C-148/91 *Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, paragraph 9, that the Mediawet is intended to establish a pluralist and non-commercial radio and television broadcasting system and thus forms part of a cultural policy whose aim is to safeguard the freedom of expression in the audiovisual sector of the various components, in particular social, cultural, religious and philosophical ones, of the Netherlands.

It also follows from those three judgments that ***such cultural policy objectives are objectives of general interest which a Member State may lawfully pursue*** by formulating the statutes of its own broadcasting bodies in an appropriate manner.

Case C-23/93 TV10 [1994] ECR I-4795 §18, 19

The first and third ***cultural policy*** objectives adduced by the Belgian Government reveal that ***in reality the purpose*** of the measure complained of is to restrict genuine competition with the national broadcasting stations in order to maintain their advertising revenue. As regards the objective of preserving and developing the artistic heritage, suffice it to note, as does the Commission, that the measure complained of is in reality likely to reduce demand for television productions in Dutch.

Case C-211/91 Commission v Belgium [1992] ECR I-6757 §9

The Netherlands Government maintains that those restrictions are justified by imperatives relating to the ***cultural policy*** which it has implemented in the audio-visual sector. It explains that the aim of this policy is to safeguard the freedom of expression of the various - in particular social,



cultural, religious and philosophical - components of the Netherlands in order that that freedom may be capable of being exercised in the press, on the radio or on television. It says that that objective may be jeopardized by the excessive influence of advertisers over the content of programmes.

*A cultural policy understood in that sense may indeed constitute an overriding requirement relating to the general interest* which justifies a restriction on the freedom to provide services. The maintenance of the pluralism which that Dutch policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order (Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 13).

However, it should be observed *that there is no necessary connection between such a cultural policy and the conditions relating to the structure of foreign broadcasting bodies*. In order to ensure pluralism in the audio-visual sector it is not indispensable for the national legislation to require broadcasting bodies established in other Member States to align themselves on the Dutch model should they intend to broadcast programmes containing advertisements intended for the Dutch public. *In order to secure the pluralism which it wishes to maintain the Netherlands Government may very well confine itself to formulating the statutes of its own bodies in an appropriate manner*.

Conditions affecting the structure of foreign broadcasting bodies cannot therefore be regarded as being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism.

*In this respect, it must be observed in the first place that restrictions on the broadcasting of advertisements, such as a prohibition on advertising particular products or on certain days, a limitation of the duration or frequency of advertisements or restrictions designed to enable listeners or viewers not to confuse advertising with other parts of the programme, may be justified by overriding reasons relating to the general interest. Such restrictions may be imposed in order to protect consumers against excessive advertising or, as an objective of cultural policy, in order to maintain a certain level of programme quality.*

Case C-288/89 *Mediawet I* [1991] ECR I-4007 §22, 23, 24, 25, 27

Taking into account the particular nature of certain services to be provided, such as the placing of entertainers in employment, specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good *or by the need to ensure the protection of the entertainer*, which are binding upon any person established in the said State, in so far as the person providing the service is not subject to similar requirements in the Member State in which he is established.

Joined cases 110 and 111/78 *Van Wesemael* [1979] ECR 35 §28

#### 4.1.2.12 *Protection of the historical and artistic heritage*

***The general interest in consumer protection and in the conservation of the national historical and artistic heritage can constitute an overriding reason justifying a restriction on the freedom to provide services.*** However, the requirement in question contained in the Italian legislation goes beyond what is necessary to ensure the safeguarding of that interest inasmuch as it makes the activities of a tourist guide accompanying groups of tourists from another Member State subject to possession of a licence.

Case C-180/89 Commission v Italy [1991] ECR I-709 §20

(see also: Case C-288/89 Mediawet I [1991] ECR I-4007 §14)

##### 4.1.2.12.1 Conservation

The first and third cultural policy objectives adduced by the Belgian Government reveal that in reality the purpose of the measure complained of is to restrict genuine competition with the national broadcasting stations in order to maintain their advertising revenue. As regards the objective of ***preserving*** and developing the artistic heritage, suffice it to note, as does the Commission, that the measure complained of is in reality likely to reduce demand for television productions in Dutch.

Case C-211/91 Commission v Belgium [1992] ECR I-6757 §9

(see also: Case C-288/89 Mediawet I [1991] ECR I-4007 §14)

##### 4.1.2.12.2 Proper appreciation

Moreover, the profitable operation of such group tours depends on the commercial reputation of the operator, who faces competitive pressure from other tour companies; the need to maintain that reputation and the competitive pressure themselves compel companies to be selective in employing tourist guides and exercise some control over the quality of their services. Depending on the specific expectations of the groups of tourists in question, that factor is likely to contribute to ***the proper appreciation of the artistic and archaeological heritage*** and the protection of consumers, in the case of conducted tours of places other than museums or historical monuments which may be visited only with a professional guide.

Case C-198/89 Commission v Greece [1991] ECR I-727 §24

Case C-154/89 Commission v France [1991] ECR I-659 §20

Case C-288/89 Mediawet I [1991] ECR I-4007 §14

***The general interest in the proper appreciation of the artistic and archaeological heritage of a country and in consumer protection can constitute an overriding reason justifying a restriction on the freedom to provide services.*** However, the requirement in question contained in the Greek legislation goes beyond what is necessary to ensure the safeguarding of that interest inasmuch as

it makes the activities of a tourist guide accompanying groups of tourists from another Member State subject to possession of a licence.

Case C-198/89 Commission v Greece [1991] ECR I-727 §21

Case C-154/89 Commission v France [1991] ECR I-659 §17

It follows that in view of the scale of the restrictions it imposes, the legislation in issue is disproportionate in relation to the objective pursued, namely to ensure the *proper appreciation of places and things of historical interest* and the widest dissemination of knowledge of the artistic and cultural heritage of the Member State in which the tour is conducted.

Case C-154/89 Commission v France [1991] ECR I-659 §21

#### 4.1.2.12.3 Better distribution of knowledge

The general interest in the proper appreciation of places and things of historical interest and *the widest possible dissemination of knowledge of the artistic and cultural heritage of a country* can constitute an overriding reason justifying a restriction on the freedom to provide services. However, the requirement in question contained in the French legislation goes beyond what is necessary to ensure the safeguarding of that interest inasmuch as it makes the activities of a tourist guide accompanying groups of tourists from another Member State subject to possession of a licence.

Moreover, the profitable operation of such group tours depends on the commercial reputation of the operator, who faces competitive pressure from other tour companies; the need to maintain that reputation and the competitive pressure themselves compel companies to be selective in employing tourist guides and exercise some control over the quality of their services. Depending on the specific expectations of the groups of tourists in question, that factor is likely to contribute to the proper appreciation of places and things of historical interest and to *the widest possible dissemination of knowledge relating to the artistic and cultural heritage*, in the case of conducted tours of places other than museums or historical monuments which may be visited only with a professional guide.

Case C-154/89 Commission v France [1991] ECR I-659 §17, 20

See also: Case C-198/89 Commission v Greece [1991] ECR I-727 §21, 24

It follows that in view of the scale of the restrictions it imposes, the legislation in issue is disproportionate in relation to the objective pursued, namely to ensure the proper appreciation of places and things of historical interest and *the widest dissemination of knowledge of the artistic and cultural heritage* of the Member State in which the tour is conducted.

Case C-154/89 Commission v France [1991] ECR I-659 §21

#### 4.1.2.13 *Maintaining the good reputation of the financial sector*

***Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.***

***Consequently, the prohibition of cold calling by the Member State from which the telephone call is made, with a view to protecting investor confidence in the financial markets of that State, cannot be considered to be inappropriate to achieve the objective of securing the integrity of those markets.***

**Case C-384/93 Alpine Investments [1995] ECR I-1141 §44, 49**

**(see also §56)**

#### 4.1.2.14 *Road safety control*

In the present case, the justification put forward by the Portuguese Republic during the pre-litigation procedure relates ***to the need to ensure road safety, which, according to settled case-law, constitutes an overriding reason relating to the public interest*** (see, in particular, *Commission v Netherlands*, paragraph 77, and Case C-110/05 *Commission v Italy* [2009] ECR I-0000, paragraph 60).

**Case C-438/08 Commission v Portugal [2009] ECR I-10219 §48**

***Regulations of that kind may be justified, however, by the requirements of road safety, which constitute overriding reasons relating to the public interest***, within the meaning of the judgment in *Gouda* (see Case C-288/89 [1991] ECR I-4007, paragraphs 13 and 14).

It should also be noted that, ***as a result of the incomplete harmonization of the criteria for testing, although the directive requires, in Article 5(3), that each Member State recognize test certificates issued in other Member States to vehicles registered on their territory as proof at least of compliance with its provisions, it does not, on the other hand, oblige each Member State - in view of the large number of verification processes and procedures - to recognize test certificates issued in other Member States in respect of vehicles registered on its own territory.***

**Case C-55/93 Van Schaik [1994] ECR I-4837 §19, 22**

#### 4.1.2.15 *Preserving diversity of opinion*

In *Commission v Netherlands*, cited above, paragraph 30, the Court held that ***the maintenance of the pluralism which the Netherlands broadcasting policy seeks to safeguard is intended to preserve the diversity of opinions, and hence freedom of expression, which is precisely what the European Convention on Human Rights, is designed to protect.***

**Case C-23/93 TV10 [1994] ECR I-4795 §25**

#### 4.1.2.16 Preserving the financial balance of the social security system

In this respect, it must be noted that, according to the Court's case-law, *the risk of seriously undermining the financial equilibrium of the social security system may constitute an overriding reason in the public interest capable of justifying an obstacle to the principle of freedom to provide services* (see, in particular, *Kohll*, paragraph 41; *Smits and Peerbooms*, paragraph 72, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 30).

Case C-350/07 Kattner [2009] ECR I-1513 §85

Whilst it is not in dispute that Community law does not detract from *the power of the Member States to organise their social security systems*, and that, in the absence of harmonisation at Community level, *it is for the legislation of each Member State to determine the conditions in which social security benefits are granted*, when exercising that power *Member States must comply with Community law, in particular the provisions on the freedom to provide services* (see, inter alia, *Smits and Peerbooms*, paragraphs 44 to 46; *Müller-Fauré and van Riet*, paragraph 100; and *Inizan*, paragraph 17). Those provisions *prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of that freedom in the healthcare sector*.

The Court has already held that it is possible *for the risk of seriously undermining the financial balance of a social security system to constitute an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services* (*Kohll*, paragraph 41; *Smits and Peerbooms*, paragraph 72; and *Müller-Fauré and van Riet*, paragraph 73).

Case C-372/04 Watts [2006] ECR I-4325 §92, 103

It must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services (see, to that effect, Case C-398/95 *SETTG v Ypourgos Ergasias* [1997] ECR I-3091, paragraph 23). However, *it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind*.

Case C-158/96 Kohll [1998] ECR I-1931 §41

#### 4.1.2.17 Quality of trade work

It must be acknowledged, as the Commission pointed out, that *the objective of guaranteeing the quality of skilled trade work and of protecting those who have commissioned such work is an overriding requirement relating to the public interest capable of justifying a restriction on freedom to provide services*.

Case C-58/98 Corsten [2000] ECR I-7919 §38

#### 4.1.2.18 *Language requirements*

As the Advocate General notes in points 105 to 113 of his Opinion, *the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making the appointment as a dental practitioner under a social security scheme subject to language requirements*. Dialogue with patients, compliance with rules of professional conduct and law specific to dentistry in the Member State of establishment and performance of administrative tasks require an appropriate knowledge of the language of that State.

However, it is important that language requirements designed to ensure that the dental practitioner *will be able to communicate effectively with his patients*, whose mother tongue is that of the Member State concerned, *and with the administrative authorities and the professional bodies of that State* do not go beyond what is necessary to attain that objective. In this respect, it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language.

Case C-424/97 Haim [2000] ECR I-5123 §59, 60

#### 4.1.2.19 *Combating drug tourism*

It must be pointed out that *combating drug tourism and the accompanying public nuisance* is part of combating drugs. It concerns both the maintenance of public order and the protection of the health of citizens, at the level of the Member States and also of the European Union.

Given the commitments entered into by the European Union and its Member States, there is no doubt that the abovementioned objectives *constitute a legitimate interest which*, in principle, *justifies a restriction* of the obligations imposed by European Union law, even under a fundamental freedom such as the freedom to provide services.

Case C-137/09 Josemans [2010] ECR I-13019 §65, 66

### 4.1.3 *Examples of non-admissible justifications*

#### 4.1.3.1 *Economic justifications*

In the light of the foregoing considerations, the answer to the second question is that Article 49 TFEU must be interpreted as opposing national legislation which provides for the refusal of the grant of authorisation to operate a tourist bus service as a result of the *reduced profitability of a competing undertaking* which has been authorised to operate a service which is partially or entirely identical to the one applied for, on the sole basis of the statements of that competing undertaking.

Case C-338/09 Yellow Cab Verkehrsbetrieb [2010] ECR I-13927 §55

In so doing, the Federal Republic of Germany has failed to put forward any convincing argument which could be based on one of the grounds set out in Article 46 EC, *since economic considerations* and mere practical difficulties in the implementation of the German-Polish Agreement *are not*, in any event, *sufficient to justify restrictions on a fundamental freedom* (see, by analogy, inter alia, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 45) or, a fortiori, a derogation under Article 46 EC, which presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

Case C-546/07 Commission v Germany [2010] ECR I-439 §51

First, according to the consistent case-law of the Court, *prevention of a reduction in tax receipts is not one of the reasons set out in Article 46 EC* read in conjunction with Article 55 EC and nor can it be regarded as an imperative reason in the public interest.

Case C-318/05 Commission v Germany [2007] ECR I-6957 §95

With regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that *the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services* (see, to that effect, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56).

Case C-243/01 Gambelli [2003] ECR I-13031 §61

Moreover, the right of Member States to restrict the free movement of persons and services on grounds of public policy, public security or public health is not intended to exclude economic sectors such as the private security sector from the application of that principle, from the point of view of access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public policy, public security or public health (see *Commission v Spain*, cited above, paragraph 42).

Case C-355/98 Commission v Belgium [2000] ECR I-1221 §29

*Since the Land of Vorarlberg has justified the imposition of a quota on moorings for non-resident owners* not on grounds of public policy, public security or public health, but *for economic reasons for the benefit of local owners, Article 56 of the Treaty cannot be applied*; in those circumstances, it must be ascertained whether the existence of an exception in the Act of Accession authorised the Land of Vorarlberg to take measures such as the quota at issue in the main proceedings in order to limit the influx of boat-owners from other Member States.

Case C-224/97 Ciola [1999] ECR I-2517 §17

*It must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services* (see, to that effect, Case C-398/95 *SETTG v Ypourgos Ergasias* [1997] ECR I-3091, paragraph 23).

Case C-158/96 Kohll [1998] ECR I-1931 §41

However, *maintaining industrial peace* as a means of bringing a collective labour dispute to an end and thereby preventing any adverse effects on an economic sector, and consequently on the economy of the State, *must be regarded as an economic aim which cannot constitute a reason relating to the general interest that justifies a restriction of a fundamental freedom guaranteed by the Treaty* (see *Gouda and Others*, cited above, paragraph 11).

The answer to the second question must therefore *be that such rules cannot be justified by reasons relating to the general interest in maintaining industrial peace as a means of bringing a collective labour dispute to an end and thereby preventing any adverse effects on an economic sector, and consequently on the economy of the State.*

Case C-398/95 SETTG [1997] ECR I-3091 §23, 25

As stated in paragraph 12 above, *the rule in question entails discrimination based on the place of establishment. Such discrimination can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty, to which Article 66 refers, and which do not include economic aims* (see in particular Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 11).

Case C-484/93 Svensson and Gustavsson [1995] ECR I-3955 §15

The first and third cultural policy objectives adduced by the Belgian Government reveal that in reality *the purpose* of the measure complained of *is to restrict genuine competition* with the national broadcasting stations in order to maintain their advertising revenue. As regards the objective of preserving and developing the artistic heritage, suffice it to note, as does the Commission, that the measure complained of is *in reality likely to reduce demand* for television productions in Dutch.

Case C-211/91 Commission v Belgium [1992] ECR I-6757 §9

As the Court held in its judgment in Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, at paragraphs 32 and 33, national rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article 56 of the Treaty. *It also appears from that judgment (paragraph 34) that economic aims cannot constitute grounds of public policy* within the meaning of Article 56 of the Treaty.

Unlike the *Kabelregeling*, the provisions of the *Mediawet* at issue in this case no longer reserve to the STER all the revenue from advertising intended specifically for the Dutch public. However, by laying down rules on the broadcasting of such advertisements *they restrict the competition* to which the STER may be exposed in that market from foreign broadcasting bodies.

Accordingly the result is that they *protect the revenue* of the STER - albeit to a lesser degree than the *Kabelregeling* - and therefore pursue the same objective as the previous legislation.



As the Court held in the *Bond van Adverteerders* case (cited above), at paragraph 34, ***that objective cannot justify restrictions on the freedom to provide services.***

Case C-288/89 Mediawet I [1991] ECR I-4007 §11, 29

The reply to the national court must therefore be that *Community law does not prevent* the granting of a television monopoly ***for considerations of a non-economic nature relating to the public interest.*** However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition.

Case C-260/89 ERT [1991] ECR I-2925 §12

***It must be pointed out that economic aims, such as that of securing for a national public foundation all the revenue from advertising intended especially for the public of the Member State in question, cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty.***

Case 352/85 Bond van Adverteerders [1988] ECR 2085 §34

Case C-224/97 Ciola [1999] ECR I-2517 §16

For the implementation of those provisions, Title II of the General Programme for the Abolition of Restrictions on Freedom to Provide Services (Official Journal, English Special Edition, Second Series IX, p. 3), which was drawn up by the Council pursuant to Article 63 of the Treaty on 18 December 1961, envisages inter alia the repeal of provisions laid down by law, regulation or administrative action which in any Member State govern, ***for economic purposes***, the entry, exit and residence of nationals of Member States, where such provisions are not justified on grounds of public policy, public security or public health and are liable to hinder the provision of services by such persons.

Joined cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377 §11

The answer to the questions submitted by the Cour de Cassation of the Grand Duchy of Luxembourg must therefore be that Community law precludes a Member State from requiring an employer who is established in another Member State and temporarily carrying out work in the first-named Member State, using workers who are nationals of non-member countries, to pay the employer's share of social security contributions in respect of those workers when that employer is already liable under the legislation of the State in which he is established for similar contributions in respect of the same workers and the same periods of employment and the contributions paid in the State in which the work is performed do not entitle those workers to any social security benefits. ***Nor would such a requirement be justified if it were intended to offset the economic advantages*** which the employer might have gained by not complying with the legislation on minimum wages in the State in which the work is performed.

Joined cases 62 and 63/81 Seco [1982] ECR 223 §15

#### 4.1.3.2 Administrative justifications

In so doing, the Federal Republic of Germany has failed to put forward any convincing argument which could be based on one of the grounds set out in Article 46 EC, since economic considerations and *mere practical difficulties in the implementation of* the German-Polish Agreement are not, in any event, sufficient to justify restrictions on a fundamental freedom (see, by analogy, inter alia, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 45) or, a fortiori, a derogation under Article 46 EC, which presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

Case C-546/07 Commission v Germany [2010] ECR I-439 §51

(available only in French)

Il ressort tout d'abord de la jurisprudence de la Cour que *des considérations d'ordre administratif ne sauraient justifier une dérogation aux règles communautaires, ce d'autant plus lorsque ladite dérogation revient à exclure ou à restreindre l'exercice d'une des libertés fondamentales du droit communautaire* (arrêts du 23 novembre 1999, *Arblade* e.a., C-369/96 et C-376/96, Rec. p. I-8453, point 37, ainsi que du 3 octobre 2000, *Corsten*, C-58/98, Rec. p. I-7919, point 42).

Case C-356/08 Commission v Austria [2009] ECR I-108 §46

The reasons for the requirement of entry on the Register *being purely of an administrative nature, such considerations cannot justify derogation by a Member State from the rules of Community law*, especially where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law (see, in particular, Case C-18/95 *Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345, paragraph 45, and *Arblade*, cited above, paragraph 37).

Case C-58/98 Corsten [2000] ECR I-7919 §42

By contrast, *considerations of a purely administrative nature cannot justify derogation* by a Member State *from the rules of Community law*, especially where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law (see, in particular, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 45).

Joined cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453 §37

The Court has already stressed in its decisions, most recently in its judgment of 3 February 1983 (Case 29/82 *Van Luipen* [1983] ECR 151), *that considerations of an administrative nature cannot justify derogation by a Member State from the rules of Community law*. That principle applies with even greater force where the derogation in question amounts to preventing the exercise of one of the fundamental freedoms guaranteed by the Treaty. In this instance it is therefore not sufficient that the presence on the undertaking's premises of all the documents needed for supervision by the authorities of the State in which the service is provided may make it easier for those authorities to perform their task. It must also be shown that those authorities cannot, even under an authorization procedure, carry out their supervisory tasks effectively unless

the undertaking has in the aforesaid State a permanent establishment at which all the necessary documents are kept.

Case 205/84 Commission v Germany [1986] ECR 3755 §54

#### *4.1.3.3 Technical differences between mechanisms intended to protect the same public interest*

That finding is borne out by the case-file and the information provided in response to the written questions put by the Court, as well as by the arguments presented at the hearing. It appears that although the Luxembourg legislation differs from the Belgian legislation, in particular as regards the percentage of the premiums and the procedure for their payment, ***they both provide mechanisms intended, on the one hand, to protect workers in the construction industry against the risk of suspension of the work*** and, therefore, of loss of remuneration because of bad weather and, on the other hand, to reward their loyalty to the sector in question.

***Since social protection of workers constitutes the only consideration of public interest capable of justifying restrictions on the freedom to provide services such as those at issue, any technical differences in the operation of the two schemes cannot justify such a restriction.***

Case C-272/94 Guiot [1996] ECR I-1905 §20, 21

#### *4.1.3.4 Market needs*

However, as follows from Articles 44(3) and 58(1) of the Association Agreement, ***the host Member State cannot refuse to a Polish national admission and residence for the purpose of that person's establishment in the territory of that State, for instance on grounds of the nationality of the person concerned or his country of residence, or because the national legal system provides for a general limitation on immigration, or make the right to take up an activity as a self-employed person in that State subject to confirmation of a proven need in the light of economic or labour-market considerations.***

Case C-63/99 Gloszczuk [2001] ECR I-6369 §59

In that regard, it is sufficient to find that, as the French Government has, moreover, acknowledged, ***national legislation which makes the grant of a licence to pursue an activity such as the engagement of performing artists subject to the need to engage performing artists constitutes a restriction in that it tends to limit the number of suppliers of services.*** The French Government has not given any reason whatsoever that could justify that restriction.

Case C-255/04 Commission v France [2006] ECR I-5251 §29

## 4.2 NON CONSIDERATION OF REQUIREMENTS IMPOSED BY THE PROVIDER'S STATE OF ESTABLISHMENT

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However, *the conditions to be satisfied in order to obtain such authorisation may not duplicate the equivalent statutory conditions which have already been satisfied in the State of establishment* (see, to that effect, *Commission v Germany*, cited above, paragraph 47).

### Case C-496/01 Commission v France [2004] ECR I-2351 §71

In view of all the foregoing, it must be declared that, by adopting, in the framework of the Law of 1997, provisions which require that:

–undertakings that wish to provide services in the Netherlands and their managers must have a *permit, without taking into account the obligations to which foreign service providers are already subject in the Member State where they are established, and by charging fees for this permit, and*

–*members of the staff* of these firms *seconded* from the Member State where they are established to work in the Netherlands *have a proof of identity card* issued by the Netherlands authorities, in so far as *the checks to which cross-frontier providers of services are already subject in their Member State of origin are not taken into account* for the requirement in question, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 49 EC.

### Case C-189/03 Commission v Netherlands [2004] ECR I-9289 §33

However, as the Commission has correctly pointed out, *the professional aptitude test* required for the compulsory enrolment of patent agents on the Italian register *does not differentiate* between providers of services whose professional competence and qualities have been subject to *scrutiny in the Member State of origin* and those who have not been subject to such scrutiny.

Consequently, even if *the Italian legislation* in question applies irrespective of the nationality of the providers of services and appears to be appropriate to ensure the attainment of the objectives consisting in the protection of those who commissioned the services provided, it *goes beyond what is necessary to attain those objectives*.

### Case C-131/01 Commission v Italy [2003] ECR I-1659 §30, 32

The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, *in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established* (Case 279/80 *Webb* [1981] ECR 3305, paragraph 17).

### Case C-355/98 Commission v Belgium [2000] ECR I-1221 §37

Even if there is no harmonisation in the field, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, *in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established* (see, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17, Case C-180/89 *Commission v Italy* [1991] ECR I-709, paragraph 17, Case C-198/89 *Commission v Greece* [1991] ECR I-727, paragraph 18, *Säger*, cited above, paragraph 15, *Vander Elst*, cited above, paragraph 16, and *Guiot*, cited above, paragraph 11).

**Joined cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453 §34**

As the Advocate General has rightly observed in paragraph 30 of his Opinion, *irrespective of the possibility of applying national rules of public policy governing the various aspects of the employment relationship to workers sent temporarily to France, the application of the Belgian system in any event excludes any substantial risk of workers being exploited or of competition between undertakings being distorted.*

**Case C-43/93 *Vander Elst* [1994] ECR I-3803 §25**

It is also settled case-law that, even if there is no harmonisation in the field, such a restriction on the fundamental principle of freedom to provide services can be based only on rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, *in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established* (see, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; Case C-180/89 *Commission v Italy* [1991] ECR I-709, paragraph 17; Case C-198/89 *Commission v Greece* [1991] ECR I-727, paragraph 18; *Säger*, cited above, paragraph 15; *Vander Elst*, cited above, paragraph 16; *Guiot*, cited above, paragraph 11; and *Arblade*, cited above, paragraph 34).

**Case C-58/98 *Corsten* [2000] ECR I-7919 §35**

**Case C-76/90 *Säger* [1991] ECR I-4221 §15**

In the absence of harmonization of the rules applicable to services, or even of a system of equivalence, *restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation.*

As the Court has consistently held (see, most recently, the judgments in *Commission v France*, cited above, paragraph 15; *Commission v Italy*, cited above, paragraph 18; and *Commission v Greece*, cited above, paragraph 18), *such restrictions come within the scope of Article 59 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that*

*legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.*

Case C-288/89 Mediawet I [1991] ECR I-4007 §12, 13

Accordingly, those requirements can be regarded as compatible with Articles 59 and 60 of the Treaty only if it is established that with regard to the activity in question there are overriding reasons relating to the public interest which justify restrictions on the freedom to provide services, *that the public interest is not already protected by the rules of the State of establishment* and that the same result cannot be obtained by less restrictive rules.

Case C-198/89 Commission v Greece [1991] ECR I-727 §19

Case C-180/89 Commission v Italy [1991] ECR I-709 §18

Case C-154/89 Commission v France [1991] ECR I-659 §15

As regards the financial position of insurance undertakings, the two directives contain very detailed provisions on the free assets of the undertaking, in other words its own capital resources. Those provisions are intended to ensure that the undertaking is solvent and the directives require the supervisory authority of the Member State in which the head office is situated to verify the state of solvency of the undertaking 'with respect to its entire business'. That expression must be construed as also covering business conducted in the context of the provision of services. It follows that the State in which the service is provided is not entitled to carry out such verifications itself, but *must accept a certificate of solvency drawn up by the supervisory authority of the Member State in whose territory the head office* of the undertaking providing the service is situated. According to the German Government, which has not been contradicted by the Commission, that is the case in the Federal Republic of Germany.

It should however be emphasized that the authorization must be granted on request to any undertaking established in another Member State which meets the conditions laid down by the legislation of the State in which the service is provided, *that those conditions may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established and that the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment*. According to the German Government, which has not been contradicted on that point by the Commission, the German authorization procedure conforms fully to those requirements.

Case 205/84 Commission v Germany [1986] ECR 3755 §37, 47

Such a measure would be excessive in relation to the aim pursued, however, if the requirements to which the issue of a licence is subject *coincided with the proofs and guarantees required in the State of establishment*. In order to maintain the principle of freedom to provide services the first requirement is that in considering applications for licences and in granting them the Member State in which the service is to be provided may not make any distinction based on the nationality of the provider of the services or the place of his establishment; the second requirement is *that it must take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment*.

Case 279/80 Webb [1981] ECR 3305 §20

Taking into account the particular nature of certain services to be provided, such as the placing of entertainers in employment, specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good or by the need to ensure the protection of the entertainer, which are binding upon any person established in the said State, *in so far as the person providing the service is not subject to similar requirements in the Member State in which he is established.*

Such a requirement is not objectively justified when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the service is established in another Member State and in that State holds *a licence issued under conditions comparable* to those required by the State in which the service is provided and his activities are subject in the first State to *proper supervision* covering all employment agency activity whatever may be the Member State in which the service is provided.

For all these reasons, the answer should be that when the pursuit of the activity of fee-charging employment agencies for entertainers is made subject in the State in which the service is provided to the issue of a licence, that State may not impose on the persons providing the service who are established in another Member State any obligation either to satisfy that requirement or to act through a fee-charging employment agency which holds such a licence when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the services holds in the Member State in which he is established *a licence issued under conditions comparable* to those required by the State in which the service is provided and his activities are subject in the first State to *proper supervision* covering all employment agency activity whatever may be the Member State in which the service is provided.

Joined cases 110 and 111/78 Van Wesemael [1979] ECR 35 §28, 30, 39

## 4.3 CONDITIONS OF JUSTIFIED RESTRICTIONS

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### 4.3.1 Appropriateness of measure

*National legislation is moreover appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.* In any event, those restrictions must be applied without discrimination (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 60 and 61).

Joined cases C-447/08 and C-448/08 Otto Sjöberg [2010] ECR I-6921 §40

In that regard, it should be borne in mind that, according to settled case-law, *irrespective of the existence of a legitimate objective which serves overriding reasons relating to the public interest, a restriction on the fundamental freedoms guaranteed by the EC Treaty may be justified only if the relevant measure is appropriate to ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective* (see Case C-150/04

*Commission v Denmark* [2007] ECR I-1163, paragraph 46; *Government of the French Community and Walloon Government*, paragraph 55; and Case C-222/07 *UTECA* [2009] ECR I-0000, paragraph 25). **Furthermore, national legislation is appropriate to ensuring attainment of the objective pursued only if it genuinely reflects** a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 55).

**Case C-169/08 Presidente del Consiglio dei Ministri v Regione Sardegna [2009] ECR I-10821 §42**

In the present case, to justify that restriction, **the Spanish Government puts forward the protection of the safety of the recipients of the services** in question and the remainder of the population. For reasons set out more fully by the Advocate General in point 52 of her Opinion, **the requirement of legal personality is not a measure suitable for attaining the objectives pursued**. None of the practical problems listed by that government is directly connected to the legal form of the undertaking.

**Case C-514/03 Commission v Spain [2006] ECR I-963 §32**

According to those decisions, the restrictions must be justified by imperative requirements in the general interest, **be suitable for achieving the objective which they pursue** and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

**Case C-243/01 Gambelli [2003] ECR I-13031 §65**

However, in accordance with the principle of proportionality, the application of national rules to providers of services established in other Member States must **be appropriate for securing attainment of the objective which they pursue** and must not go beyond what is necessary in order to attain it (see, in particular, *Säger*, cited above, paragraph 15, and *Arblade*, cited above, paragraph 35).

**Case C-58/98 Corsten [2000] ECR I-7919 §39**

**The effective protection** of workers in the construction industry, particularly as regards health and safety matters and working hours, **may require that certain documents are kept on site, or at least in an accessible and clearly identified place in the territory of the host Member State**, so that they are available to the authorities of that State responsible for carrying out checks, particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71.

Furthermore, in the absence of an organised system for cooperation or exchanges of information of the kind referred to in the preceding paragraph, **the obligation to draw up and keep on site, or at least in an accessible and clearly identified place in the territory of the host Member State, certain of the documents** required by the rules of that State **may constitute the only appropriate means** of control, having regard to the objective pursued by those rules.

**The items of information respectively required by the rules of the Member State of establishment and by those of the host Member State** concerning, in particular, the employer, the worker, working conditions and remuneration **may differ to such an extent that the monitoring**



*required under the rules of the host Member State cannot be carried out on the basis of documents kept in accordance with the rules of the Member State of establishment.*

On the other hand, *the mere fact that there are certain differences of form or content cannot justify the keeping of two sets of documents*, one of which *conforms* to the rules of the Member State of establishment and the other to those of the host Member State, if the information provided, as a whole, by the documents required under the rules of the Member State of establishment is adequate to enable the controls needed in the host Member State to be carried out.

Consequently, *the authorities* and, if need be, the courts of the host Member State must *verify in turn*, before demanding that social or labour documents complying with their own rules be drawn up and kept in the territory of that State, *that the social protection for workers which may justify those requirements is not sufficiently safeguarded by the production, within a reasonable time, of originals or copies of the documents kept in the Member State of establishment or, failing that, by keeping the originals or copies of those documents available on site or in an accessible and clearly identified place in the territory of the host Member State.*

Joined cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453 §61, 62, 63, 64, 65

As regards the proportionality of the restriction at issue, it is settled case-law that *requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim* and must not go beyond what is necessary in order to achieve that aim (see, in particular, *Collectieve Antennevoorziening Gouda*, cited above, paragraph 15, and Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paragraph 45).

Case C-6/98 ARD [1999] ECR I-7599 §51

In this respect, the Court held in Case C-113/89 *Rush Portuguesa* ([1990] ECR I-1417, paragraph 18), that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, relating to minimum wages, to any person who is employed, even temporarily, within their territory, regardless of the country in which the employer is established; *Community law also does not prohibit Member States from enforcing those rules by appropriate means.*

In the circumstances, the questions to be considered are, first, whether the requirements imposed by the Belgian legislation have a restrictive effect on the freedom to provide services; second, if so, whether *overriding requirements of the public interest in that area justify such restrictions on the freedom to provide services*; and third, if so, whether that interest is already protected by the rules of the State where the service provider is established and *whether the same result can be achieved by less restrictive rules.*

Case C-272/94 Guiot [1996] ECR I-1905 §12, 13

In those cases there was a direct link between the deductibility of the contributions and the tax on the sums payable by the insurers under death and old-age insurance policies, a link which had to be preserved in order to preserve the integrity of the relevant fiscal regime, *whereas there is no direct link whatsoever in this case between the grant of the interest rate subsidy to borrowers on*

*the one hand and its financing by means of the profit tax on financial establishments on the other.*

Case C-484/93 Svensson and Gustavsson [1995] ECR I-3955 §18

Consequently, *the prohibition of cold calling by the Member State from which the telephone call is made, with a view to protecting investor confidence in the financial markets of that State, cannot be considered to be inappropriate to achieve the objective of securing the integrity of those markets.*

Case C-384/93 Alpine Investments 1995 I-1141 §49

(see also: §56)

*Workers employed by an undertaking established in one Member State who are temporarily sent to another Member State to provide services do not in any way seek access to the labour market in that second State, if they return to their country of origin or residence after completion of their work (see the judgment in Case C-113/89 *Rush Portuguesa v Office National d'Immigration* [1990] ECR I-1417). Those conditions were fulfilled in the present case.*

Case C-43/93 Vander Elst [1994] ECR I-3803 §21

Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States *must be such as to guarantee the achievement of the intended aim* and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules (see, most recently, Case C-154/89 *Commission v France*, cited above, paragraphs 14 and 15; Case C-180/89 *Commission v Italy*, cited above, paragraphs 17 and 18; Case C-198/89 *Commission v Greece*, cited above, paragraphs 18 and 19).

Case C-288/89 Mediawet I [1991] ECR I-4007 §15

Finally, it should be stated, in response to the concern expressed in this connection by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; *nor does Community law prohibit Member States from enforcing those rules by appropriate means* ( judgment of 3 February 1982 in Joined Cases 62 and 63/81 *Seco SA and Another v EVI* (( 1982 )) ECR 223 ).

Case C-113/89 Rush Portuguesa [1990] ECR I-1417 §18

It is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means. However, it is not possible to describe as an appropriate means any rule or practice which imposes a general requirement to pay social security contributions, or other such charges affecting the freedom to provide services, on

all persons providing services who are established in other Member States and employ workers who are nationals of non-member countries, irrespective of whether those persons have complied with the legislation on minimum wages in the Member State in which the services are provided, because such a general measure is by its nature unlikely *to make* employers *comply with that legislation* or to be of any benefit whatsoever to the workers in question.

Joined cases 62 and 63/81 Seco [1982] ECR 223 §14

The answer must therefore be that national rules prohibiting the transmission by cable television of advertisements cannot be regarded as constituting either a disproportionate measure in relation to the objective to be achieved, *in that the prohibition in question is relatively ineffective* in view of the existence of natural reception zones, or discrimination which is prohibited by the Treaty in regard to foreign broadcasters, in that their geographical location allows them to broadcast their signals only in the natural reception zone.

Case 52/79 Debauxe [1980] ECR 833 §22

### 4.3.2 Necessity of measure

Furthermore, the declaration requirement at issue includes the obligation to provide the Belgian authorities with very detailed information, particularly in the ‘ordinary’ declaration. Although it may be feasible for a Member State to ask self-employed service providers established in another Member State, travelling to Belgium to supply a service there, to provide it with certain specific information, *that is on condition that the provision of that information be justified in the light of the objectives pursued*. However, the Kingdom of Belgium fails to give a sufficiently convincing justification as to how the provision of that very detailed information is necessary in order to achieve the objectives of public interest on which it relies and how the obligation to give that information in advance does not go beyond what is necessary to achieve those objectives, despite the fact that it should have done so (see, to that effect, Case C-319/06 Commission v Luxembourg [2008] ECR I-4323, paragraph 51 and the case-law cited).

In those circumstances, *the provisions at issue must be regarded as disproportionate since they go beyond what is necessary to achieve the objectives of public interest relied upon by the Kingdom of Belgium. Consequently, the declaration requirement at issue cannot be regarded as compatible with Article 56 TFEU.*

C-577/10 Commission v Belgium [2012] not published yet §55, 56

It is therefore necessary to determine whether the restriction at issue can in fact be justified in the light of such overriding reasons, and if such is the case to make sure, in accordance with settled case-law, that it *does not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules* (see *Smits and Peerbooms*, paragraph 75, and the case-law cited).

Case C-372/04 Watts [2006] ECR I-4325 §106

However, it is important that language requirements designed to ensure that the dental practitioner will be able to communicate effectively with his patients, whose mother tongue is that of the

Member State concerned, and with the administrative authorities and the professional bodies of that State *do not go beyond what is necessary* to attain that objective. In this respect, it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language.

Case C-424/97 Haim [2000] ECR I-5123 §60

As regards the proportionality of the restriction at issue, it is settled case-law that requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and must *not go beyond what is necessary* in order to achieve that aim (see, in particular, *Collectieve Antennevoorziening Gouda*, cited above, paragraph 15, and *Case C-384/93 Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paragraph 45).

Case C-6/98 ARD [1999] ECR I-7599 §51

*The requirement that vehicles undergo a periodic test serves the interests of road safety. The effectiveness of those tests is assured, in particular, by various requirements relating to the solvency and professional competence of the authorized garages, and by supervision of the tests carried out, which can only be undertaken on Netherlands territory and by the Netherlands authorities.*

Case C-55/93 Van Schaik [1994] ECR I-4837 §20

In addition, such requirements *must be objectively justified by the need* to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected (*ibid*, paragraph 17).

Case C-106/91 Ramrath [1992] ECR I-3351 §30

Having regard to the particular characteristics of certain provisions of services, specific requirements imposed on the provider, which result from the application of rules governing those types of activities, cannot be regarded as incompatible with the Treaty. However, as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements *must be objectively necessary* in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they *must not exceed what is necessary* to attain those objectives (see, most recently, the judgments in *Cases C-154/89 Commission v France* [1991] ECR I-659, *C-180/89 Commission v Italy* [1991] ECR I-709 and *C-198/89 Commission v Greece* [1991] ECR p. I-727).

Case C-76/90 Säger [1991] ECR I-4221 §15

Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must *not go beyond that which is necessary* in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules (see, most

recently, Case C-154/89 *Commission v France*, cited above, paragraphs 14 and 15; Case C-180/89 *Commission v Italy*, cited above, paragraphs 17 and 18; Case C-198/89 *Commission v Greece*, cited above, paragraphs 18 and 19).

Case C-288/89 Mediawet I [1991] ECR I-4007 §15

However, in view of the specific requirements in relation to certain services, the fact that a Member State makes the provision thereof subject to conditions as to the qualifications of the person providing them, pursuant to rules governing such activities within its jurisdiction, cannot be considered incompatible with Articles 59 and 60 of the Treaty. Nevertheless, as one of the fundamental principles of the Treaty the freedom to provide services may be restricted only by rules which are justified in the general interest and are applied to all persons and undertakings operating in the territory of the State where the service is provided, *in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established*. In addition, such requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected (see inter alia the judgment in Case 205/84 *Commission v Germany* [1986] ECR 3755, at paragraph 27).

Case C-198/89 Commission v Greece [1991] ECR I-727 §18

Case C-180/89 Commission v Italy [1991] ECR I-709 §17

Case C-154/89 Commission v France [1991] ECR I-659 §14

Case 252/83 Commission v Denmark [1986] ECR 3713 §17

The general interest in consumer protection and in the conservation of the national historical and artistic heritage can constitute an overriding reason justifying a restriction on the freedom to provide services.

However, the requirement in question contained in the Italian legislation *goes beyond what is necessary* to ensure the safeguarding of that interest inasmuch as it makes the activities of a tourist guide accompanying groups of tourists from another Member State subject to possession of a licence.

Case C-180/89 Commission v Italy [1991] ECR I-709 §20

It therefore appears that in the field in question there are imperative reasons relating to the public interest which may justify restrictions on the freedom to provide services, provided, however, that the rules of the State of establishment are not adequate in order to achieve the *necessary* level of protection and that the requirements of the State in which the service is provided do not *exceed what is necessary* in that respect.

It follows from the foregoing that the requirement of authorization may be maintained only in so far as it is justified on the grounds relating to the protection of policy-holders and insured persons relied upon by the German Government. It must also be recognized that those grounds are not equally important in every sector of insurance and that there may be cases where, because of the

nature of the risk insured and of the party seeking insurance, *there is no need* to protect the latter by the application of the mandatory rules of his national law.

Case 205/84 Commission v Germany [1986] ECR 3755 §33, 49

However, when the pursuit of the employment agency activity at issue is made subject in the State in which the service is provided to the issue of a licence and to supervision by the competent authorities, that State may not, without failing to fulfil the essential requirements of Article 59 of the Treaty, impose on the persons providing the service who are established in another Member State any obligation either to satisfy such requirements or to act through the holder of a licence, except where such requirement is *objectively justified* by the need to ensure observance of the professional rules of conduct and to ensure the said protection.

Joined cases 110 and 111/78 Van Wesemael [1979] ECR 35 §29

In accordance with these principles, the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes within the jurisdiction of certain courts or tribunals cannot be considered incompatible with the provisions of Articles 59 and 60, where such requirement is *objectively justified* by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics.

Case 33-74 Van Binsbergen [1974] ECR 1299 §14

### 4.3.3 Indispensability of measure

Although it is true that It is true that in *Bachmann* (paragraph 28) and Case C-300/90 *Commission v Belgium* [1992] ECR I-305, paragraph 21, the Court accepted that the need to safeguard the coherence of the tax system could justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty.

Subsequently, however, it has stated that, in *Bachmann* and *Commission v Belgium*, there was a *direct link*, with respect to the taxpayer subject to income tax, between the deductibility of the insurance contributions from taxable income and the later taxation of the sums paid by the insurers under pension and life assurance contracts, and that link had to be maintained in order to preserve the coherence of the tax system concerned (see, inter alia, Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 18, and Case C-319/02 *Manninen* [2004] ECR I-0000, paragraph 42). Where there is no such direct link, the argument based on the need to safeguard the coherence of the tax system cannot be relied upon (see, inter alia, *Weidert and Paulus*, paragraphs 20 and 21).

*In a situation such as that in the main proceedings, there is no such direct link between general corporation tax, on the one hand, and a tax credit for part of the research expenditure incurred by a company, on the other.*

Case C-39/04 Laboratoires Fournier [2005] ECR I-2057 §20, 21

Subject to the national court's determination of this issue, it must be noted that, as the Court has already pointed out, if the requirement of an authorization constitutes a restriction on the freedom

to provide services, the requirement of a permanent establishment is the very negation of that freedom. It has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided. If such a requirement is to be accepted, *it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued* (see *Commission v Germany*, cited above, paragraph 52, and Case C-101/94 *Commission v Italy* [1996] ECR I-2691, paragraph 31).

Case C-222/95 Parodi [1997] ECR I-3899 §31

Case C-204/90 Bachmann [1992] ECR I-249 §32

Case C-300/90 Commission v Belgium [1992] ECR I-305 §23

In its judgment delivered this day in Case 205/84 *Commission v Federal Republic of Germany* [1986] ECR 3793, the Court held that in the insurance sector in general there were imperative reasons relating to the protection of the consumer both as a policy-holder and as an insured person which might justify restrictions on the freedom to provide services. The Court also recognized that in the present state of Community law, in particular with regard to the coordination of the relevant national rules, the protection of that interest was not necessarily guaranteed by the rules of the State of establishment. The Court concluded therefrom that, as regards the field of direct insurance in general, the requirement of a separate authorization granted by the authorities of the State in which the service was provided remained justified subject to certain conditions. On the other hand, the Court considered that the requirement of an establishment, which represented the very negation of the freedom to provide services, exceeded what was *necessary to attain the objective pursued* and that, accordingly, that requirement was contrary to Articles 59 and 60 of the Treaty.

Case 252/83 Commission v Denmark [1986] ECR 3713 §20

#### 4.3.4 Proportionality of measure

It follows from this that the restriction on the freedom to provide services brought about by the application of the contested national legislation, which *reserves the grant of a tax exemption solely to interest payments by banks established in Belgium, to the exclusion of interest payments by banking institutions established in other Member States, cannot be justified* by the objectives relied upon by the Kingdom of Belgium, and nor does that restriction satisfy the requirement of proportionality.

Case C-383/10 Commission v Belgium [2013] not published yet §69

By imposing, in such a situation, a *fixed minimum wage corresponding to that required in order to ensure reasonable remuneration for employees in the Member State of the contracting authority in the light of the cost of living in that Member State, but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained.*

In the light of all of the foregoing, the answer to the question referred is that, in a situation such as that at issue in the main proceedings, in which a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation.

**C-549/13 Bundesdruckerei [2014] not published yet §34, 36**

Furthermore, the declaration requirement at issue includes the obligation to provide the Belgian authorities with very detailed information, particularly in the ‘ordinary’ declaration. *Although it may be feasible for a Member State to ask self-employed service providers established in another Member State, travelling to Belgium to supply a service there, to provide it with certain specific information, that is on condition that the provision of that information be justified in the light of the objectives pursued.* However, the Kingdom of Belgium fails to give a sufficiently convincing justification as to how the provision of that very detailed information is necessary in order to achieve the objectives of public interest on which it relies and how the obligation to give that information in advance does not go beyond what is necessary to achieve those objectives, despite the fact that it should have done so (see, to that effect, Case C-319/06 Commission v Luxembourg [2008] ECR I-4323, paragraph 51 and the case-law cited).

In those circumstances, the provisions at issue must be regarded as disproportionate since they go beyond what is necessary to achieve the objectives of public interest relied upon by the Kingdom of Belgium. Consequently, the declaration requirement at issue cannot be regarded as compatible with Article 56 TFEU.

**C-577/10 Commission v Belgium [2012] not published yet §55, 56**

*The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (Liga Portuguesa de Futebol Profissional and Bwin International, paragraph 58).*

**Joined cases C-447/08 and C-448/08 Sjöberg and Gerdin [2010] ECR I-6921 §38**

However, in accordance with the principle of proportionality, which constitutes a general principle of Community law (see, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47), *the measures adopted by the Member States must not go beyond what is necessary to achieve that objective* (see, to that effect, *Michaniki*, paragraphs 48 and 61, and Case C-538/07 *Assitur* [2009] ECR I-0000, paragraphs 21 and 23).

**Case C-376/08 Serrantoni [2009] ECR I-12169 §33**

In that respect, it must be pointed out that, first, the protection of consumers, in particular recipients of the legal services provided by persons concerned in the administration of justice and, secondly, the safeguarding of the proper administration of justice, are objectives to be included among those which may be regarded as overriding requirements relating to the public interest



capable of justifying a restriction on freedom to provide services (see, to that effect, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 31, and the case-law cited, and Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 33), ***on condition, first, that the national measure at issue in the main proceedings is suitable for securing the attainment of the objective pursued and, secondly, it does not go beyond what is necessary in order to attain that objective.***

It is a matter for the national court to decide whether, in the main proceedings, the restriction on freedom to provide services introduced by that national legislation fulfils those conditions. For that purpose, it is for that court to take account of the factors set out in the following paragraphs.

Thus, it must be determined, in particular, whether there is a correlation between the level of fees and the quality of the services provided by lawyers and whether, in particular, the setting of such minimum fees constitutes an appropriate measure for attaining the objectives pursued, namely the protection of consumers and the proper administration of justice.

Although it is true that a scale imposing minimum fees cannot prevent members of the profession from offering services of mediocre quality, it is conceivable that such a scale does serve to prevent lawyers, in a context such as that of the Italian market which, as indicated in the decision making the reference, is characterised by an extremely large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided.

***Account must also be taken of the specific features*** both of the market in question, as noted in the preceding paragraph, and the services in question and, in particular, of the fact that, in the field of lawyers' services, there is usually an asymmetry of information between 'client-consumers' and lawyers. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore find it difficult to judge the quality of the services provided to them (see, in particular, the Report on Competition in Professional Services in Communication from the Commission of 9 February 2004 (COM(2004)83 final, p. 10)).

However, the national court will have to determine whether professional rules in respect of lawyers, in particular rules relating to organisation, qualifications, professional ethics, supervision and liability, suffice in themselves to attain the objectives of the protection of consumers and the proper administration of justice.

**Joined cases C-94/04 and C-202/04 Cipolla [2006] ECR I-11421 §64, 65, 66, 67, 68, 69**

As a rule, it is for the Member States to decide on the degree of protection which they wish to afford to such lawful interests and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the ***principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objective they pursue and not go beyond what is necessary in order to attain it*** (see, in particular, *Säger*, paragraph 15, and Case C-262/02 *Commission v France*, paragraph 24).

**Case C-255/04 Commission v France [2006] ECR I-5251 §44**

However, [...], a requirement that the service provider furnishes a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social security cover in the Member State where that provider employs them, would give the national authorities, in a less restrictive but as effective a manner as checks in advance of posting, a guarantee that those workers' situation is lawful and that they are carrying on their main activity in the Member State where the service provider is established (see, to that effect, *Commission v Luxembourg*, paragraph 46).

Accordingly, ***the requirement of at least a year's prior employment by the undertaking effecting the posting must be regarded as disproportionate*** to attain the objectives relied upon by the Federal Republic of Germany.

**Case C-244/04 Commission v Germany [2006] ECR I-885 §41, 63**

As regards the argument that the rules mean in practice that whole events cannot be broadcast, although there are less restrictive measures to ensure the protection of public health, it must be observed that, for the reasons given by the Advocate General in paragraphs 103 and 104 of his Opinion, having regard, first, to the technical means currently available and, second, to their excessive cost, ***there is not currently any measure which is less restrictive*** which can exclude or conceal indirect television advertising for alcoholic beverages resulting from hoardings visible during the retransmission of sporting events. Since that advertising appears on screen only sporadically and only for a few seconds, it is not possible either to control its content or to insert warnings at the same time as the appearance of the advertisement on the screen on the dangers resulting from an excessive consumption of alcohol.

As regards the argument that advertising for alcoholic beverages is permitted in certain Member States, it must be observed that, as the Advocate General stated in paragraph 106 of his Opinion, ***the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate*** (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51).

**Case C-262/02 Commission v France [2004] ECR I-6569 §34, 37**

The reply, therefore, to the question referred must be that ***Article 49 EC prohibits*** a Member State's legislation under which ***winnings from games of chance organised in other Member States*** are treated as ***income of the winner chargeable to income tax***, whereas ***winnings from games of chance conducted in the Member State*** in question are ***not taxable***.

**Case C-42/02 Lindman [2003] ECR I-13519 §27**

First of all, whilst in *Schindler*, *Läärä* and *Zenatti* ***the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest***, such as ***consumer protection*** and the ***prevention of both fraud and incitement to squander on gaming***, ***restrictions*** based on such grounds and on the need to preserve public order ***must also be suitable for achieving those objectives***, inasmuch as they must ***serve to limit betting activities in a consistent and systematic manner***.

**Case C-243/01 Gambelli [2003] ECR I-13031 §67**

The *need to determine which court has territorial jurisdiction over proceedings relating to patents registered in Italy* as well as *concern to ensure the efficient conduct of such proceedings* may be pleaded as *overriding reasons of public interest capable of justifying restrictions* on the freedom to provide services.

However, *the requirement to have a residence or place of business in Italy goes*, on any view, *beyond what is necessary* to attain those objectives, since the Italian Republic could have adopted less restrictive measures to achieve those objectives.

Case C-131/01 Commission v Italy [2003] ECR I-1659 §44, 45

In that regard, it suffices to state *that even if the need for protection* relied on by the municipality of Watermael-Boitsfort *is capable of justifying restriction of the freedom to provide services, and even if it is established that merely reducing the number of satellite dishes as anticipated by the introduction of a tax such as the one in question in the main proceedings is capable of meeting that need, the tax exceeds what is necessary to do so.*

Case C-17/00 De Coster [2001] ECR I-9445 §37

In the light of the foregoing, the reply to Question 2(c) is that *it is for the national court to determine the type of information that the German authorities may reasonably require of providers of services established outside the Federal Republic of Germany, having regard to the principle of proportionality.* For this purpose, the national court should consider whether *the objective differences between the position of businesses established in Germany and that of businesses established outside Germany objectively require the additional information required of the latter.*

Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 Finalarte [2001] ECR I-7831 §75

However, it is important that language requirements designed to ensure that the dental practitioner will be able to communicate effectively with his patients, whose mother tongue is that of the Member State concerned, and with the administrative authorities and the professional bodies of that State *do not go beyond what is necessary* to attain that objective. In this respect, it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language.

Case C-424/97 Haim [2000] ECR I-5123 §60

Moreover, as the Commission has rightly emphasised, the provider of a service who goes to another Member State must be in possession of an identity card or a passport. It follows that the requirement of an additional identity document, issued by the Belgian Minister for the Interior, is *disproportionate* in relation to the need to ensure the identification of the persons in question.

Case C-355/98 Commission v Belgium [2000] ECR I-1221 §40

The application of national rules to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must *not go beyond what is necessary* in order to attain it (see, in particular, *Säger*, paragraph 15, Case C-

19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32, Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procurati di Milano* [1995] ECR I-4165, paragraph 37, and *Guiot*, cited above, paragraphs 11 and 13).

Joined cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453 §35  
Case C-58/98 *Corsten* [2000] ECR I-7919 §39

In response to those arguments it must be recalled that the Court has held that, in order to establish whether a provision of Community law complies with the principle of proportionality, *it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it* (see, in particular, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 57).

Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405 §54

It should next be stated that the public interest in the protection of the recipients of the services in question against such harm justifies a restriction of the freedom to provide services. However, such a provision goes beyond what is necessary to protect that interest if it makes the pursuit, by way of business, of an activity such as that at issue, subject to the possession by the persons providing the service of a professional qualification which is quite specific and *disproportionate* to the needs of the recipients.

It must therefore be stated that neither the nature of a service such as that at issue nor the consequences of a default on the part of the person providing the service justifies reserving the provision of that service to persons possessing a specific professional qualification, such as lawyers or patent agents. Such a restriction must be regarded as *disproportionate* to the objective pursued.

Case C-76/90 *Säger* [1991] ECR I-4221 §17, 20

That does not mean that it would not be possible for the national legislatures to lay down a general framework for cooperation between the two lawyers. However, the resultant obligations must not be *disproportionate* in relation to the objectives of the duty to work in conjunction, as defined above.

Case C-294/89 *Commission v France* [1991] ECR I-3591 §32

It follows that in view of the scale of the restrictions it imposes, the legislation in issue is *disproportionate* in relation to the objective pursued, namely the conservation of the historical and artistic heritage of the Member State in which the tour is conducted and the protection of consumers.

Case C-180/89 *Commission v Italy* [1991] ECR I-709 §24

Case C-154/89 *Commission v France* [1991] ECR I-659 §21

Those considerations show that the prohibition on the enrolment in a register of the Ordre in France of any doctor or dental surgeon who is still enrolled or registered in another Member State

*is too absolute* and general in nature to be justified by the need to ensure continuity of medical treatment or of applying French rules of medical ethics in France.

Case 96/85 Commission v France [1986] ECR 1475 §14

*Such a measure would be excessive in relation to the aim pursued*, however, if the requirements to which the issue of a licence is subject coincided with the proofs and guarantees required in the State of establishment. In order to maintain the principle of freedom to provide services the first requirement is that in considering applications for licences and in granting them the Member State in which the service is to be provided may not make any distinction based on the nationality of the provider of the services or the place of his establishment; the second requirement is that it must take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment.

Case 279/80 Webb [1981] ECR 3305 §20

The answer must therefore be that national rules prohibiting the transmission by cable television of advertisements cannot be regarded *as constituting either a disproportionate measure in relation to the objective to be achieved*, in that the prohibition in question is relatively ineffective in view of the existence of natural reception zones, or discrimination which is prohibited by the Treaty in regard to foreign broadcasters, in that their geographical location allows them to broadcast their signals only in the natural reception zone.

Case 52/79 Debaue [1980] ECR 833 §22

#### 4.3.5 Priority for less restrictive measures

In those circumstances, as the Commission suggests, *the establishment of a system of ex post facto control, together with deterrent penalties* to prevent and identify individual instances of the use of bogus amateur or unpaid status, *would suffice* to combat concealed employment effectively.

Case C-255/04 Commission v France [2006] ECR I-5251 §53

In this regard, the Court has already held that the requirement to have a *minimum share capital*, imposed on private security undertakings, *infringed Articles 43 EC and 49 EC* (*Commission v Portugal*, paragraphs 53 to 57). The justifications put forward by the Spanish Government, especially the particular terrorist threat existing in Spain, have no direct connection with the amount of the share capital of the undertaking and do not explain the restrictions placed on freedom to provide services and freedom of establishment.

Moreover, there are *less restrictive means* which would permit the attainment of *the objective of protection of the recipients of the services in question, such as lodging security or taking out insurance*. Even if, as the Spanish Government submits, in certain cases *each of those two measures may alone be insufficient, the possibility remains of applying them both cumulatively*. The Spanish Government has therefore failed to present arguments to show how the above two measures do not suffice to meet the objectives of security and protection of citizens.

Case C-514/03 Commission v Spain [2006] ECR I-963 §36, 37

As the Commission observed, *there are methods other than the tax in question in the main proceedings, less restrictive of the freedom to provide services*, which could achieve an objective such as the protection of the urban environment, *for instance the adoption of requirements concerning the size of the dishes, their position and the way in which they are fixed to the building or its surroundings or the use of communal dishes*. Moreover, such requirements have been adopted by the municipality of Watermael-Boitsfort, as is apparent from the planning rules on outdoor aerals adopted by that municipality and approved by regulation of 27 February 1997 of the government of the Brussels-Capital region (Moniteur belge of 31 May 1997, p. 14520).

Case C-17/00 De Coster [2001] ECR I-9445 §38

Where, as in the present case, there is an obligation to keep available and retain certain documents at the address of a natural person residing in the host Member State, who is to keep them as the agent or servant of the employer by whom he has been designated, even after the employer has ceased to employ workers in that State, *it is not sufficient, for the purposes of justifying such a restriction of freedom to provide services, that the presence of such documents within the territory of the host Member State may make it generally easier for the authorities of that State to perform their supervisory task. It must also be shown that those authorities cannot carry out their supervisory task effectively unless the undertaking has, in that Member State, an agent or servant designated to retain the documents in question* (see, to that effect, Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 54).

*Monitoring of compliance with rules concerning the social protection of workers in the construction industry can be achieved by less restrictive measures*. As the Advocate General observes in point 88 of his Opinion, where an employer established in another Member State ceases to employ workers in Belgium, the originals or copies of the social documents comprising the staff register and the individual accounts, or of the equivalent documents which the undertaking is required to draw up under the legislation of the Member State of establishment, may be sent to the national authorities, who may check them and, if necessary, retain them.

Joined cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453 §76, 78

The answer to be given must therefore be that, on a proper construction of Article 59 of the Treaty, a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising. However, it is for the national court to determine whether *those provisions are necessary for meeting overriding requirements of general public importance* or one of the aims mentioned in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether those aims *or overriding requirements could be met by measures less restrictive of intra-Community trade*.

Joined cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843 §54

Whilst it is true that debt-collection agencies are not subject to legal regulation in France, *the fact that one Member State imposes less strict rules than another Member State does not mean that*

*the latter's rules are disproportionate and hence incompatible with Community law* (Case C-348/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paragraph 51).

Case C-3/95 *Reisebüro Broede* [1996] ECR I-06511 §42

Case C-384/93 *Alpine Investments* [1995] ECR I-01141 §51

It follows that, as Community law stands at present, it is not possible to ensure the cohesion of such a tax system by means of *measures which are less restrictive* than those provided for by the rules in question, and that the consequences of any other measure ensuring the recovery by the Belgian State of the tax due under its legislation on sums payable by insurers pursuant to the contracts concluded with them would ultimately be similar to those resulting from the non-deductibility of contributions.

Case C-300/90 *Commission v Belgium* [1992] ECR I-305 §20

Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249 §27

Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, *it must not be possible to obtain the same result by less restrictive rules* (see, most recently, Case C-154/89 *Commission v France*, cited above, paragraphs 14 and 15; Case C-180/89 *Commission v Italy*, cited above, paragraphs 17 and 18; Case C-198/89 *Commission v Greece*, cited above, paragraphs 18 and 19).

Case C-288/89 *Mediawet I* [1991] ECR I-4007 §15

Case C-198/89 *Commission v Greece* [1991] ECR I-727 §18, 19

Case C-180/89 *Commission v Italy* [1991] ECR I-709 §17, 18

Case C-154/89 *Commission v France* [1991] ECR I-659 §14, 15

In the first place, as the Court stated in its judgment in *Klopp*, at paragraph 21, modern methods of transport and telecommunications enable lawyers to maintain the necessary contacts with clients and the judicial authorities. Furthermore, the expeditious conduct of the proceedings, in compliance with the principle that both sides must be given the opportunity to state their case, can be ensured by imposing on the lawyer providing services obligations *which restrict the pursuit of his activities to a lesser extent*. That aim could therefore be achieved by requiring the lawyer providing services to have an address for service at the chambers of the lawyer in conjunction with whom he works, where notifications from the judicial authority in question could be duly served.

Case C-294/89 *Commission v France* [1991] ECR I-3591 §35

It follows that that requirement may be regarded as compatible with Articles 59 and 60 of the EEC Treaty only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services,

that the public interest is not already protected by the rules of the State of establishment and *that the same result cannot be obtained by less restrictive rules*.

Case 252/83 Commission v Denmark [1986] ECR 3713 §19

Case 205/84 Commission v Germany [1986] ECR 3755 §29

Although, in the light of the special nature of certain services, it cannot be denied that a Member State is entitled to adopt measures which are intended to prevent the freedom guaranteed by Article 59 being used by a person whose activities are entirely or chiefly directed towards his territory in order to avoid the professional rules which would apply to him if he resided in that State, the requirement of residence in the territory of the State where the service is provided can only be allowed as an exception *where the Member State is unable to apply other, less restrictive, measures to ensure respect for these rules*.

On these grounds it must be concluded that the provisions of the EEC Treaty, in particular Articles 59, 60 and 65, must be interpreted as meaning that national legislation may not, by means of a requirement of residence in the territory, make it impossible for persons residing in another Member State to provide services *when less restrictive measures enable the professional rules to which provision of the service is subject in that territory to be complied with*.

Case 39/75 Coenen [1975] ECR 1547 §9, 12

In relation to a professional activity the exercise of which is similarly unrestricted within the territory of a particular Member State, the requirement of residence within that State constitutes a restriction which is incompatible with Articles 59 and 60 of the Treaty if the administration of justice can satisfactorily be ensured by measures which are *less restrictive*, such as the choosing of an address for service.

Case 33/74 Van Binsbergen [1974] ECR 1299 §16

## 4.4 THE BURDEN OF PROOF

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From the outset, it should be borne in mind that, according to settled case-law, in proceedings brought under Article 226 EC for failure to fulfil obligations, *it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information required to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption* (see, inter alia, Case 290/87 *Commission v Netherlands* [1989] ECR 3083, paragraphs 11 and 12, and Case C-241/08 *Commission v France* [2010] ECR I-0000, paragraph 22).

Case C-105/08 Commission v Portugal [2010] ECR I-5331 §26



As the Commission states, the French Republic's contentions are not substantiated by any statistical information or data. That Member State has not fully established that the exclusive rights over defined geographical areas granted to those authorised centres were necessary to ensure that the insemination service was offered throughout French territory.

**Case C-389/05 Commission v France [2008] ECR I-5337 §103**

However, although it cannot be denied that such grounds are among those which, under Article 30 EC, may be relied on by a Member State in order to justify such an obligation, and that, in the absence of harmonising rules, the Member States are free to decide on their intended level of protection of health and life of humans (Case C-293/94 *Brandsma* [1996] ECR I-3159, paragraph 11, and *Commission v Portugal*, paragraph 44), the fact remains ***that an exception to the principle of the free movement of goods may be justified under that article only if the national authorities show that it is necessary in order to attain one or more objectives mentioned in that article and that it is in conformity with the principle of proportionality*** (Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 40; Case C-358/95 *Morellato* [1997] ECR I-1431, paragraph 14; *ATRAL*, paragraph 67; and *Commission v Italy*, paragraph 22).

In that regard, ***the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated*** (Case C-42/02 *Lindman* [2003] ECR I-13519, paragraph 25; Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 45; Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 63; Case C-137/04 *Rockler* [2006] ECR I-1441, paragraph 25; and Case C-185/04 *Öberg* [2006] ECR I-1453, paragraph 22).

**Case C-254/05 Commission v Belgium [2007] ECR I-04269 §35, 36**

As a rule, it is for the Member States to decide on the degree of protection which they wish to afford to such lawful interests and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objective they pursue and not go beyond what is necessary in order to attain it (see, in particular, *Säger*, paragraph 15, and Case C-262/02 *Commission v France*, paragraph 24).

With regard, secondly, to the objective of combating concealed employment, the fact that performing artists are normally engaged on an intermittent basis and for short periods by different show organisers cannot, of itself, mean that a ***general assumption*** of concealed employment is well founded. That is particularly so in this case because the performing artists in question are recognised as service providers, established in their Member State of origin, where they usually provide similar services.

**Case C-255/04 Commission v France [2006] ECR I-5251 §44, 52**

## 5. SPECIFIC PROFESSIONS AND FIELDS

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### 5.1 TOURISM (tourist guides)

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It should be pointed out at the outset that the activities of a tourist guide may be subject to two distinct sets of rules. A tourist agency may itself employ guides but it may also engage self-employed tourist guides. *In the latter case, the service is provided by the tourist guide to the tourist agency and constitutes an activity carried on for remuneration within the meaning of Article 60 of the Treaty* (Case C-198/89 *Commission v Greece* [1991] ECR I-727, paragraphs 5 and 6).

Case C-398/95 SETTG [1997] ECR I-3091 §7

As a preliminary matter it should be pointed out that the activities of a tourist guide from a Member State other than Greece who accompanies tourists on an organized tour from that other Member State to Greece may be subject to *two distinct sets of legal rules. A tour company established in another Member State may itself employ guides. In that case it is the tour company that provides the service to tourists through its own guides. A tour company may also engage self-employed tourist guides established in that other Member State. In that case, the service is provided by the guide to the tour company.*

The two cases described above thus relate to the provision of services by the tour company to tourists and by the self-employed tourist guide to the tour company respectively. *Such services, which are of limited duration and are not governed by the provisions on the free movement of goods, capitals and persons, constitute activities carried on for remuneration within the meaning of Article 60 of the EEC Treaty.*

Case C-198/89 *Commission v Greece* [1991] ECR I-727 §5, 6

Case C-180/89 *Commission v Italy* [1991] ECR I-709 §5, 6

Case C-154/89 *Commission v France* [1991] ECR I-659 §6, 7

The Greek Government stresses in that connection that *the occupation of tourist guide must be distinguished from that of courier*. It is clear from the fourteenth recital in the preamble and Article 2(5) of Council Directive 75/368/EEC of 16 June 1975 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various activities (ex ISIC Division 01 to 85) and, in particular, transitional measures in respect of those activities (Official Journal 1975 L 167, p. 22) that only the occupation of courier has been the subject of Community harmonization. Accordingly, authorization to carry on the occupation of a courier in no way entails the right to act as a tourist guide.

That argument cannot be upheld. It need merely be pointed out that the Commission in no way maintained that the two occupations were identical and that a courier might equally carry on that occupation or that of a tourist guide. In its application it refers *only to the activities of a tourist*

*guide carried on by a person travelling with a group of tourists*, and does not raise the issue whether that person is also acting as a courier.

Case C-198/89 Commission v Greece [1991] ECR I-727 §13, 14

Case C-180/89 Commission v Italy [1991] ECR I-709 §12, 13

By making the provision of services by tourist guides accompanying a group of tourists from another Member State subject *to possession of a specific qualification*, that legislation *prevents* both tour companies from providing that service with their own staff and self-employed tourist guides from offering their services to those companies for organized tours. It also *prevents* tourists taking part in such organized tours from availing themselves at will of the services in question.

Case C-198/89 Commission v Greece [1991] ECR I-727 §17

Case C-180/89 Commission v Italy [1991] ECR I-709 §16

Case C-154/89 Commission v France [1991] ECR I-659 §13

The service of accompanying tourists is performed under quite specific conditions. The independent or employed tourist guide travels with the tourists and accompanies them in a closed group; in that group they move temporarily from the Member State of establishment to the Member State to be visited.

In those circumstances *a licence requirement imposed by the Member State of destination* has the effect of reducing the number of tourist guides qualified to accompany tourists in a closed group, which may lead a tour operator to have recourse instead to local guides employed or established in the Member State in which the service is to be performed. However, that consequence may have the drawback that tourists who are the recipients of the services in question do not have a guide who is familiar with their language, their interests and their specific expectations.

Moreover, the profitable operation of such group tours depends on the commercial reputation of the operator, who faces competitive pressure from other tour companies; the need to maintain that reputation and *the competitive pressure themselves compel companies to be selective in employing tourist guides and exercise some control over the quality of their services*. Depending on the specific expectations of the groups of tourists in question, *that factor is likely* to contribute to the proper appreciation of the artistic and archaeological heritage and the protection of consumers, in the case of conducted tours of places other than museums or historical monuments which may be visited only with a professional guide.

Case C-198/89 Commission v Greece [1991] ECR I-727 §22, 23, 24

Case C-180/89 Commission v Italy [1991] ECR I-709 §21, 22, 23

Case C-154/89 Commission v France [1991] ECR I-659 §18, 19, 20

## 5.2 MEDICINE

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### 5.2.1 Health services

Even though it does not lay down a complete prohibition of advertising or a particular form of advertising, which, according to settled case-law, is capable of constituting in itself a restriction of the freedom to provide services (see, inter alia, Case C-500/06 Corporación Dermoestética [2008] ECR I-5785, paragraph 33 and the case-law cited), *a rule laying down a prohibition relating to the unprofessional nature of the content of advertising, such as Paragraph 27(3) of the Code of professional conduct for doctors in Hesse, which suffers from a certain ambiguity, is liable to constitute an obstacle to the relevant freedom to provide medical services.*

In the light of the above considerations, the answer to Questions 1 to 3 is that Article 5(3) of Directive 2005/36 must be interpreted as meaning that *national rules such as, first, Paragraph 12(1) of the Code of professional conduct for doctors in Hesse, under which fees must be reasonable and, unless provided otherwise by law, calculated on the basis of the official Regulation on doctors' fees, and, secondly, Paragraph 27(3) of that code, which prohibits doctors from engaging in unprofessional advertising, do not fall within its material scope. It is, however, for the referring court to ascertain, taking into account the indications given by the Court, whether those rules constitute a restriction within the meaning of Article 56 TFEU, and, if so, whether they pursue an objective in the public interest, are appropriate to ensuring that it is attained, and do not go beyond what is necessary for attaining it.*

C-475/11 Konstantinides [2013] not published vet §56, 58

It should be noted in this connection that, according to settled case-law, *medical services supplied for consideration fall within the scope of the provisions on the freedom to provide services* (see, inter alia, Case C-158/96 Kohll [1998] ECR I-1931, paragraph 29, and Case C-173/09 Elchinov [2010] ECR I-0000, paragraph 36), there being no need to distinguish between care provided in a hospital environment and care provided outside such an environment (Case C-368/98 Vanbraekel and Others [2001] ECR I-5363, paragraph 41; Case C-385/99 Müller-Fauré and van Riet [2003] ECR I-4509, paragraph 38; Case C-372/04 Watts [2006] ECR I-4325, paragraph 86; and Commission v France, paragraph 30).

Case C-255/09 Commission v Portugal, [2011] ECR I-10547 §46

In the present case, it is clear that *a national rule excluding, in all cases, payment for hospital treatment given in another Member State without prior authorisation deprives the insured person who, for reasons relating to his state of health or to the need to receive urgent treatment in a hospital, was prevented from applying for such authorisation or was not able, like Mr Elchinov, to wait for the answer of the competent institution, of reimbursement from that institution in respect of such treatment, even though all other conditions for such reimbursement to be made are met.*

In the light of all the foregoing, the answer to the fifth question is that Articles 49 EC and 22 of Regulation No 1408/71 preclude legislation of a Member State which is interpreted as excluding,

in all cases, reimbursement in respect of hospital treatment given in another Member State without prior authorisation.

Case C-173/09 Elchinov [2010] ECR I-8889 §45, 51

In the circumstances of the case, *the prior authorisation* to which the national legislation makes subject responsibility for payment by the competent institution, in accordance with the rules governing cover in force in the Member State to which it belongs, *for treatment planned in another Member State and involving the use of major medical equipment outside hospital infrastructures* is capable of deterring, or even preventing, persons insured under the French system from applying to providers of medical services established in such another Member State in order to obtain the treatment in question. It constitutes, therefore, for both the insured persons and the providers of those services, *a restriction of the freedom to provide services* (see, to that effect, *Müller-Fauré and van Riet*, paragraphs 44 and 103, and *Watts*, paragraph 98).

Case C-512/08 Commission v France [2010] ECR I-8833 §32

In the light of the foregoing, the answer to the seventh question must be that the obligation of the competent institution under both Article 22 of Regulation No 1408/71 and Article 49 EC *to authorise a patient* registered with a national health service to obtain, at that institution's expense, *hospital treatment in another Member State* where the waiting time exceeds an acceptable period having regard to an objective medical assessment of the condition and clinical requirements of the patient concerned *does not contravene Article 152(5) EC*.

Case C-372/04 Watts [2006] ECR I-4325 §148

(available only in French)

Il y a lieu, par conséquent, de constater que, *en interdisant l'exercice à titre libéral de certaines professions médicales techniques (technicien de laboratoire, technicien en radiologie et orthoptiste) en vertu de l'article 7 a de la loi MTD, la république d'Autriche a manqué aux obligations qui lui incombent en vertu des articles 43 CE et 49 CE*.

Case C-81/03 Commission v Austria [2004] not published yet §19

Second, as has already been made clear in paragraph 39 above, a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system providing benefits in kind. The Court has, in particular, held that a medical service provided in one Member State and paid for by the patient cannot cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation which is essentially of the type which provides for benefits in kind (*Smits and Peerbooms*, paragraph 55). *The requirement for prior authorisation where a person is subsequently to be reimbursed for the costs of that treatment is precisely what constitutes, as has already been stated in paragraph 44 above, the barrier to freedom to provide services*, that is to say, to a patient's ability to go to the medical service provider of his choice in a Member State other than that of affiliation. *There is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently*

*applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly.*

Case C-385/99 Müller-Fauré and van Riet [2003] ECR I-4509 §103

In the light of all the foregoing considerations, the answer to the questions must be that:

- *Articles 59 and 60 of the Treaty* must be interpreted as *not precluding legislation* of a Member State, such as that at issue in the main proceedings, which (i) *makes the assumption of the costs of hospital care provided in a Member State other than that in which the insured person's sickness fund is established, by a provider with which that fund has not concluded an agreement, conditional upon prior authorisation by the fund* and (ii) *makes the grant of that authorisation subject to the condition that such action is necessary for the insured person's health care.* However, *authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in an establishment which has concluded an agreement with the fund;*
- by contrast, *Articles 59 and 60 of the Treaty do preclude the same legislation in so far as it makes the assumption of the costs of non-hospital care provided in another Member State* by a person or establishment with whom or which the insured person's sickness fund has not concluded an agreement conditional upon prior authorisation by the fund, even when *the national legislation concerned sets up a system of benefits in kind under which insured persons are entitled not to reimbursement of costs incurred for medical treatment, but to the treatment itself which is provided free of charge.*

Case C-385/99 Müller-Fauré and van Riet [2003] ECR I-4509 §109

In view of all the foregoing considerations, the answer to be given to the national court must be that *Articles 59 and 60 of the Treaty do not preclude legislation of a Member State*, such as that at issue in the main proceedings, *which makes the assumption of the costs of treatment provided in a hospital located in another Member State subject to prior authorisation from the insured person's sickness insurance fund and the grant of such authorisation subject to the condition that (i) the treatment must be regarded as normal in the professional circles concerned*, a criterion also applied in determining whether hospital treatment provided on national territory is covered, *and (ii) the insured person's medical treatment must require that treatment.* However, that applies only in so far as

- *the requirement that the treatment must be regarded as normal is construed to the effect that authorisation cannot be refused on that ground where it appears that the treatment concerned is sufficiently tried and tested by international medical science,* and
- *authorisation can be refused on the ground of lack of medical necessity only if the same or equally effective treatment can be obtained without undue delay at an establishment having a contractual arrangement with the insured person's sickness insurance fund.*

Case C-157/99 Smits and Peerbooms [2001] ECR I-5473 §108

It must be borne in mind at the outset that Directive 93/16 is intended, according to the twenty-first recital in its preamble, only to institute specific training in general medical practice which satisfies minimum quality and quantity requirements, and supplements the minimum basic training which medical practitioners must receive in accordance with that directive. Although they are entitled to impose more stringent requirements, ***the Member States are required, by Article 2 of Directive 93/16, to recognise each other's diplomas, certificates and other evidence of formal qualifications awarded in accordance with the minimum requirements laid down by Directive 93/16.***

**Case C-93/97 Fédération Belge des Chambres Syndicales de Médecins ASBL [1998] ECR I-4837 §21**

It follows that ***doctors and dentists established in other Member States must be afforded all guarantees equivalent to those accorded to doctors and dentists established on national territory***, for the purposes of freedom to provide services.

**Case C-158/96 Kohll [1998] ECR I-1931 §48**

According to the first paragraph of that provision, services are to be considered to be "services" within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons. Indent (d) of the second paragraph of Article 60 ***expressly states that activities of the professions fall within the definition of services.***

It must be held that ***termination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity.*** In any event, the Court has already held in the judgment in *Luisi and Carbone* (Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 16) that medical activities fall within the scope of Article 60 of the Treaty.

Consequently, the answer to the national court's first question must be that medical ***termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.***

**Case C-159/90 Grogan [1991] ECR I-4685 §17, 18, 21**

It must first be stated that both Directive 75/362/EEC of 16 June 1975, concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (Official Journal 1975 L 167, p. 1) and Directive 75/363/EEC also of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors (Official Journal 1975 L 167, p.14) relate only to the profession of "doctor". Moreover, ***there are no Community provisions governing the exercise of professions allied to medicine*** such as, in particular, osteopathy. It must also be noted that the abovementioned directives contain no Community definition of what activities are to be regarded as those of a doctor.

Secondly, it must be observed that in so far as ***there is no Community definition of medical acts, the definition of acts restricted to the medical profession is, in principle, a matter for the***

**Member States.** It follows that in the absence of Community legislation on the professional practice of osteopathy each Member State is free to regulate the exercise of that activity within its territory, without discriminating between its own nationals and those of the other Member States.

Case C-61/89 Bouchoucha [1990] ECR I-3551 §8, 12

It must first be pointed out that nationals of a Member State who pursue their occupation in another Member State are obliged to comply with the rules which govern the pursuit of the occupation in question in that Member State. As the French Government rightly observes, *in the case of the medical and dental professions* those rules reflect in particular a concern to ensure that *individuals* enjoy the most effective and complete *health protection* possible.

However, in so far as those rules have the effect of restricting freedom of movement for workers, the right of establishment and the freedom to provide services within the Community, they are compatible with the Treaty only if the restrictions which they entail are *actually justified in view of the general obligations inherent in the proper practice of the professions in question and apply to nationals and foreigners alike*. That is not the case where the restrictions are such as to create discrimination against practitioners established in other Member States or raise obstacles to access to the profession which go beyond what is necessary in order to achieve the intended goals.

Secondly, it must be observed that the general rule prohibiting doctors and dental practitioners established in another Member State from practising in France is unduly restrictive. *First of all, in the case of certain medical specialties, it is not necessary that the specialist should be close to the patient on a continuous basis after the treatment has been given. That is so where the specialist carries out a single procedure, as is often the case of a radiologist, for example, or where subsequent care is provided by other medical personnel, as is often the case of a surgeon. Furthermore, as the French Government indeed recognized, recent developments in the medical profession show that even in the area of general medicine the increasing trend is for practitioners to belong to group practices, so that a patient cannot always consult the same general practitioner.*

Those considerations show that *the prohibition on the enrolment in a register of the Ordre* in France of any doctor or dental surgeon who is still enrolled or registered in another Member State is too absolute and general in nature to be justified by the need to ensure continuity of medical treatment or of applying French rules of medical ethics in France.

The Commission is therefore correct to argue that the French legislation *prohibiting* any doctor or dentist established in another Member State from practising in France *as a locum, as a principal in a practice or as an employee is contrary to the provisions of the Treaty on freedom of movement for persons*.

The French Government's argument that the freedom of doctors established in other Member States to provide services is recognized in France on the basis of Article 356-1 of the code de la santé publique is not relevant. In both its reasoned opinion and its application to the Court the Commission merely contended that because of its generality the French system was contrary to the freedom to provide services inasmuch as it never permitted *a doctor established in another Member State to act as locum for a doctor established in France*. The application of Article 356-



It is subject to the requirements set out in the implementing decree, according to which a doctor established in another Member State can provide medical treatment to only a single patient for a period of not more than two days. Such a limited possibility of carrying out medical treatment does not allow that doctor to act as locum for a French colleague.

**Case 96/85 Commission v France [1986] ECR 1475 §10, 11, 13, 14, 15, 16**

With regard to the specific question raised by the Italian Government as to whether the person affected may be so entitled even if he has not been *enrolled on the relevant professional register*, it should be stated that the conformity of such a requirement with Community law depends upon whether the fundamental principles of Community law and in particular the principle of non-discrimination are observed.

As the Court made clear in the aforementioned judgment, enrolment on a professional register cannot be refused on grounds which fail to take into account the validity of a professional qualification obtained in another Member State in so far as such a qualification is one which all the Member States and their professional organizations, acting as bodies entrusted with a public duty, are required to recognize under Community law. Thus legislation which provides for the bringing of criminal or administrative proceedings against a veterinary surgeon practising his profession without having been enrolled on the professional register, to the extent to which such enrolment has been refused in breach of Community law, is incompatible with Community law in so far as its result is to deprive of any effectiveness the provisions of the Treaty and of Directive 78/1026, the second recital in the preamble to which states that it is to facilitate the 'effective' exercise of the right of establishment and freedom to provide services in respect of the activities of veterinary surgeons.

The reply to the first question referred to the Court by the Pretore di Lodi must therefore be that a Member State *may not enforce a penal measure* in respect of the improper practice of the profession of veterinary surgeon against a national of another Member State, who is entitled to practise as a veterinary surgeon in his own country, on the ground that he is not enrolled on the register of veterinary surgeons of the first Member State, where such enrolment is refused in breach of Community law.

**Case 5/83 Rienks [1983] ECR 4233 §9, 10, 11**

### **5.2.2 Laboratories**

Consequently, it must be held that, *by failing to provide*, under its social security rules, for *the possibility of acceptance of liability for costs relating to laboratory analyses and tests*, within the meaning of Article 24 of the Social Security Code, *which are carried out in another Member State*, by means of reimbursement of the costs paid for those analyses and tests, *but by providing solely for a system of direct billing to sickness insurance funds*, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 49 EC.

**Case C-490/09 Commission v Luxembourg [2011] ECR I-247 §48**

It follows from the foregoing considerations that, *by imposing on bio-medical analysis laboratories established in other Member States the requirement that they have a place of business in France in order to obtain the requisite operating authorisation*, the French Republic has failed to fulfil its obligations under Article 49 EC.

Consequently, it must be held that, *by precluding any reimbursement of the costs of bio-medical analyses carried out by a bio-medical analysis laboratory established in another Member State*, the French Republic *has failed* to fulfil its obligations under Article 49 EC.

Case C-496/01 Commission v France [2004] ECR I-2351 §77, 95

### 5.2.3 Health cure

Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude rules of a Member State, such as those at issue in the main proceedings, *under which reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report* in connection with a health cure taken in another Member State *is conditional on obtaining prior recognition of eligibility, which is given only provided it is established*, in a report drawn up by a medical officer or a medical consultant, that the proposed cure is absolutely necessary owing to the *greatly increased* prospects of success *in that other Member State*.

Articles 49 EC and 50 EC are to be interpreted as meaning that they do not in principle preclude rules of a Member State, such as those at issue in the main proceedings, under which *reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure*, whether taken in that Member State or in another Member State, *is made only where the health spa concerned is listed in the Register of Health Spas*. However, it is for the national court to ensure that any conditions to which the registration of a health spa in such a register may be subject are objective and do not have the effect of making the provision of services between Member States more difficult than the provision of services purely within the Member State concerned.

Articles 49 EC and 50 EC are to be interpreted as meaning *that they preclude the application of national rules under which the reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another Member State is precluded where the person concerned has not awaited the conclusion of the court proceedings* brought against the decision refusing to recognise that expenditure as eligible for assistance before commencing the cure in question.

Case C-8/02 Leichtle [2004] ECR I-2641 Operative part

In view of all the foregoing considerations, the answer to the first question must be that:

- Articles 49 EC and 50 EC are to be interpreted as meaning that they preclude rules of a Member State, such as those at issue in the main proceedings, under which *reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure taken in another*

*Member State is conditional on obtaining prior recognition of eligibility*, which is given only where it is established, in a report drawn up by a medical officer or a medical consultant, that the proposed cure is absolutely necessary owing to the greatly increased prospects of success in that other Member State.

- Articles 49 EC and 50 EC are to be interpreted as meaning that they *do not* in principle *preclude* rules of a Member State, such as those at issue in the main proceedings, under which *reimbursement of expenditure incurred on board, lodging, travel, visitors' tax and the making of a final medical report in connection with a health cure, whether taken in that Member State or in another Member State, is made only where the health spa concerned is listed in the Register of Health Spas*. However, it is for the national court to ensure that any conditions to which the registration of a health spa in such a register may be subject are objective and do not have the effect of making the provision of services between Member States more difficult than the provision of services purely within the Member State concerned.

In view of the foregoing, the answer to the second question must be that *Articles 49 EC and 50 EC* are to be interpreted as meaning that they *preclude* the application of *national rules* under which *the reimbursement of expenditure* incurred on board, lodging, travel, visitors' tax and the making of a final medical report *in connection with a health cure taken in another Member State is precluded where the person concerned has not awaited the conclusion of the court proceedings* brought against the decision refusing to recognise that expenditure as eligible for assistance before commencing the cure in question.

Case C-8/02 Leichtle [2004] ECR I-2641 §51, 59

## 5.3 INSURANCE

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In fact, in view of *the disadvantage to the employer in financial terms in the postponement of the right to deduction until the time the pension benefits are paid to the employee*, national rules such as those at issue in the main proceedings are liable both to *dissuade Swedish employers from taking out occupational pension insurance with institutions established in a Member State other than the Kingdom of Sweden and to dissuade those institutions from offering their services on the Swedish market* (see, to that effect, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 30, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 31).

In the light of the foregoing observations, the answer to the question referred must be that *Article 49 EC precludes an insurance policy issued by an insurance company established in another Member State which meets the conditions laid down in national law for occupational pension insurance, apart from the condition that the policy must be issued by an insurance company operating in the national territory, from being treated differently in terms of taxation*, with income tax effects which, depending on the circumstances in the individual case, may be less favourable.

Case C-422/01 Försäkringsaktiebolaget Skandia (publ) and Ramstedt [2003] ECR I-6817 §28, 62

In the light of the foregoing, the answer to the question referred must be that:

- benefits such as those provided by ELGA under the *compulsory insurance scheme against natural risks do not fall within the scope of either Articles 59 and 60 of the Treaty or Directive 73/239*;
- *such a compulsory insurance scheme may, however, constitute a restriction on the freedom of insurance companies established in other Member States, who wish to offer services covering such risks in Greece, to provide services*, within the meaning of those Treaty provisions. It is for the referring court to determine whether that scheme is in fact justified by social policy objectives and to examine, in particular, whether the cover provided by that compulsory insurance scheme is proportionate to those objectives.

Case C-355/00 Freskot [2003] ECR I-5263 §74

*Since the provision of insurance constitutes a service within the meaning of Article 60 of the Treaty, it must next be borne in mind that, according to the case-law of the Court, Article 59 of the Treaty precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them* (see, in particular, Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 16).

In those circumstances, *legislation* such as that in question in the main proceedings *contains a number of elements liable to dissuade individuals from taking out capital life assurance with companies not established in Sweden and liable to dissuade insurance companies from offering their services on the Swedish market*.

Case C-118/96 Safir [1998] ECR I-1897 §22, 30

It is to be noted that provisions such as those contained in the Belgian legislation at issue constitute a restriction on freedom to provide services. Provisions *requiring an insurer to be established in a Member State* as a condition of the eligibility of insured persons to benefit from certain tax deductions in that State operate to *deter* those seeking insurance from approaching insurers established in another Member State, and thus *constitute a restriction of the latter's freedom to provide services*.

However, as the Court has previously held (see the judgment in *Commission v Germany*, referred to above, paragraph 52), *the requirement of an establishment is compatible* with Article 59 of the Treaty where it constitutes a condition which is *indispensable* to the achievement of the public-interest objective pursued.

Case C-204/90 Bachmann [1992] ECR I-249 §31, 32

Case C-300/90 Commission v Belgium [1992] ECR I-305 §22, 23

Although the rules on *movements of capital* are therefore not of such a nature as to restrict the freedom to conclude insurance contracts in the context of the *provision of services* under Articles 59 and 60, it is, however, necessary to determine the scope of those articles in relation to the provisions of the Treaty on the right of *establishment*.

In that respect, it must be acknowledged *that an insurance undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment*, even if that presence does not take the form of a *branch or agency*, but consists *merely of an office* managed by the undertaking's own staff or by *a person who is independent but authorized* to act on a permanent basis for the undertaking, as would be the case with an agency. In the light of the aforementioned definition contained in the first paragraph of Article 60, such an insurance undertaking cannot therefore avail itself of Articles 59 and 60 with regard to its activities in the Member State in question.

Finally, it should be mentioned that since the scope of Articles 59 and 60 is defined by reference to the places of establishment or of residence of the provider of the services and of the person for whom they are intended, special problems may arise where *the risk covered by the insurance contract is situated on the territory of a Member State other than that of the policy-holder* as the person for whom the services are intended. The Court does not propose in these proceedings to consider such problems, which were not the subject of argument before it. The following examination therefore concerns only insurance against risks situated in the Member State of the policy-holder (hereinafter referred to as 'the State in which the service is provided').

It must be stated that the requirements in question in these proceedings, namely that an insurer who is established in another Member State, authorized by the supervisory authority of that State and subject to the supervision of that authority, *must have a permanent establishment within the territory of the State in which the service is provided and that he must obtain a separate authorization from the supervisory authority of that State, constitute restrictions on the freedom to provide services* inasmuch as they increase the cost of such services in the State in which they are provided, in particular where the insurer conducts business in that State only occasionally.

As the German Government and the parties intervening in its support have maintained, without being contradicted by the Commission or the United Kingdom and Netherlands Governments, *the insurance sector is a particularly sensitive area from the point of view of the protection of the consumer* both as a policy-holder and as an insured person. This is so in particular because of the specific nature of the service provided by the insurer, which is linked to future events, the occurrence of which, or at least the timing of which, is uncertain at the time when the contract is concluded. An insured person who does not obtain payment under a policy following an event giving rise to a claim may find himself in a very precarious position. Similarly, it is as a rule very difficult for a person seeking insurance to judge whether the likely future development of the insurer's financial position and the-terms of the contract, usually imposed by the insurer, offer him sufficient guarantees that he will receive payment under the policy if a claimable event occurs.

It must also be borne in mind, as the German Government has pointed out, that in certain fields *insurance has become a mass phenomenon*. Contracts are concluded by such enormous numbers of policy-holders that the protection of the interests of insured persons and injured third parties affects virtually the whole population.

As regards *the financial position of insurance undertakings*, the two directives contain very detailed provisions on the free assets of the undertaking, in other words its own capital resources.

Those provisions are intended to ensure that the undertaking is solvent and the directives require the supervisory authority of the Member State in which the head office is situated to verify the state of solvency of the undertaking 'with respect to its entire business'. That expression must be construed as also covering business conducted in the context of the provision of services. It follows that the State in which the service is provided is not entitled to carry out such verifications itself, but ***must accept a certificate of solvency drawn up by the supervisory authority of the Member State in whose territory the head office*** of the undertaking providing the service is situated. According to the German Government, which has not been contradicted by the Commission, that is the case in the Federal Republic of Germany.

In the course of the proceedings before the Court, the German Government and the governments intervening in its support have shown that ***considerable differences exist in the national rules currently in force concerning technical reserves and the assets which represent such reserves***. In the absence of harmonization in that respect and of any rule requiring the supervisory authority of the Member State of establishment to supervise compliance with the rules in force in the State in which the service is provided, it must be recognized that the latter State is justified in requiring and supervising compliance with its own rules on technical reserves with regard to services provided within its territory, provided that such rules do not exceed what is necessary for the purpose of ensuring that policy-holders and insured persons are protected.

In that respect it should be noted that in all the Member States the supervision of insurance undertakings is organized in the form of ***an authorization procedure*** and that the necessity of such a procedure is recognized in the two first coordination directives as regards the activities to which they refer. In each of those directives Article 6 thereof provides that each Member State must ***make the taking-up of the business*** of insurance in its territory subject to an official authorization. An undertaking which sets up branches and agencies in Member States other than that in which its head office is situated must therefore obtain an authorization from the supervisory authority of each of those States.

In those circumstances the German Government's argument to the effect that only the requirement of an authorization can provide an effective means of ensuring the supervision which, having regard to the foregoing considerations, is justified on grounds relating to the protection of the consumer both as a policy-holder and as an insured person, must be accepted. Since a system such as that proposed in the draft for a ***second directive, which entrusts the operation of the authorization procedure to the Member State in which the undertaking is established***, working in close cooperation with the State in which the service is provided, can be set up only by legislation, it must also be acknowledged that, in the present state of Community law, it is for the State in which the service is provided to grant and withdraw that authorization.

It should however be emphasized that the authorization must be granted on request to any undertaking established in another Member State which meets the conditions laid down by the legislation of the State in which the service is provided, ***that those conditions may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established and that the supervisory authority of the State in which the service is provided must take into account supervision and verifications which have already been carried out in the Member State of establishment***. According to the German Government, which has not been contradicted on that point by the Commission, the German authorization procedure conforms fully to those requirements.

It follows from the foregoing that *the requirement of authorization* may be maintained only in so far as it is justified on the grounds relating to the protection of policy-holders and insured persons relied upon by the German Government. It must also be recognized that *those grounds are not equally important in every sector of insurance and that there may be cases where, because of the nature of the risk insured and of the party seeking insurance, there is no need to protect the latter by the application of the mandatory rules of his national law.*

*If the requirement of an authorization constitutes a restriction on the freedom to provide services, the requirement of a permanent establishment is the very negation of that freedom.* It has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided (see in particular the judgment of 3 December 1974, cited above, and the judgments of 26 November 1985 in Case 39/75 *Coenen v Sociaal-Economische Raad* [1975] ECR 1547, and 10 February 1982 in Case 76/81 *Transporoute v Minister for Public Works* [1982] ECR 417). If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued.

That has not been shown to be the case. As has been stated above, Community law on insurance does not, as it stands at present, prohibit the State in which the service is provided from requiring that the *assets representing the technical reserves* covering business conducted on its territory be localized in that State. In that case *the presence of such assets may be verified in situ, even if the undertaking does not have any permanent establishment in the State.* As regards the other conditions for the conduct of business which are subject to supervision, it appears to the Court that such supervision may be effected on the basis of copies of balance sheets, accounts and commercial documents, including the conditions of insurance and schemes of operation, sent from the State of establishment and duly certified by the authorities of that Member State. It is possible under an authorization procedure to subject the undertaking to such conditions of supervision by means of a provision in the certificate of authorization and to ensure compliance with those conditions, if necessary by withdrawing that certificate.

As regards the Commission's first head of claim, it must therefore be concluded that the Federal Republic of Germany has failed to fulfil its obligations under Articles 59 and 60 of the Treaty by providing in the *Versicherungsaufsichtsgesetz* that where insurance undertakings in the Community wish to provide services in relation to direct insurance business, other than transport insurance, through salesmen, representatives, agents or other intermediaries, they must have an establishment in its territory; however, that failure does not extend to compulsory insurance and insurance for which the insurer either maintains *a permanent presence* equivalent to an agency or a branch or directs his business entirely or principally towards the territory of the Federal Republic of Germany.

Consideration of the first head of claim has shown, in addition, that *the requirement of authorization in the State in which the service is provided is not justified where the undertaking providing the services already satisfies equivalent conditions in the Member State in which it is established and where there exists a system of cooperation between the supervisory authorities of the Member States concerned ensuring effective supervision of compliance with such conditions also as regards the provision of services.* According to the preamble to Directive 78/473, the directive is intended to establish the minimum coordination necessary to facilitate the

effective pursuit of Community co-insurance business and to organize special cooperation between the supervisory authorities of the Member States and between those authorities and the Commission which, for the provision of services in the insurance business in general, is provided for only in the proposal for a second directive.

Case 205/84 Commission v Germany [1986] ECR 3755 § 20, 21, 23, 28, 30, 31, 37, 39, 44, 46, 47, 49, 52, 55, 57, 65

In its judgment delivered this day in Case 205/84 Commission v Federal Republic of Germany [1986] ECR 3793, the Court held that in the insurance sector in general there were imperative reasons relating to the protection of the consumer both as a policy-holder and as an insured person which might justify restrictions on the freedom to provide services. The Court also recognized that in the present state of Community law, in particular with regard to the coordination of the relevant national rules, the protection of that interest was not necessarily guaranteed by the rules of the State of establishment. The Court concluded therefrom that, *as regards the field of direct insurance in general, the requirement of a separate authorization granted by the authorities of the State in which the service was provided remained justified subject to certain conditions. On the other hand, the Court considered that the requirement of an establishment, which represented the very negation of the freedom to provide services, exceeded what was necessary to attain the objective pursued and that, accordingly, that requirement was contrary to Articles 59 and 60 of the Treaty.*

With regard to the first complaint, it must be stated that *no provision of Community law prevents a Member State from requiring insurance undertakings and their branches which are established on its territory to obtain an authorization not only in respect of business conducted on its territory but also for business conducted in other Member States in the context of the provision of services. On the contrary, such a requirement is consistent with the principles laid down in Directive 73/239.*

Article 7 (1) of that directive provides that an insurance undertaking may request and obtain an official authorization to carry on its business only in a part of the national territory. In that case, if it wishes to extend its business beyond such part, it is required under Article 6 (2) (d) to request further authorization and, in accordance with Article 8 (2), a new scheme of operations must be submitted with that request.

Those provisions, read in conjunction with the rules on the supervision of the financial position of the undertakings concerned and on the withdrawal of authorizations, show that the directive is based on the principle that *the State of establishment is authorized to take into account all the business activities of undertakings constituted within its territory* in order to be able to carry out an effective supervision of the conditions in which such activities are pursued. Moreover, Article 8 (1) of the proposal for a second directive expressly provides that any undertaking wishing to extend its business by way of the exercise of freedom to provide services to the territory of another Member State must seek authorization for that purpose from the supervisory authority of the authorizing Member State.

Case 252/83 Commission v Denmark [1986] ECR 3713 §20, 28, 29



## 5.4 LAWYERS

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It follows, as the Advocate General has stated in point 42 of his Opinion, that the Community legislature formed the view that, *apart from the exceptions expressly mentioned, all other conditions and rules in force in the host country may apply to the transfrontier provision of services by a lawyer*. The reimbursement of the fees of a lawyer established in a Member State may therefore also be made subject to the rules applicable to lawyers established in another Member State. This solution is, moreover, the only one which complies with the *principle of predictability*, and thus of *legal certainty*, for a party which enters into proceedings and thus incurs the risk of having to bear the costs of the other party in the event of being unsuccessful.

The answer to the first part of the question must therefore be that Article 49 EC, Article 50 EC and the Directive are to be interpreted as not precluding a *judicial rule* of a Member State *limiting to the level of the fees which would have resulted from representation by a lawyer established in that State the reimbursement, by an unsuccessful party in a dispute to the successful party, of costs in respect of the services provided by a lawyer established in another Member State*.

It cannot, however, be inferred from this mandatory requirement that the disadvantage resulting from the *appointment of the lawyer practising before the court seised*, that is to say, the *additional* associated *costs*, must be attributed, automatically and in every case, to the party which has had recourse to the lawyer established in another Member State, irrespective of whether that party has or has not been successful in the dispute. On the contrary, the obligation to have recourse to the services of a lawyer practising before the court seised means that the resulting costs will be necessary for the purposes of appropriate legal representation.

*The general exclusion of these costs from the amount to be reimbursed by the unsuccessful party would penalise the successful party, with the effect, as the Advocate General has stated in point 70 of his Opinion, that parties to legal proceedings would be strongly discouraged from having recourse to lawyers established in other Member States*. The freedom of such lawyers to provide their services would thereby be obstructed and the harmonisation of the sector, as initiated by the Directive, adversely affected.

*The rules in issue cannot be justified by the requirements of the proper administration of justice*. The German Government submits in this regard that it is necessary to protect the unsuccessful party to a dispute against claims for reimbursement that are exaggerated and unforeseeable. It must be stated that, in the Member State in question, *the fees of a lawyer practising before the court seised are perfectly foreseeable* inasmuch as they are expressly mentioned in Paragraph 24a of the BRAGO. Likewise, in view of the relatively limited activity of that lawyer, the associated costs are significantly lower than those corresponding to the representation by the other lawyer.

It follows that the answer to the second part of the question submitted must be that *Article 49 EC and the Directive* are to be construed as precluding a judicial rule of a Member State which provides that the *successful party* to a dispute, in which that party has been represented by a lawyer established in another Member State, *cannot recover* from the unsuccessful party, in

addition to the fees of that lawyer, *the fees of a lawyer practising before the court seised of the dispute who*, under the national legislation in question, *was required* to work in conjunction with the first lawyer.

Case C-289/02 AMOK [2003] ECR I-15059 §30, 31, 39, 40, 41

Having regard to all the foregoing, it must be held that:

- *by maintaining, contrary to Article 59 of the Treaty, the general prohibition whereby lawyers established in other Member States and practising in Italy in the exercise of their freedom to provide services cannot have in that State the infrastructure needed to provide their services,*
- by requiring members of the Bar to reside in the judicial district of the court to which the Bar at which they are enrolled is attached, contrary to Article 52 of the Treaty, and
- by incompletely transposing Directive 89/48, inasmuch as no rules have been laid down to regulate the conduct of the aptitude test for lawyers from other Member States, *the Italian Republic has failed to fulfil its obligations under Articles 52 and 59 of the Treaty and Directive 89/48.*

Case C-145/99 Commission v Italy [2002] ECR I-2235 §57

As the Court has repeatedly observed, *the application of professional rules to lawyers, in particular those relating to organization, qualifications, professional ethics, supervision and liability, ensures that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience* (see to that effect, the judgments in Case 292/86 *Gullung v Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne* [1988] ECR 111 and *Van Binsbergen*, cited above).

Case C-3/95 Reisebüro Broede [1996] ECR I-6511 §38

According to the first paragraph of that provision, services are to be considered to be "services" within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons. Indent (d) of the second paragraph of Article 60 *expressly states that activities of the professions fall within the definition of services.*

Case C-159/90 Grogan [1991] ECR I-4685 §17

*The rule of territorial exclusivity* laid down in the fourth paragraph of Article 126-3 of Decree No 72-468 is in fact part of national legislation *normally relating to a permanent activity of lawyers established in the territory of the Member State concerned*, all of whom are entitled to plead before the Tribunal de Grande Instance within whose area of jurisdiction they are established. However, a lawyer providing services who is established in another Member State is not in a position where he can plead before a French Tribunal de Grande Instance.

In those circumstances, it must be stated that *the rule of territorial exclusivity cannot be applied to activities of a temporary nature pursued by lawyers established in other Member States*, since

the conditions of law and fact which apply to those lawyers are not in that respect comparable to those applicable to lawyers established on French territory.

In that judgment, the Court considered that the obligation which *Member States may impose on a lawyer providing services to work in conjunction with a lawyer practising before the judicial authority in question* was intended to provide the former with the support necessary to enable him to act within a judicial system different from that to which he was accustomed and to assure the judicial authority concerned that he actually had that support and was thus in a position fully to comply with the procedural and ethical rules that applied.

Accordingly, the lawyer providing services and the local lawyer, both being subject to the ethical rules applicable in the host Member State, must be regarded as being capable, in compliance with those ethical rules and in the exercise of their professional independence, of agreeing upon a form of cooperation appropriate to their client's instructions.

That *does not mean that it would not be possible for the national legislatures to lay down a general framework for cooperation between the two lawyers*. However, the resultant obligations must not be disproportionate in relation to the objectives of the duty to work in conjunction, as defined above.

In the first place, as the Court stated in its judgment in *Klopp*, at paragraph 21, *modern methods of transport and telecommunications enable lawyers to maintain the necessary contacts with clients and the judicial authorities*. Furthermore, the expeditious conduct of the proceedings, in compliance with the principle that both sides must be given the opportunity to state their case, can be ensured by imposing on the lawyer providing services obligations which restrict the pursuit of his activities to a lesser extent.

That aim could therefore be achieved by requiring the lawyer providing services *to have an address for service at the chambers of the lawyer in conjunction with whom he works*, where notifications from the judicial authority in question could be duly served.

Case C-294/89 Commission v France [1991] ECR I-3591 §27, 28, 30, 31, 32, 35

*Professional activities involving contacts, even regular and organic, with the courts, including even compulsory cooperation in their functioning, do not constitute, as such, connexion with the exercise of official authority.*

*The most typical activities of the profession of avocat, in particular, such as consultation and legal assistance and also representation and the defence of parties in court, even when the intervention or assistance of the avocat is compulsory or is a legal monopoly, cannot be considered as connected with the exercise of official authority.*

The exercise of these activities leaves the discretion of judicial authority and the free exercise of judicial power intact.

Case 2-74 Revners [1974] ECR 631 §51, 52, 53

## 5.5 INFORMATION SOCIETY SERVICES, MEDIA, BROADCAST AND CINEMA

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Consequently, the answer to the first question is that Article 4(1) of the Audiovisual Media Services Directive, *the principle of equal treatment and Article 56 TFEU must be interpreted as not precluding, in principle, a national rule, such as that at issue in the main proceedings, which lays down shorter hourly television advertising limits for pay-TV broadcasters than those set for free-to-air broadcasters, provided that the principle of proportionality is observed, which is a matter for the referring court to assess.*

Case C-234/12 Sky Italia [2013] not published vet § 26

In that regard, even if the objective of encouraging such attendance of stadiums by the public were capable of justifying a restriction on the fundamental freedoms, suffice it to state that *compliance with the aforementioned rule can be ensured, in any event, by incorporating a contractual limitation in the licence agreements between the right holders and the broadcasters, under which the latter would be required not to broadcast those Premier League matches during closed periods. It is indisputable that such a measure proves to have a lesser adverse effect on the fundamental freedoms than application of the restriction at issue in the main proceedings.*

It follows that the restriction which consists in the prohibition on using foreign decoding devices cannot be justified by the objective of encouraging the public to attend football stadiums.

In light of all the foregoing, the answer to the questions referred is that, on a proper construction of Article 56 TFEU, *that article precludes legislation of a Member State which makes it unlawful to import into and sell and use in that State foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State that includes subject-matter protected by the legislation of that first State.*

Joined Cases C-403/08 and C429/08 Football Association Premier League and Others [2011] ECR I-9083 §123, 124, 125

Article 5(1)(c) of 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') must be interpreted as meaning that *a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its electronic mail address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number.* That information may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, to whom the service provider replies by electronic mail except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic, means of communication.

Case C-298/07 Verbraucherzentrale Bundesverband eV [2008] ECR I-7841 Operative part

In the light of all The foregoing, the answer to the national court's question must be that *Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.*

Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

Case C-275/06 Promusicae [2008] ECR I-271 §70

In particular, *such legislation cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law relating to a fundamental freedom* (see, to that effect, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37, and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 35).

Therefore, as the Commission points out, *the award of must-carry status must first of all be subject to a transparent procedure based on criteria known by broadcasters in advance, so as to ensure that the discretion vested in the Member States is not exercised arbitrarily. In particular, each broadcaster must be able to determine in advance the nature and scope of the precise conditions to be satisfied and, where relevant, the public service obligations it is required to observe if it is to apply for that status.* In that regard, the mere setting out, in the statement of reasons for the national legislation, of declarations of principle and general policy objectives cannot be considered sufficient.

Next, *the award of must-carry status must be based on objective criteria* which are suitable for securing pluralism by allowing, where appropriate, by way of public service obligations, access inter alia to national and local news on the territory in question. Thus, such status should not automatically be awarded to all television channels transmitted by a private broadcaster, but must be strictly limited to those channels having an overall content which is appropriate for the purpose of attaining such an objective. In addition, *the number of channels reserved to private broadcasters having that status must not manifestly exceed what is necessary* in order to attain that objective.

*Lastly, the criteria on the basis of which must-carry status is awarded must be non-discriminatory.* In particular, *the award of that status must not, either in law or in fact, be subject to a requirement of establishment on the national territory* (see, to that effect, Case C-211/91 *Commission v Belgium* [1992] ECR I-6757, paragraph 12).

Furthermore, even where the requirements laid down for the award of must-carry status apply without discrimination, in so far as those requirements are capable of being more easily satisfied by broadcasters established on the national territory by reason, in particular, of the content of the programmes to be transmitted, they must be essential for the attainment of the legitimate objective in the general interest which is being pursued.

**Case C-250/06 United Pan-Europe Communications [2007] ECR I-11135 §45,46, 47, 48, 49**

*The Court has also held, concerning Information Society services specifically, that Article 49 EC relates to the services which a provider established in a Member State offers via the internet – and so without moving – to recipients in another Member State, with the result that any restriction of those activities constitutes a restriction on the freedom to provide services (Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraph 54).*

However, measures such as those provided for in Articles 2(1) and 3 of Law No 3037/2002, in so far as they prohibit the installation in Greece of all electrical, electromechanical and electronic games, including all computer games, on all public and private premises apart from casinos, and the use of games on computers in undertakings providing internet services, and make the operation of such undertakings subject to the issue of a special authorisation, must be considered to be technical regulations within the meaning of Article 1(11) of Directive 98/34 (see, to that effect, Case C-267/03 Lindberg [2005] ECR I-3247).

**Case C-65/05 Commission v Greece [2006] ECR I-10341 §54, 61**

It follows from those considerations that *the tax on satellite dishes introduced by the tax regulation is liable to impede more the activities of operators in the field of broadcasting or television transmission established in Member States other than the Kingdom of Belgium*, while giving *an advantage to the internal Belgian market* and to radio and television distribution within that Member State.

In that regard, it suffices to state that *even if the need for protection* relied on by the municipality of Watermael-Boitsfort *is capable of justifying restriction of the freedom to provide services, and even if it is established that merely reducing the number of satellite dishes as anticipated by the introduction of a tax such as the one in question in the main proceedings is capable of meeting that need, the tax exceeds what is necessary to do so.*

As the Commission observed, *there are methods other than the tax* in question in the main proceedings, *less restrictive* of the freedom to provide services, *which could achieve an objective such as the protection of the urban environment*, for instance the adoption of requirements concerning the size of the dishes, their position and the way in which they are fixed to the building or its surroundings or the use of communal dishes. Moreover, such requirements have been adopted by the municipality of Watermael-Boitsfort, as is apparent from the planning rules on outdoor aerials adopted by that municipality and approved by regulation of 27 February 1997 of the government of the Brussels-Capital region (Moniteur belge of 31 May 1997, p. 14520).

**Case C-17/00 De Coster [2001] ECR I-9445 §35, 37, 38**

As regards the compatibility with Article 59 of the Treaty of national rules imposing the net principle, which a Member State may prescribe by exercising its right under Article 3(1) of Directive 89/552, as amended, it must be observed that, since *such rules limit the possibility for television broadcasters established in the State of transmission to broadcast advertisements for the benefit of advertisers established in other Member States, they involve a restriction on the freedom to provide services.*

Case C-6/98 ARD [1999] ECR I-7599 §49

Joined cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843 §50

It must, however, be pointed out that *the protection of consumers against abuses of advertising or, as an aim of cultural policy, the maintenance of a certain level of programme quality constitute overriding reasons relating to the general interest which may justify restrictions on freedom to provide services* (see, in particular, Case C-288/89 *Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 27).

Case C-6/98 ARD [1999] ECR I-7599 §50

The answer to be given must therefore be that, on a proper construction of Article 59 of the Treaty, *a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising.* However, it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance or one of the aims mentioned in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade.

Joined cases C-34/95, C-35/95 and C-36/95 De Agostini [1997] ECR I-3843 §54

It follows from the judgment in Case 262/81 *Coditel v Ciné-Vog Films* ([1982] ECR 3381, paragraph 11) that *the exploitation of films* in a cinema or on television implies that the author may make any public projection of the work subject to his authorization and that the commercial exploitation of films by such means, which involves the grant of performing licences, *is an activity which comes under the freedom to provide services.*

However, the Decree-Law links the grant of licences for dubbing such films to the obligation to distribute a Spanish film. *It thus accords preferential treatment to the producers of national films in comparison with producers established in other Member States*, since the former have a guarantee that their films will be distributed and that they will receive the corresponding receipts, whereas the latter are dependent solely on the choice of the Spanish distributors. That obligation *therefore has the effect of protecting undertakings producing Spanish films and by the same token places undertakings of the same type established in other Member States at a disadvantage.* Since the producers of films from other Member States are thus deprived of the advantage granted to the producers of Spanish films, that restriction is of a *discriminatory nature.*

In those circumstances, the link between the grant of licences for dubbing films from third countries and the distribution of national films pursues *an objective of a purely economic nature*

*which does not constitute a ground of public policy within the meaning of Article 56 of the Treaty.*

Case C-17/92 Distribuidores Cinematográficos [1993] ECR I-2239 §10, 15, 21

The Netherlands Government maintains that those restrictions are justified by imperatives relating to the cultural policy which it has implemented in the audio-visual sector. It explains that the aim of this policy is to safeguard the freedom of expression of the various - in particular social, cultural, religious and philosophical - components of the Netherlands in order that that freedom may be capable of being exercised in the press, on the radio or on television. It says that that objective may be jeopardized by the excessive influence of advertisers over the content of programmes.

*A cultural policy understood in that sense may indeed constitute an overriding requirement* relating to the general interest which justifies a restriction on the freedom to provide services. The maintenance of the pluralism which that Dutch policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order (Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 13).

However, it should be observed that there is no necessary connection between such a ***cultural policy*** and the conditions relating to the structure of foreign broadcasting bodies. In order to ***ensure pluralism in the audio-visual sector*** it is not indispensable for the national legislation to require broadcasting bodies established in other Member States to align themselves on the Dutch model should they intend to broadcast programmes containing advertisements intended for the Dutch public. In order to secure the pluralism which it wishes to maintain the Netherlands Government may very well confine itself to formulating the statutes of its own bodies in an appropriate manner.

Conditions affecting the structure of foreign broadcasting bodies cannot therefore be regarded as being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism.

In this respect, it must be observed in the first place that restrictions on the broadcasting of advertisements, such as a prohibition on advertising particular products or on certain days, a limitation of the duration or frequency of advertisements or restrictions designed to enable listeners or viewers not to confuse advertising with other parts of the programme, may be justified by overriding reasons relating to the general interest. Such restrictions may be imposed in order ***to protect consumers against excessive advertising or, as an objective of cultural policy, in order to maintain a certain level of programme quality.***

Unlike the *Kabelregeling*, the provisions of the *Mediawet* at issue in this case no longer reserve to the STER all the revenue from advertising intended specifically for the Dutch public. However, by laying down rules on the broadcasting of such advertisements ***they restrict the competition*** to which the STER may be exposed in that market from foreign broadcasting bodies. Accordingly the result is that they protect the revenue of the STER - albeit to a lesser degree than the *Kabelregeling* - and therefore pursue the same objective as the previous legislation. As the Court



held in the *Bond van Adverteerders* case (cited above), at paragraph 34, ***that objective cannot justify restrictions on the freedom to provide services.***

Case C-288/89 Mediawet I [1991] ECR I-4007 §22, 23, 24, 25, 27, 29

The reply to the national court must therefore be that ***Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest.*** However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition.

It should be observed in limine that it follows from the Sacchi judgment that ***television broadcasting falls within the rules of the Treaty relating to services and that since a television monopoly is a monopoly in the provision of services, it is not as such contrary to the principle of the free movement of goods.***

As has been indicated in paragraph 12 of this judgment, ***although the existence of a monopoly in the provision of services is not as such incompatible with Community law***, the possibility cannot be excluded ***that the monopoly may be organized in such a way as to infringe the rules relating to the freedom to provide services.*** Such a case arises, in particular, where the monopoly leads to discrimination between national television broadcasts and those originating in other Member States, to the detriment of the latter.

It is apparent from the observations submitted to the Court that the sole objective of the rules in question ***was to avoid disturbances due to the restricted number of channels available.*** Such an objective cannot however constitute justification for those rules for the purposes of Article 56 of the Treaty, where the undertaking in question uses only a limited number of the available channels.

Case C-260/89 ERT [1991] ECR I-2925 §12, 13, 20, 25

It must therefore be held that there is ***discrimination owing to the fact that the prohibition of advertising laid down in the Kabelregeling deprives broadcasters established in other Member States of any possibility of broadcasting on their stations advertisements intended especially for the public*** in the Netherlands whereas the Omroepwet permits the broadcasting of advertisements on national television stations for the benefit of all the Omroeporganisaties.

Case 352/85 Bond van Adverteerders [1988] ECR 2085 §26

The answer must therefore be that Articles 59 and 60 of the Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television — as they prohibit the broadcasting of advertisements by television — ***if those rules are applied without distinction*** as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established.

The answer must therefore be that ***national rules prohibiting the transmission by cable television of advertisements cannot be regarded as constituting either a disproportionate measure in relation to the objective to be achieved, in that the prohibition in question is relatively ineffective in view of the existence of natural reception zones, or discrimination which is***

*prohibited by the Treaty in regard to foreign broadcasters, in that their geographical location allows them to broadcast their signals only in the natural reception zone.*

Case 52/79 Debaue [1980] ECR 833 §16, 22

These facts are important in two regards. On the one hand, they highlight the fact that the right of a copyright owner and his assigns to require fees for any *showing of a film is part of the essential function of copyright in this type of literary and artistic work*. On the other hand, they demonstrate that the exploitation of copyright in films and the fees attaching thereto *cannot be regulated without regard being had to the possibility of television broadcasts of those films*. The question whether an assignment of copyright limited to the territory of a Member State is capable of constituting a restriction on freedom to provide services must be examined in this context.

The *exclusive assignee of the performing right* in a film for the whole of a Member State may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another Member State, *without thereby infringing Community law*.

Consequently the answer to the second question referred to the Court by the Cour d'Appel, Brussels, should be that *the provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion* if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.

Case 62/79 Coditel [1980] ECR 881 §14, 17, 18

In the absence of express provision to the contrary in the Treaty, *a television signal must*, by reason of its nature, *be regarded as provision of services*. Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to free movement of goods, such is however the case, as appears from Article 60, only insofar as they are governed by such provisions.

On the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for *goods*. As a result, although the existence of a monopoly with regard to television advertising is not in itself contrary to the principle of free movement of goods, such a monopoly would contravene this principle if it discriminated in favour of national material and products.

Article 37 concerns the adjustment of State monopolies of a commercial character. It follows both from the place of this provision in the Chapter on the elimination of quantitative restrictions and from the use of the words 'imports' and 'exports' in the second indent of Article 37 (1) and of the word 'products' in Article 37 (3) and (4) that it refers to trade in goods and cannot relate to a monopoly in the provision of services. Thus *televised commercial advertising, by reason of its character as a service, does not come under these provisions*.

However, for the performance of their tasks *these establishments remain subject to the prohibitions against discrimination* and, to the extent that this performance comprises activities of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights.

Such would certainly be the case with an undertaking possessing a monopoly of television advertising, if it imposed unfair charges or conditions on users of its services or if it discriminated between commercial operators or national products on the one hand, and those of other Member States on the other, as regards access to television advertising.

Case 155-73 Sacchi [1974] ECR 409 §6, 7, 10, 14, 17

## 5.6 POSTING OF WORKERS AND LABOUR MARKET

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It follows from all the foregoing considerations that the answer to question 6 is that Article 3(1) and (7) of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU, must be interpreted as meaning that:

- it does not preclude a *calculation of the minimum wage for hourly work* and/or for piecework which is based on the categorisation of employees into pay groups, as provided for by the relevant collective agreements of the host Member State, provided that that calculation and categorisation are carried out in accordance with rules that are binding and transparent, a matter which it is for the national court to verify;
- a *daily allowance* such as that at issue in the main proceedings must be regarded as part of the minimum wage on the same conditions as those governing the inclusion of the allowance in the minimum wage paid to local workers when they are posted within the Member State concerned;
- *compensation for daily travelling time*, which is paid to the workers on condition that their daily journey to and from their place of work is of more than one hour's duration, must be regarded as part of the minimum wage of the posted workers, provided that that condition is fulfilled, a matter which it is for the national court to verify;
- coverage of the *cost of those workers' accommodation* is not to be regarded as an element of their minimum wage;
- an allowance taking the form of *meal vouchers* provided to the posted workers is not to be regarded as part of the latter's minimum salary; and
- the pay which the posted workers must receive for *the minimum paid annual holidays* corresponds to the minimum wage to which those workers are entitled during the reference period.

C-396/13 Sähköalojen ammattiliitto [2015] not published vet §70

Having regard to all of the foregoing, the answer to the question referred is that Articles 56 TFEU and 57 TFEU must be interpreted as *not precluding legislation of a Member State, such as that at issue in the main proceedings, under which the recipient of services performed by workers posted by a service provider established in another Member State is required to declare to the competent authorities, before those workers begin to work, the data identifying those workers who are unable to submit proof of the declaration which their employer should have made to the competent authorities of that host Member State prior to the commencement of that provision of services, since such legislation is capable of being justified as safeguarding an overriding ground of public interest, such as the protection of workers or the combating of social security fraud, on condition that it is established that that legislation is appropriate for ensuring the attainment of the*

legitimate objective or objectives pursued and that it does not go beyond what is necessary to achieve them, these being matters for the referring court to determine.

C-315/13 De Clercq et al. [2014] not published yet §75

It is clear that, in the present case, *the obligation to withhold an advance payment on the income tax of workers* supplied by temporary employment agencies not established in the Czech Republic and to pay that advance payment to the Czech State is inevitably imposed on the recipients of the services provided by those agencies and entails an additional administrative burden which is not required for the recipients of the same services provided by a resident service provider. Consequently, *such an obligation is liable to render cross-border services less attractive for those recipients than services provided by resident service providers, and consequently to deter those recipients from having recourse to service providers resident in other Member States* (see, to that effect, *FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 33; *Commission v Belgium*, C-433/04, EU:C:2006:702, paragraphs 30 to 32; and X, EU:C:2012:635, paragraph 28).

Joined cases C-53/13 and C-80/13 Strojírny Prostějov [2014] not published yet §37

In the light of all of the foregoing, the answer to the question referred is that, in a situation such as that at issue in the main proceedings, in which *a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation*.

C-549/13 Bundesdruckerei [2014] not published yet §36

In view of all of the foregoing considerations, the answer to the first question is that Articles 56 TFEU and 57 TFEU *do not preclude a Member State from making, during the transitional period* provided for in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, the hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, *on its territory, of workers who are Polish nationals subject to the obtaining of a work permit*.

Consequently, the answer to the second question is that the hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, is *a service provided for remuneration in respect of which the worker who has been hired out remains in the employ of the undertaking providing the service, no contract of employment being entered into with the user undertaking*. It is characterised by the fact that *the movement of the worker to the host Member State constitutes the very purpose of the provision of services effected by the undertaking providing the services* and that *that worker carries out his tasks under the control and direction of the user undertaking*.

Joined cases C-307/09, C-308/09 and C-309/09 Vicoplus [2011] ECR I-453 §41, 51

The answer to the question referred is therefore that:

- *Articles 56 TFEU and 57 TFEU preclude national legislation requiring an employer, established in another Member State and posting workers to the territory of the first Member State, to send a prior declaration of posting, in so far as the employer must be notified of a registration number for the declaration before the*

*planned posting may take place* and the national authorities of that first State have a period of five working days from receipt of the declaration to issue that notification.

- Articles 56 TFEU and 57 TFEU *do not preclude* national legislation requiring an employer, established in another Member State and posting workers to the territory of the first Member State, *to keep available to the national authorities of the latter*, during the posting, *copies of documents equivalent to the social or labour documents required under the law of the first Member State and also to send those copies to the authorities at the end of that period.*

Case C-515/08 Santos Palhota and Others [2010] ECR I-9133 §61

More particularly, *it has already been held that a Member State may check that an undertaking established in another Member State, which deploys on the territory of the first-mentioned Member State workers who are nationals of a non-member State, is not availing itself of the freedom to provide services for a purpose other than the accomplishment of the service concerned* (*Commission v Germany*, paragraph 40, and case-law cited).

In that context, the Court held that *a requirement that the service provider furnishes a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social security cover in the Member State where that provider employs them, is a measure which, in principle, does not exceed what is necessary to prevent the abuse to which the implementation of the freedom to provide services may give rise* (see, to that effect, Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, paragraph 46, and *Commission v Germany*, paragraphs 41 and 42).

Case C-219/08 Commission v Belgium [2009] ECR I-9213 §15, 16

First of all, in order to address the main argument put forward by the Grand Duchy of Luxembourg in its defence, it must be pointed out that, according to Article 3(1)(a) thereof, Directive 2006/123 is not intended to replace Directive 96/71 and the latter prevails over the former in the event of conflict. Therefore, the Grand Duchy of Luxembourg cannot base its arguments on the legislative procedure which led to the adoption of Directive 2006/123 in order to support its interpretation of a provision of Directive 96/71.

It is clear from recital 13 in the preamble to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there (Case C-341/05 *Laval un Partneri* [2007] ECR I-0000, paragraph 59). Thus, *the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, undertakings established in another Member State which post workers to their territory in the framework of a transnational provision of services, guarantee the posted workers the terms and conditions of employment, covering the matters set out in that article, which are laid down in the Member State in which the work is carried out* (Case C-490/04 *Commission v Germany* [2007] ECR I-6095, paragraph 18).

***For that purpose, Article 3(1) sets out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State.***

Nevertheless, under the first indent of Article 3(10) of Directive 96/71 it is open to Member States, in compliance with the EC Treaty, to apply, in a non-discriminatory manner, to undertakings which post workers to their territory terms and conditions of employment on matters other than those referred to the first subparagraph of Article 3(1), in the case of public policy provisions.

As is clear from Article 1(1) of the Law of 20 December 2002, which states that the provisions concerning matters referred to in points 1 to 14 thereof are mandatory provisions falling under national public policy, the Grand Duchy of Luxembourg intended to rely on the first indent of Article 3(10) of Directive 96/71.

In that connection, it must be recalled that ***the classification of national provisions by a Member State as public-order legislation applies 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*** (Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 30).

Therefore, contrary to the Grand Duchy of Luxembourg's submissions, the public policy exception is a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, the scope of which cannot be determined unilaterally by the Member States (see, regarding freedom of movement for persons, Case C-503/03 *Commission v Spain* [2006] ECR I-1097, paragraph 45).

In the context of Directive 96/71, the first indent of Article 3(10), constitutes a derogation from the principle that the matters with respect to which the host Member State may apply its legislation to undertakings which post workers to its territory are set out in an exhaustive list in the first subparagraph of Article 3(1) thereof. ***The first indent of Article 3(10) must therefore be interpreted strictly.***

Moreover, Declaration No 10 which, as the Advocate General rightly pointed out in point 45 of her Opinion, may be relied on in support of an interpretation of the first indent of Article 3(10) of Directive 96/71, states that the expression 'public policy provisions' is to be construed as covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest.

In any event, Article 3(10) of Directive 96/71 provides that availing themselves of the option for which it provides does not exempt the Member States from complying with their obligations under the EC Treaty and, in particular, those relating to the freedom to provide services, the promotion of which is referred to in recital 5 of the preamble to the directive.

Accordingly, the contested provision has the effect of making undertakings which post workers to Luxembourg subject to an obligation to which they are already subject in the Member State in which they are established. Moreover, the aim of Directive 96/71, which is to guarantee compliance with a nucleus of rules for the protection of workers, renders the existence of such an additional obligation all the more redundant since, having regard to the procedures involved, it is

likely to dissuade undertakings established in another Member State from exercising their freedom to provide services.

Case C-319/06 Commission v Luxembourg [2008] ECR I-4323 §23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 41

As a preliminary point, it must be noted that the activity of employee recruitment constitutes, in accordance with case-law, the provision of services for the purposes of Articles 49 EC and 50 EC (see Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, paragraph 7, and Case 279/80 *Webb* [1981] ECR 3305, paragraphs 8 and 9).

***By making payment of the recruitment voucher subject to the condition that the person seeking employment be employed in a post which is subject to compulsory social security contributions in the national territory, legislation such as the legislation at issue in the main proceedings gives rise to a restriction on the freedom to provide services based on the place where that service is provided.***

Such legislation is capable of affecting the recipient of the services, that is to say, in the main proceedings, the person seeking employment, who must himself, where the job found by the private-sector recruitment agency is in another Member State, pay the fee due to the agency.

Case C-208/05 ITC [2007] ECR I-181 §54, 57, 58

Secondly, as regards ***making the issue of the EU Posting Confirmation subject to the requirement that there must be an employment contract of at least one year or of indefinite duration, such a measure goes beyond what is required for the objective of social protection as a necessary condition for providing services through the posting of workers who are nationals of non-Member States*** (*Commission v Luxembourg*, paragraphs 32 and 33, and *Commission v Germany*, paragraph 58).

In addition, the Austrian Government cannot rely on the formula used by the Court in paragraph 26 of the judgment in *Vander Elst* to argue that such a requirement enables verification to be made that a posted worker who is a national of a non-Member State has lawful and habitual employment in his employer's Member State of establishment. It must be observed that ***the Court did not couple the concept of 'lawful and habitual employment' with a requirement of residence or employment for a certain period in the State of establishment of the service provider*** (*Commission v Germany*, paragraph 55).

A measure which would be ***just as effective*** whilst being less restrictive than the measure at issue [*the EU posting confirmation for third-country nationals*] is ***the obligation*** imposed, under the AVRAG, on a service provider to ***report, before the posting, to the local authorities the presence of one or more workers to be posted, the anticipated duration of their presence and the provision or provisions of services justifying the posting.*** It enables those authorities to monitor compliance with Austrian social welfare and wages legislation during the posting while at the same time taking account of the obligations by which the undertaking is already bound under the social welfare legislation applicable in the Member State of origin.

It should be borne in mind in this regard that ***workers employed by an undertaking established in a Member State and who are posted to another Member State for the purpose of providing***

*services there do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work* (see *Commission v Luxembourg*, paragraph 38).

As a preliminary point, it is important to note that the area of entry into a Member State and residence there of nationals of non-Member States in connection with a posting by a service provider established in another Member State is not harmonised at Community level.

However, *the control exercised by a Member State so far as that legislation is concerned cannot affect the freedom to provide services of the undertaking which employs those nationals* (*Seco and Desquenne & Giral*, paragraph 12).

Case C-168/04 *Commission v Austria* [2006] ECR I-9041 §50, 51, 52, 55, 59, 60

However, as the Advocate General observed in point 27 of his Opinion, a requirement that the service provider furnishes a simple prior declaration certifying that the situation of the workers concerned is lawful, particularly in the light of the requirements of residence, work visas and social security cover in the Member State where that provider employs them, would give the national authorities, in a less restrictive but as effective a manner as checks in advance of posting, a guarantee that those workers' situation is lawful and that they are carrying on their main activity in the Member State where the service provider is established (see, to that effect, *Commission v Luxembourg*, paragraph 46). Such a requirement would enable the national authorities to check that information subsequently and to take the necessary measures if those workers' situation was not regular. Such a requirement could in addition take the form of a succinct communication of the documents required, particularly when the length of the posting does not allow such a check to be effectively carried out.

However, an obligation imposed on a service provider established in another Member State, at the same time as the requirement referred to in paragraph 41 above, to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the service or services justifying the deployment would be a more proportionate means than the check in advance of positing because it is less restrictive but just as effective. It would enable those authorities to monitor compliance with German social welfare legislation during the deployment while at the same time taking account of the obligations by which that undertaking is already bound under the social welfare legislation applicable in the Member State of origin (*Commission v Luxembourg*, paragraph 31).

Consequently, it must be held that, *by not confining itself to making the posting of workers who are nationals of non-member States for the purpose of the provision of services in Germany subject to a simple prior declaration by the undertaking* established in another Member State which intends to post such workers, and *by requiring that they have been employed for at least a year by that undertaking*, the Federal Republic of Germany *has failed to fulfil its obligations under Article 49 EC*.

Case C-244/04 *Commission v Germany* [2006] ECR I-885 §41, 45, 64



Having regard to all the preceding considerations, it must be held that, *by reserving*, in Article 4 of Law No 85-704, *the task of delegated project contracting to an exhaustive list of legal persons under French law, the French Republic has failed to fulfil its obligations* under Directive 92/50 and Article 49 EC.

Case C-264/03 Commission v France [2005] ECR I-8831 §71

Accordingly, the Court finds that, by imposing on service providers established in another Member State who wish to deploy in its territory workers who are nationals of non-member countries a *requirement of individual work permits*, the issuance of which is subject to considerations relating to the employment market, or a *requirement of a collective work permit*, which is granted only in exceptional cases and only when the workers concerned have, for at least six months prior to the deployment, been in a relationship with their undertaking of origin through a contract of employment of indefinite duration, and *by requiring* those service providers *to provide a bank guarantee*, the Grand Duchy of Luxembourg *has failed to fulfil its obligations under Article 49 EC*.

Case C-445/03 Commission v Luxembourg [2004] ECR I-10191 §50

The fact remains, however, that *the requirement to have the registered office or a branch office on Italian territory*, under Article 2(2)(a) of Law No 196/97, *goes beyond what is necessary to achieve the objective of protection of workers* relied upon by the Italian Government.

The said requirement *applies equally to every undertaking providing temporary labour established in a Member State other than the Italian Republic, without any distinction according to the place of residence of the workers whom such an undertaking employs*.

However, it cannot be excluded that *the workers made available to a user of temporary manpower established in Italy, by an undertaking providing temporary labour which is established in another Member State, may reside in that latter State*, so that *the need to protect the workers*, relied on in this case by the Italian Government to justify the requirement in issue, *does not exist so far as they are concerned*.

*The same* applies in cases in which *the worker usually works in Italy under an individual employment contract*.

It follows from all the preceding considerations that, *by requiring undertakings engaged in the provision of temporary labour which are established in other Member States to maintain their registered office or a branch office on Italian territory, and to lodge a guarantee of ITL 700 million with a credit institution having its registered office or a branch office on Italian territory*, the Italian Republic has failed to fulfil its obligations under Articles 49 EC and 56 EC.

Case C-279/00 Commission v Italy [2002] ECR I-1425 §20, 21, 22, 23, 41

It follows from the foregoing considerations that the answer to be given to the first question must be that, *in assessing whether the application by the host Member State to service providers established in another Member State of domestic legislation laying down a minimum wage is compatible with Articles 59 and 60 of the Treaty*, it is for the *national authorities* or, as the case

may be, *the national courts to determine whether, considered objectively, that legislation provides for the protection of posted workers.* In that regard, although the declared intention of the legislature cannot be conclusive, it *may nevertheless constitute an indication as to the objective pursued by the legislation.*

The reply to be given to the second question must therefore be that *the fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement* declared to be generally applicable, *whilst an employer established in another Member State cannot do so*, constitutes an unjustified restriction on the freedom to provide services.

Case C-164/99 Portuguesa Construções [2002] ECR I-787 §30, 35

Consequently, the reply to the first question is that *Articles 59 and 60 of the Treaty do not preclude a Member State from imposing national rules*, such as those laid down by the first sentence of Paragraph 1(3) of the AEntG *guaranteeing entitlement to paid leave for posted workers, on a business established in another Member State which provides services in the first Member State by posting workers for that purpose, on the two-fold condition that: (i) the workers do not enjoy an essentially similar level of protection under the law of the Member State where their employer is established*, so that the application of the national rules of the first Member State confers a genuine benefit on the workers concerned, which significantly adds to their social protection, and (ii) *the application of those rules by the first Member State is proportionate to the public interest objective pursued.*

Consequently, the reply to Question 2(a) is that *Articles 59 and 60 of the Treaty do not preclude the extension of the rules of a Member State which provide for a longer period of paid leave than that provided for by Directive 93/104 to workers posted to that Member State by providers of services established in other Member States* during the period of the posting.

Consequently, the reply to Question 2(b) is that Articles 59 and 60 of the Treaty do not preclude national rules from allowing businesses established in the Federal Republic of Germany to claim reimbursement of expenditure on holiday pay and holiday allowances from the fund, whereas it does not provide for such a claim in the case of businesses established in other Member States, but instead provides for a direct claim by the posted workers against the fund, *in so far as that is justified by objective differences between businesses established in the Federal Republic of Germany and those established in other Member States.*

Consequently, the reply to the third question is that *Articles 59 and 60 of the Treaty preclude the application of a Member State's scheme for paid leave to all businesses established in other Member States providing services to the construction industry in the first Member State where businesses established in the first Member State, only part of whose activities are carried out in that industry, are not all subject to that scheme in respect of their workers engaged in that industry.*

It should be stated that, since the concept of the provision of services as defined by Article 60 of the Treaty covers very different activities, the same conclusions are not necessarily appropriate in all cases. In particular, it must be acknowledged, as the French Government has argued, ***that an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State.*** In such a case, Article 216 of the Act of Accession would preclude the making available of workers from Portugal by an undertaking providing services.

Case C-113/89 Rush Portuguesa [1990] ECR I-1417 §16

Where an undertaking ***hires out, for remuneration, staff*** who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions laid down in the first paragraph of Article 60. Accordingly they must be considered a "service" within the meaning of that provision.

The French Government has sought to emphasize in this connection the special nature of the activity in question, which although covered by the expression "services" in Article 60 of the Treaty ought to receive special consideration inasmuch as it may be covered as well both by provisions concerning social policy and by those concerning the free movement of persons. Whilst employees of agencies for the supply of manpower may in certain circumstances be covered by the provisions ***of Articles 48 to 51*** of the Treaty and the Community regulations adopted in implementation thereof, ***that does not prevent undertakings of that nature which employ such workers from being undertakings engaged in the provision of services, which therefore come within the scope of the provisions of Article 59 et seq. of the Treaty.*** As the Court has already declared, in particular in its judgment of 3 December 1974 (Case 33/74 *Van Binsbergen* [1974] ECR 1299), the special nature of certain services does not remove them from the ambit of the rules on the freedom to supply services.

Case 279/80 Webb [1981] ECR 3305 §9, 10

***Taking into account the particular nature of*** certain services to be provided, such as the placing of entertainers in employment, specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good or by the need to ensure the protection of the entertainer, which are binding upon any person established in the said State, ***in so far as the person providing the service is not subject to similar requirements in the Member State in which he is established.***

Such a requirement is not objectively justified when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the service is established in another Member State and in that State ***holds a licence issued under conditions comparable*** to those required by the State in which the service is provided and his activities are subject in the first State to ***proper supervision*** covering all employment agency activity whatever may be the Member State in which the service is provided.

For all these reasons, the answer should be that when the pursuit of the activity of fee-charging employment agencies for entertainers is made subject in the State in which the service is provided

to the issue of a licence, *that State may not impose on the persons providing the service who are established in another Member State* any obligation either to satisfy that requirement or to act through a fee-charging employment agency which holds such a licence when the service is provided by an employment agency which comes under the public administration of a Member State or when the person providing the services holds in the Member State in which he is established *a licence issued under conditions comparable* to those required by the State in which the service is provided and his activities are subject in the first State to proper supervision covering all employment agency activity whatever may be the Member State in which the service is provided.

Joined cases 110 and 111/78 Van Wesemael [1979] ECR 35 §28, 30, 39

## 5.7 GAMES OF CHANCE

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### 5.7.1 Scope

Having regard to all the foregoing, the answer to the first question is that, on a proper interpretation of *Article 49 EC*, *an operator wishing to offer via the internet bets on sporting competitions in a Member State other than the one in which it is established does not cease to fall within the scope* of the said provision solely because that operator *does not have an authorisation permitting it to offer such bets to persons within the territory of the Member State in which it is established, but holds only an authorisation to offer those services to persons located outside that territory.*

Case C-46/08 Carmen Media Group Ltd [2010] ECR I-8149 §52

As the Portuguese Government in particular points out, the Court has already held that *lotteries constitute an economic activity, within the meaning of the Treaty, inasmuch as they consist in the importation of goods or the provision of services for remuneration* (Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 19). With particular regard to the activities in issue in the main proceedings, the Court has held that *games consisting in the use, in return for a money payment, of slot machines must be regarded as gambling which is comparable to the lotteries forming the subject of the Schindler judgment* (Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 18).

The answer to the second, third and fifth questions must therefore be that *the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service* within the meaning of the Treaty and, accordingly, it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.

Given that games of chance or gambling constitute services, within the meaning of the Treaty, as held at paragraph 56 above, *any monopoly in the operation of games of chance or gambling falls outside the scope of Article 31 EC.*

Case C-6/01 Anomar and Others [2003] ECR I-8621 §46, 56, 60

In this case, on the other hand, *bets on sporting events*, even if they cannot be regarded as games of pure chance, *offer, like games of chance, an expectation of cash winnings in return for a stake. In view of the size of the sums which they can raise and the winnings which they can offer players, they involve the same risks of crime and fraud and may have the same damaging individual and social consequences.*

*In those circumstances, the betting at issue in the main proceedings must be regarded as gambling of a kind comparable to the lotteries at issue in Schindler.*

Case C-67/98 Zenatti [1999] ECR I-7289 §18, 19

Although the judgment in *Schindler* relates to the organisation of lotteries, *those considerations are equally applicable* - as is apparent, moreover, from the very wording of paragraph 60 of that judgment - *to other comparable forms of gambling.*

Case C-124/97 Läärä and Others [1999] ECR I-6067 §15

Lottery activities are *thus not activities relating to "goods"*, falling, as such, under Article 30 of the Treaty.

*They are however to be regarded as "services" within the meaning of the Treaty.*

Case C-275/92 Schindler [1994] ECR I-1039 §24, 25

### 5.7.2 Restrictions

In that regard, it follows, inter alia, from the case-law cited in paragraph 41 that *national legislation which authorises the operation and playing of certain games of chance in casinos only constitutes an obstacle to the freedom to provide services.*

In those circumstances, the answer to question 8 is that national legislation, such as that at issue in the main proceedings, which, without providing for either a transitional period or compensation for operators of amusement arcades, prohibits the use of slot machines outside casinos constitutes a restriction on the freedom to provide services guaranteed by Article 56 TFEU.

It should be noted at the outset that *legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of harmonisation at EU level, the Member States are, in principle, free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought* (see, to that effect, judgments in *Dickinger and Ömer*, C-347/09, EU:C:2011:582, paragraph 47, and in *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 24).

Case C-98/14 Berlington Hungary and Others [2015] not published yet § 51, 52, 56

Legislation of a Member State, such as that at issue in the main proceedings, *which prohibits the operation of gaming machines in the absence of the prior authorisation of the administrative authorities constitutes a restriction of the freedom to provide services guaranteed by Article 56*

*TFEU* (see, to that effect, inter alia, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* EU:C:2007:133, paragraph 42).

Case C-390/12 Pflieger and Others [2014] not published vet §39

Having regard to all the foregoing considerations, the answer to the questions referred is that *Article 56 TFEU* must be interpreted as meaning that it **does not preclude legislation common to the majority of the federal entities of a Member State having a federal structure which prohibits, in principle, the organisation and facilitation of games of chance via the internet, where, for a limited period, a single federal entity has maintained in force more liberal legislation coexisting with the restrictive legislation of the other federal entities**, provided that such legislation is able to satisfy the conditions of proportionality laid down by the case-law of the Court, which is for the national court to ascertain.

Case C-156/13 Digibet Ltd and Gert Albers [2014] not published vet §41

In light of the foregoing, the answer to the question referred is that *Article 56 TFEU* must be interpreted as **not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State**.

Case C-176/11 HIT and HIT LARIX [2012] not published vet §36

It must be stated at the outset that **any restriction concerning the supply of games of chance over the internet is more of an obstacle to operators established outside the Member State concerned, in which the recipients benefit from the services**; those operators, as compared with operators established in that Member State, would thus be denied a means of marketing that is particularly effective for directly accessing that market (see, to that effect, Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 74, and Case C-108/09 *Ker-Optika* [2010] ECR I-0000, paragraph 54).

Case C-212/08 Zeturf [2011] ECR I-5633 §74

With regard, first, to the fact that **the number of concessions to operate gaming establishments is limited, it is clear that such a limitation involves obstacles to the freedom of establishment and the freedom to provide services** (*Placanica and Others*, paragraphs 50 and 51).

With regard, secondly, to **the duration of the concessions, it is clear from the Court's case-law that the grant of concessions for a duration of up to 15 years is liable to impede or even prohibit the exercise of the freedoms guaranteed by Articles 43 EC and 49 EC** by operators in other Member States and therefore constitutes a restriction on the exercise of those freedoms (see, to that effect, Case C-323/03 *Commission v Spain* [2006] ECR I-2161, paragraph 44).

Case C-64/08 Engelmann [2010] ECR I-8219 §44, 46

It should be noted that, in the same way, **the characteristics specific to the offer of games of chance by the internet** may prove to be a source of risks of a different kind and a greater **order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games**. Apart from the lack of direct contact between the consumer and the

operator, previously referred to, the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as underlined by consistent case-law.

Moreover, it should be noted that, having regard to the discretion which Member States *enjoy in determining the level of protection of consumers and the social order in the gaming sector, it is not necessary, with regard to the criterion of proportionality, that a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States* concerning the means of protecting the legitimate interest at issue (see, by analogy, Case C-518/06 *Commission v Italy* [2009] ECR I-3491, paragraphs 83 and 84).

Having regard to the whole of the above, it must be acknowledged *that a prohibition measure covering any offer of games of chance via the internet may, in principle, be regarded as suitable for pursuing the legitimate objectives of preventing incitement to squander money on gambling, combating addiction to the latter and protecting young persons*, even though the offer of such games remains authorised through more traditional channels.

Case C-46/08 Carmen Media Group Ltd [2010] ECR I-8149 §103, 104, 105

In that context, it must be observed that the legislation on gambling is one of the areas in which *there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question* (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 57).

*The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure* (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58).

*The Member States are therefore free to set the objectives of their policy on gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality* (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

Joined cases C-447/08 and C-448/08 Sjöberg and Gerdin [2010] ECR I-6921 §37, 38, 39

*It is common ground that the legislation of a Member State under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering*

*via the internet services within the scope of that regime in the territory of the first Member State, constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (Liga Portuguesa de Futebol Profissional and Bwin International, paragraph 52, and Case C-203/08 Sporting Exchange [2010] ECR I-0000, paragraph 24).*

Case C-258/08 Ladbrokes Betting [2010] ECR I-4757 §16

The Court has already ruled that, in so far as the national legislation at issue in the main proceedings *prohibits – on pain of criminal penalties – the pursuit of activities in the betting and gaming sector* without a licence or police authorisation issued by the State, it constitutes a *restriction on the freedom of establishment and the freedom to provide services* (see *Gambelli and Others*, paragraph 59 and the operative part).

In that context, *moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion* for the national authorities, *sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order* (*Gambelli and Others*, paragraph 63).

*National legislation which prohibits the pursuit of the activities of collecting, taking, booking and forwarding offers of bets*, in particular bets on sporting events, without a licence or a police authorisation issued by the Member State concerned, *constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively*.

Joined cases C-338/04, C-359/04 and C-360/04 Placanica [2007] ECR I-1891 §42, 47, 72

As a preliminary point, it should be noted that although, in the absence of harmonised rules at Community level in the games sector, Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they *must, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty* (see, to that effect, Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31, and Case C-514/03 *Commission v Spain* [2006] ECR I-963, paragraph 23).

As regards the freedom to provide services, it is settled case-law that, first, *the activity of operating gaming machines must*, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, *be considered a service* within the meaning of the Treaty provisions and, secondly, *national legislation which only authorises the operation and playing of games in casinos constitutes a barrier to the freedom to provide services* (see, to that effect, Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraphs 56 and 75).

However, *measures such as (...)*, in so far as they *prohibit the installation in Greece of all electrical, electromechanical and electronic games, including all computer games, on all public and private premises apart from casinos, and the use of games on computers in undertakings providing internet services*, and make the operation of such undertakings subject to *the issue of a*



*special authorisation, must be considered to be technical regulations within the meaning of Article 1(11) of Directive 98/34* (see, to that effect, Case C-267/03 *Lindberg* [2005] ECR I-3247).

Case C-65/05 Commission v Greece [2006] ECR I-10341 §47, 53, 61

Transposing that interpretation to the issue in the main proceedings, it follows that *Article 49 EC relates to the services which a provider such as Stanley established in a Member State*, in this case the United Kingdom, *offers via the internet* — and so without moving — *to recipients in another Member State*, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.

Such a *prohibition*, enforced by criminal penalties, *on participating in betting games organised in Member States other than in the country where the bettor is established* constitutes a *restriction on the freedom to provide services*.

*The same* applies to a prohibition, also enforced by criminal penalties, *for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity*, since the prohibition constitutes a *restriction on the right of the bookmaker freely to provide services*, even if the intermediaries are established in the same Member State as the recipients of the services.

In the light of all those considerations the reply to the question referred must be that national legislation which *prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets*, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a *restriction on the freedom of establishment and the freedom to provide services* provided for in Articles 43 and 49 EC respectively. *It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims*.

Case C-243/01 Gambelli [2003] ECR I-13031 §54, 57, 58, 76

The answer to the national court's eighth question must therefore be that *the possible existence, in other Member States, of legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation has no bearing on the compatibility of the latter with Community law*.

The answer to the 11th, 12th and 13th questions should therefore be that, *in the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling*, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, *falls within the margin of discretion which the national authorities enjoy*.

Case C-6/01 Anomar and Others [2003] ECR I-8621 §81, 88

It is not disputed by the parties to the main proceedings, the various Governments which have submitted observations or the Commission *that the Italian legislation, inasmuch as it prohibits the taking of bets by any person or body other than those which may be licensed to do so, applies without distinction to all operators who might be interested in such an activity, whether established in Italy or in another Member State.*

*However, such legislation, preventing as it does operators in other Member States from taking bets, directly or indirectly, in Italian territory, constitutes an obstacle to the freedom to provide services.*

It is therefore necessary to consider whether that restriction on the freedom to provide services is permissible under the exceptions expressly provided for by the Treaty or is justified, in accordance with the case-law of the Court, by overriding reasons relating to *the public interest.*

Case C-67/98 Zenatti [1999] ECR I-7289 §26, 27, 28

Given *the peculiar nature of lotteries*, which has been stressed by many Member States, those considerations are *such as to justify restrictions, as regards Article 59 of the Treaty, which may go so far as to prohibit lotteries in a Member State.*

First of all, it is not possible to disregard the *moral, religious or cultural aspects* of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve *a high risk of crime or fraud*, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have *damaging individual and social consequences*. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may *make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.*

Case C-275/92 Schindler [1994] ECR I-1039 §59, 60

### 5.7.3 Justifications

However, the fact that a restriction on gambling activities incidentally benefits the budget of the Member State concerned does not prevent that restriction from being justified *in so far as it actually pursues objectives relating to overriding reasons in the public interest* (see, to that effect, judgments in *Zenatti*, C-67/98, EU:C:1999:514, paragraph 36, and *Gambelli and Others*, C-243/01, EU:C:2003:597, paragraph 62), which is for the national court to determine.

Case C-98/14 Berlington Hungary and Others [2015] not published yet § 61

It follows that, *in this particular context, the reorganisation of the licensing system through the alignment of licence expiry dates may, by providing for a shorter period of validity for the new licences than that for the licences awarded previously, contribute to a coherent pursuit of the*

*legitimate objectives of reducing gambling opportunities or combating criminality linked to betting and gambling and may also satisfy the proportionality requirements.*

C-463/13 Stanley International Betting and Stanleybet [2015] not published yet §53

In the light of all those considerations, the answer to the first and second questions is that **Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which grants the exclusive right to run, manage, organise and operate games of chance to a single entity, where, firstly, that legislation does not genuinely meet the concern to reduce opportunities for gambling and to limit activities in that domain in a consistent and systematic manner and, secondly, where strict control by the public authorities of the expansion of the sector of games of chance, solely in so far as is necessary to combat criminality linked to those games, is not ensured.** It is for the national court to ascertain whether this is the case.

Joined cases C-186/11 and C-209/11 Stanleybet International and Others [2013] not published yet §36

It should be noted in this context that the public authorities which grant betting and gaming licences have a duty to comply with the **fundamental rules of the Treaties** and, in particular, with Articles 43 EC and 49 EC, **the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency** (see, to that effect, Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 39, and Case C-64/08 *Engelmann* [2010] ECR I-8219, paragraph 49 and the case-law cited).

Without necessarily implying an obligation to call for tenders, that **obligation of transparency**, which applies if the licence in question may be of interest to an undertaking located in a Member State other than that in which the licence is granted, requires the licensing authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the licence to be opened up to competition and the impartiality of the award procedures to be reviewed (Commission v Italy, paragraph 24 and the case-law cited; *Sporting Exchange*, paragraphs 40 and 41; and *Engelmann*, paragraph 50).

**The award of such licences must therefore be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion** (see, to that effect, *Engelmann*, paragraph 55 and the case-law cited).

The principle of equal treatment requires moreover that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions. This is especially the case in a situation such as that in the cases before the referring court, in which a breach of EU law on the part of the licensing authority concerned has already resulted in unequal treatment for some operators.

Joined cases C-72/10 and C-77/10 Costa and Cifone [2012] not published yet §54, 55, 56, 57

The answer to Questions 1 and 3 is therefore that Article 49 EC must be interpreted as meaning that:

- a) a Member State seeking to ensure a particularly high level of consumer protection in the sector of games of chance *may be entitled to consider that it is only by setting up a monopoly for a single entity subject to strict control by the public authorities that it can tackle crime linked to that sector and pursue the objective of preventing incitement to squander money on gambling and combating addiction to gambling with sufficient effectiveness*;
- b) to be consistent with the objective of fighting crime and reducing opportunities for gambling, national legislation establishing a monopoly of games of chance which allows the holder of the monopoly to follow an expansionist policy must:
- *be based on a finding that the crime and fraud linked to gaming and addiction to gambling are a problem in the Member State concerned which could be remedied by expanding authorised regulated activities, and*
  - *allow only moderate advertising limited strictly to what is necessary for channelling consumers towards monitored gaming networks;*
- c) *the fact that a Member State has opted for a system of protection that differs from that adopted by another Member State cannot affect the assessment of the need for and proportionality of the relevant provisions*, which must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure.

Case C-347/09 Dickinger and Ömer [2011] ECR I-8185 §100

It has consistently been held that *if a prior administrative authorisation scheme is to be justified even though it derogates from such fundamental freedoms, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily*. Furthermore, any person affected by a restrictive measure based on such a derogation must have an *effective judicial remedy* available to him (see *Sporting Exchange*, paragraph 50, and *Carmen Media Group*, paragraph 87).

In the light of all of those considerations, the answer to the third question is that the obligation of transparency flowing from Articles 43 EC and 49 EC and from the principle of equal treatment and the prohibition of discrimination on grounds of nationality precludes the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State.

Case C-64/08, Engelmann [2010] ECR I-8219 §55, 58

Having regard to the whole of the above, the answer to the second question referred is that, on a proper interpretation of Article 49 EC, where a *regional public monopoly on sporting bets and lotteries has been established with the objective of preventing incitement to squander money on gambling and of combating gambling addiction*, and yet a national court establishes at the same time:

- that other types of games of chance may be exploited by private operators holding an authorisation; and
- that in relation to other games of chance which do not fall within the said monopoly and which, moreover, pose a higher risk of addiction than the games which are subject to that monopoly, the competent authorities pursue policies of expanding supply, of such a nature as to develop and stimulate gaming activities, in particular with a view to maximising revenue derived from the latter;

that national court may legitimately be led to consider that such a monopoly is *not suitable for ensuring the achievement of the objective for which it was established* by contributing to reducing the opportunities for gambling and to limiting activities within that area *in a consistent and systematic manner*.

The fact that the games of chance subject to the said monopoly fall within the competence of the regional authorities, whereas those other types of games of chance fall within the competence of the federal authorities, is irrelevant in that respect.

Case C-46/08 Carmen Media Group Ltd [2010] ECR I-8149 §71

The answer to the first question in each of the cases must therefore be that, on a proper interpretation of Articles 43 EC and 49 EC:

- i. in order to justify a public monopoly on bets on sporting competitions and lotteries, such as those at issue in the cases in the main proceedings, by an objective of preventing incitement to squander money on gambling and combating addiction to the latter, *the national authorities concerned do not necessarily have to be able to produce a study establishing the proportionality of the said measure which is prior to the adoption of the latter;*
- ii. a Member State's choice to use such a monopoly rather than a system authorising the business of private operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework is capable of satisfying the requirement of proportionality, in so far as, as regards *the objective concerning a high level of consumer protection*, the establishment of the said monopoly is accompanied by *a legislative framework* suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, *in a consistent and systematic manner*, such an objective *by means of a supply that is quantitatively measured and qualitatively planned* by reference to the said objective and subject to strict control by the public authorities;
- iii. the fact that the competent authorities of a Member State might be confronted with certain difficulties in ensuring *compliance with such a monopoly by organisers of games and bets established outside that Member State*, who, *via the internet and in breach of the said monopoly, conclude bets with persons within the territorial area of the said authorities, is not capable*, as such, *of affecting the potential conformity of such a monopoly with the said provisions of the Treaty;*

- iv. in a situation where a national court finds, at the same time:
- that *advertising measures emanating from the holder of such a monopoly* and relating to other types of games of chance which it also offers are *not limited* to what is necessary in order to channel consumers towards the offer emanating from that holder by turning them away from other channels of unauthorised games, *but are designed to encourage the propensity of consumers to gamble* and to stimulate their active participation in the latter for purposes of maximising the anticipated revenue from such activities,
  - that *other types of games of chance may be exploited by private operators holding an authorisation*, and
  - that, *in relation to other types of games of chance* not covered by the said monopoly, and which, moreover, present *a higher potential risk of addiction* than the games subject to that monopoly, the competent authorities are conducting or tolerating policies of expanding supply, of such a kind as to develop and stimulate gaming activities, in particular with a view to maximising revenue from the latter,

the said national court may legitimately be led to consider that such a monopoly is *not suitable for guaranteeing achievement of the objective for which it was established, of preventing incitement to squander money on gambling and combating addiction to the latter*, by contributing to reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner.

Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 Markus Stoß [2010] ECR I-8069 §107

Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. *A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (Liga Portuguesa de Futebol Profissional and Bwin International, paragraph 56).*

Case C-258/08 Ladbrokes Betting [2010] ECR I-4757 §18

Case C-203/08 Sporting Exchange Ltd [2010] ECR I-4695 §26

Joined cases C-447/08 and C-448/08 Sjöberg and Gerdin [2010] ECR I-6921 §36

According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it *imposes do not appear disproportionate in the light of those objectives* (*Gambelli and Others*, paragraph 75, and *Placanica and Others*, paragraph 58).

In addition, because of the lack of direct contact between consumer and operator, *games of chance accessible via the internet involve different and more substantial risks of fraud by*

*operators against consumers compared with the traditional markets for such games (Liga Portuguesa de Futebol Profissional and Bwin International, paragraph 70).*

Case C-258/08 Ladbrokes Betting [2010] ECR I-4757 §22, 55

Case C-203/08 Sporting Exchange Ltd [2010] ECR I-4695 §29, 34

Specifically, restrictions based on the reasons referred to in paragraph 18 of the present judgment must *be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner* (see, to that effect, *Gambelli and Others*, paragraph 67).

*As the Court has already held, it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming – and, as such, activities which are prohibited – to activities which are authorised and regulated. In order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques (Placanica and Others, paragraph 55).*

While it is true that the grounds of the judgment in *Placanica and Others* refer solely *to the objective of crime prevention in the betting and gaming sector, whereas, in the present case, the Netherlands legislation is also designed to curb gambling addiction, the fact remains that those two objectives must be considered together, since they relate both to consumer protection and to the preservation of public order* (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 58; Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 33; and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 31).

Case C-258/08 Ladbrokes Betting [2010] ECR I-4757 §21, 25, 26

It should be noted in that regard that the internet gaming industry has not been the subject of harmonisation within the European Union. *A Member State is therefore entitled to take the view that the mere fact that an operator such as Betfair lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators* (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69).

Case C-203/08 Sporting Exchange Ltd [2010] ECR I-4695 §33

As regards the consequences flowing from the unlawful nature of the exclusion of a certain number of operators from tender procedures for the award of existing licences, it is for the national legal order to lay down detailed procedural rules to ensure the protection of the rights which those operators derive by direct effect of Community law, provided, however, that those detailed rules are not less favourable than those governing similar domestic situations (*principle*

*of equivalence*) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by Community law (*principle of effectiveness*) (see Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29, and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-0000, paragraph 57). In that connection, appropriate courses of action could be the revocation and redistribution of the old licences or the award by public tender of an adequate number of new licences. In any case, it should nevertheless be noted that, in the absence of a procedure for the award of licences which is open to operators who have been unlawfully barred from any possibility of obtaining a licence under the last tender procedure, the lack of a licence cannot be a ground for the application of sanctions to such operators.

**Joined cases C-338/04, C-359/04 and C-360/04 Placanica [2007] ECR I-1891 §63**

With regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that *the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services* (see, to that effect, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56).

First of all, whilst in *Schindler*, *Läärä* and *Zenatti* *the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives*, inasmuch as they must *serve to limit betting activities in a consistent and systematic manner*.

In so far as *the authorities of a Member State incite and encourage consumers to participate in lotteries*, games of chance and betting to the financial benefit of the public purse, the authorities of *that State cannot invoke public order concerns relating to the need to reduce opportunities for betting* in order to justify measures such as those at issue in the main proceedings.

**Case C-243/01 Gambelli [2003] ECR I-13031 §61, 67, 69**

According to the information given in the order for reference and the observations of the Italian Government, the legislation at issue in the main proceedings pursues objectives similar to those pursued by the United Kingdom legislation on lotteries, as identified by the Court in *Schindler*. *The Italian legislation seeks to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports*.

As the Court acknowledged in paragraph 58 of *Schindler*, *those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society* and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 *Ministère Public v Van Wesemael* [1979])



ECR 35, paragraph 28, Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20, and Case 15/78 *Société Générale Alsacienne de Banque v Koestler* [1978] ECR 1971, paragraph 5). Moreover, as held in paragraph 29 of this judgment, *measures based on such reasons must be suitable* for securing attainment of the objectives pursued *and not go beyond what is necessary* to attain them.

As noted in paragraph 21 of this judgment, the Italian betting legislation differs from the legislation at issue in *Schindler*, in particular in that it does not totally prohibit the transactions at issue but reserves them for certain bodies under certain circumstances.

However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of *Schindler*, recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.

In those circumstances, *the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.*

As the Court pointed out in paragraph 37 of its judgment of 21 September 1999 in Case C-124/97 *Läärä and Others* [1999] ECR I-0000 in relation to slot machines, *the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives.*

However, as the Advocate General observes in paragraph 32 of his Opinion, *such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.* As the Court observed in paragraph 60 of *Schindler*, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.

Case C-67/98 *Zenatti* [1999] ECR I-7289 §30, 31, 32, 33, 34, 35, 36

As the referring court points out, *national legislation on slot machines such as the Finnish legislation prohibits any person other than the licensed public body from running the operation of the machines in question; it therefore involves no discrimination on grounds of nationality*

*and applies without distinction to operators who might be interested in that activity, whether they are established in Finland or in another Member State.*

According to the information contained in the order for reference and in the observations of the Finnish Government, *the legislation at issue in the main proceedings responds to the concern to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes.*

As the Court acknowledged in paragraph 58 of the Schindler judgment, *those considerations* must be taken together. They *concern the protection of the recipients of the service and, more generally, of consumers, as well as the maintenance of order in society. The Court has already held that those objectives are amongst those which may be regarded as overriding reasons relating to the public interest* (see Joined Cases 110/78 and 111/78 *Ministère Public v Van Wesemael* [1979] ECR 35, paragraph 28; Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20; and Case 15/78 *Société Générale Alsacienne de Banque v Koestler* [1978] ECR 1971, paragraph 5). However, it is still necessary, as stated in paragraph 31 of this judgment, that measures based on such grounds guarantee the achievement of the intended aims and do not go beyond that which is necessary in order to achieve them.

As noted in paragraph 21 of this judgment, *the Finnish legislation* differs in particular from the legislation at issue in *Schindler* in that it does not prohibit the use of slot machines but reserves the running of them to a licensed public body.

However, *the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment*, recognised by the Court in paragraph 61 of the Schindler judgment. It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.

In those circumstances, *the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.*

Contrary to the arguments advanced by the appellants in the main proceedings, *the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public interest objectives at which it is purportedly aimed*, which must be considered as a whole. *Limited authorisation of such games on an exclusive basis, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives.*

The position is not affected by the fact that the various establishments in which the slot machines are installed receive from the licensed public body a proportion of the takings.

*The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.*

It is true that *the sums thus received by the State for public interest purposes could equally be obtained by other means*, such as taxation of the activities of the various operators authorised to pursue them within the framework of rules of a non-exclusive nature; however, *the obligation imposed on the licensed public body, requiring it to pay over the proceeds of its operations, constitutes a measure which, given the risk of crime and fraud, is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities.*

In those circumstances, in conferring exclusive rights on a single public body, the provisions of the Finnish legislation on the operation of slot machines do not appear to be disproportionate, in so far as they affect freedom to provide services, to the objectives they pursue.

Case C-124/97 Läära and Others [1999] ECR I-6067 §28, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42

Those particular factors justify national authorities having *a sufficient degree of latitude* to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, *it is for them to assess* not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

Case C-275/92 Schindler [1994] ECR I-1039 §61

#### 5.7.4 Tax treatment of gambling winnings

However, in circumstances such as those at issue in the main proceedings, *the taxation by a Member State of winnings from casinos in other Member States and the exemption of such winnings from casinos situated on its territory are not a suitable and coherent means of ensuring the attainment of the objective of combatting compulsive gambling*, as such an exemption is in fact likely to encourage consumers to participate in games of chance which allow them to benefit from such an exemption (see, to that effect, judgment in *Commission v Spain*, EU:C:2009:618, point 41).

Joined cases C-344/13 and C-367/13 Blanco [2014] not published yet §46

Contrary to that Government's submission, *the fact that gaming providers established in Finland are subject to tax as organisers of gambling does not rid the Finnish legislation of its*

*manifestly discriminatory character*, since that tax is not analogous to the income tax charged on winnings from taxpayers' participation in lotteries held in other Member States.

The reply, therefore, to the question referred must be that *Article 49 EC prohibits* a Member State's legislation under which *winnings from games of chance organised in other Member States* are treated as *income of the winner chargeable to income tax*, whereas *winnings from games of chance conducted in the Member State* in question *are not taxable*.

Case C-42/02 Lindman [2003] ECR I-13519 §22, 27

## 5.8 TRANSPORT

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The reply to the first question must therefore be that Article 1 of *Regulation No 4055/86* precludes the application in a Member State of *different harbour dues* for *domestic or intra-Community traffic and traffic between a Member State and a third country* if that difference is not objectively justified.

Case C-435/00 Geha Nafiliaki and Others [2002] ECR I-10615 §24

As the Court held in its judgment in Case C-379/92 Peralta [1994] ECR I-0000 at paragraph 39, that provision defines the beneficiaries of the freedom to provide maritime transport services between Member States and between Member States and third countries in terms which are substantially the same as those used in Article 59 of the Treaty.

Consequently, *the provision of maritime transport services between Member States cannot be subject to stricter conditions than those to which analogous provisions of services at domestic level are subject*.

*Where national legislation, though applicable without discrimination to all vessels whether used by national providers of services or by those from other Member States, operates a distinction according to whether those vessels are engaged in internal transport or in intra-Community transport*, thus securing a special advantage for the domestic market and the internal transport services of the Member State in question, that legislation must *be deemed to constitute a restriction on the freedom to provide maritime transport services* contrary to Regulation No 4055/86.

Case C-381/93 Commission v France [1994] ECR I-5145 §10, 18, 21

However, Article 84 does not exclude the application of the Treaty to transport, and marine transport remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty (see the judgment in Case 167/73 *Commission v France* [1974] ECR 359, paragraphs 31 and 32).

Second, in a judgment delivered on 17 May 1994 in Case C-18/93 *Corsica Ferries v Corpo dei Piloti del Porto di Genova*, not yet published in the ECR, paragraph 30, the Court held that *the freedom to provide maritime transport services between Member States may be relied on by an*

*undertaking as against the State in which it is established, if the services are provided for persons established in another Member State.*

Case C-379/92 Peralta [1994] ECR I-3453 §14, 40

## 5.9 SPORTS

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It must be recalled that the Treaty provisions concerning freedom of movement for persons do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. The Court stressed, however, that that restriction on the scope of the provisions in question must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity (see Case 13/76 *Donà v Mantero* [1976] ECR 1333, paragraphs 14 and 15, and *Bosman*, paragraphs 76 and 127).

The answer to the questions submitted must therefore be *that a rule requiring professional or semi-professional athletes or persons aspiring to take part in a professional or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition, which does not involve national teams competing against each other, does not in itself, as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services prohibited by Article 59 of the Treaty.*

Joined cases C-51/96 and C-191/97 Deliège [2000] ECR I-2549 §43, 69

## 5.10 ADVERTISING

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In light of the foregoing, the answer to the question referred is that Article 56 TFEU must be interpreted *as not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State.*

Case C-176/11 HIT and HIT LARIX [2012] not published vet §36

Consequently, the answer to the first question is that Article 4(1) of the Audiovisual Media Services Directive, the principle of equal treatment and Article 56 TFEU must be interpreted *as not precluding, in principle, a national rule, such as that at issue in the main proceedings, which lays down shorter hourly television advertising limits for pay-TV broadcasters than those set for free-to-air broadcasters, provided that the principle of proportionality is observed, which is a matter for the referring court to assess.*

Case C-234/12 Sky Italia [2013] not published vet § 26

Even though it does not lay down a complete prohibition of advertising or a particular form of advertising, which, according to settled case-law, is capable of constituting in itself a restriction of the freedom to provide services (see, inter alia, Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraph 33 and the case-law cited), ***a rule laying down a prohibition relating to the unprofessional nature of the content of advertising, such as Paragraph 27(3) of the Code of professional conduct for doctors in Hesse, which suffers from a certain ambiguity, is liable to constitute an obstacle to the relevant freedom to provide medical services.***

In the light of the above considerations, the answer to Questions 1 to 3 is that Article 5(3) of Directive 2005/36 must be interpreted as meaning that ***national rules such as, first, Paragraph 12(1) of the Code of professional conduct for doctors in Hesse, under which fees must be reasonable and, unless provided otherwise by law, calculated on the basis of the official Regulation on doctors' fees, and, secondly, Paragraph 27(3) of that code, which prohibits doctors from engaging in unprofessional advertising, do not fall within its material scope.*** It is, however, for the referring court to ascertain, taking into account the indications given by the Court, whether those rules constitute a restriction within the meaning of Article 56 TFEU, and, if so, whether they pursue an objective in the public interest, are appropriate to ensuring that it is attained, and do not go beyond what is necessary for attaining it.

**Case C-475/11 Konstantinides [2013] not published vet §56, 58**

That conclusion is consistent with that directive objective's which is, as noted in paragraph 26 of the present judgment, the removal of restrictions on the free movement of services between Member States. Indeed, ***legislation of a Member State forbidding qualified accountants from any canvassing could affect professionals from other Member States more, by depriving them of an effective means of penetrating the national market in question.*** Such a prohibition constitutes, therefore, a restriction on the freedom to provide cross-border services (see, by analogy, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 28 and 38).

**Case C-119/09 Société fiduciaire nationale d'expertise comptable [2011] ECR I-2551 §43**

Rules on advertising such as those laid down in Law No 175/1992, ***in so far as they permit, subject to certain conditions, broadcasting on local television networks of advertisements for medical and surgical treatments provided by private health care establishments and which effectively prohibit such advertising on national television networks constitute,*** for companies established in Member States other than the Italian Republic, such as *Dermoestética*, ***a serious obstacle to the pursuit of their activities by means of a subsidiary established in that Member State. Those rules are, therefore, liable to make it more difficult for such economic operators to gain access to the Italian market*** (see, by analogy, Case C-422/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 12 to 14, and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 58). Moreover, in so far as they prohibit companies such as *Dermoestética* from using services for broadcasting television advertisements, rules on advertising such as those laid down by Law No 175/1992 constitute a restriction on the freedom to provide services.

The rules on advertising laid down in the national legislation at issue in the main proceedings must therefore be regarded as constituting a national measure which is liable to impede or render less attractive the exercise of the basic freedoms guaranteed by Articles 43 and 49 of the EC Treaty.

Thus, rules regulating television advertising for medical and surgical treatments provided by private health care establishments can be justified in the light of the objective of protection of public health.

***With regard, in third place, to the extent to which it is possible for a set of rules, such as those laid down in the legislation at issue in the main proceedings, to guarantee that the objective of protection of public health is attained, by introducing a measure resulting in a prohibition on advertising medical and surgical treatments on national television networks while at the same time making it possible to broadcast such advertisements on local television networks, such rules exhibit an inconsistency which the Italian Government has not attempted to justify and cannot therefore properly attain the public health objective which they seek to pursue.***

**Case C-500/06 Corporación Dermoeestética [2008] ECR I-5785 §33, 34, 38, 39**

In the first place, it must be observed that the French rules on television advertising constitute a ***restriction on freedom to provide services*** within the meaning of Article 59 of the Treaty. They entail ***a restriction on freedom to provide advertising services*** in so far as the owners of the advertising hoardings must refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event is likely to be retransmitted in France. They also ***impede the provision of broadcasting services for television programmes***. French broadcasters must refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic beverages marketed in France may be visible. Furthermore, ***the organisers of sporting events taking place outside France cannot sell the retransmission rights to French broadcasters*** if the transmission of the television programmes of such events is likely to contain indirect television advertising for those alcoholic beverages.

Second, the French rules on television advertising pursue an ***objective relating to the protection of public health within the meaning of Article 56(1) of the Treaty***, as the Advocate General stated in paragraph 69 of his Opinion. ***Measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse*** reflect public health concerns (see Case 152/78 *Commission v France* [1980] ECR 2299, paragraph 17; *Aragonesa de Publicidad Exterior and Publivia*, paragraph 15; and Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraph 27).

Third, the French rules on television advertising are ***appropriate to ensure their aim of protecting public health***. Furthermore, they ***do not go beyond what is necessary*** to achieve such an objective. They limit the situations in which hoardings advertising alcoholic beverages may be seen on television and are therefore likely to restrict the broadcasting of such advertising, thus reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages.

**Case C-262/02 Commission v France [2004] ECR I-6569 §26, 30, 31**

Case C-429/02 Bacardi France SAS [2004] ECR I-6613 §35, 37, 38

Accordingly, the answer to the second question is that *Article 59 of the Treaty does not preclude a Member State from prohibiting television advertising for alcoholic beverages marketed in that State, in the case of indirect television advertising resulting from the appearance on screen of hoardings visible during the retransmission of bi-national sporting events taking place in other Member States.*

Case C-429/02 Bacardi France SAS [2004] ECR I-06613 §41

The answer to be given must therefore be that, as regards freedom to provide services, *Articles 56 and 59 of the Treaty do not preclude a prohibition on the advertising of alcoholic beverages such as that laid down in Article 2 of the Alkoholreklamlagen, unless it is apparent that, in the circumstances of law and of fact which characterise the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol can be ensured by measures having less effect on intra-Community trade.*

Case C-405/98 Gourmet International Products [2001] ECR I-1795 §42

The answer to be given must therefore be that, on a proper construction of *Article 59* of the Treaty, *a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising.* However, it is for the national court to determine whether those provisions are *necessary* for meeting *overriding requirements of general public importance or one of the aims mentioned in Article 56* of the EC Treaty, whether they are *proportionate* for that purpose and whether those aims or overriding requirements could be met by *measures less restrictive* of intra-Community trade.

Joined cases C-34/95, C-35/95 and C-36/95 De Agostini (Svenska) Förlag AB [1997] ECR I-3843 §54

## 5.11 TAXATION

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In that regard, it must be stated at the outset that, *although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with EU law* and, in particular, the fundamental freedoms guaranteed in the Treaty (see, to that effect, judgment in *Blanco and Fabretti*, Joined Cases C-344/13 and C-367/13, EU:C:2014:2311, paragraph 24 and the case-law cited).

Therefore, the answer to question 1 is that national legislation, such as that at issue in the main proceedings, which, without providing for a transitional period, introduces a five-fold increase in the flat-rate tax to be paid on slot machines operated in amusement arcades and, in addition, introduces a proportional tax on that activity, constitutes a restriction on the freedom to provide services, guaranteed by Article 56 TFEU provided that it is liable to prohibit, impede or render less attractive the exercise of the freedom to provide the services of operating slot machines in amusement arcades, this being a matter which it is for the national court to determine.

C-98/14 Burlington Hungary and Others [2015] not published yet §34, 42



In the light of the foregoing, it must be held that by having adopted the provisions contained in Article 46(c) of the Law governing pension schemes and funds and Article 86(1) of the Law on the organisation and supervision of private insurance, pursuant to which pension funds established in Member States other than the Kingdom of Spain and offering *occupational pension schemes* in that Member State and *insurance companies operating in Spain under the freedom to provide services are required to appoint a tax representative resident in that Member State, the Kingdom of Spain has failed to fulfil its obligations under Article 56 TFEU.*

C-678/11 Commission v Spain [2014] not published vet §63

It is clear that, in the present case, the obligation to *withhold an advance payment on the income tax of workers* supplied by temporary employment agencies not established in the Czech Republic and to pay that advance payment to the Czech State is inevitably imposed on the recipients of the services provided by those agencies and entails an additional administrative burden which is not required for the recipients of the same services provided by a resident service provider. *Consequently, such an obligation is liable to render cross-border services less attractive for those recipients than services provided by resident service providers, and consequently to deter those recipients from having recourse to service providers resident in other Member States* (see, to that effect, *FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 33; *Commission v Belgium*, C-433/04, EU:C:2006:702, paragraphs 30 to 32; and X, EU:C:2012:635, paragraph 28).

Joined cases C-53/13 and C-80/13 Strojírny Prostějov [2014] not published vet §37

Consequently, the rules at issue, which constitute *a general refusal to grant a tax reduction in respect of contributions paid to a savings pension managed by a financial institution established in a Member State other than the Kingdom of Belgium, cannot be justified by the need to preserve the coherence of the tax system.*

To the extent that it may be considered that such protection falls within the scope of the overriding reason in the public interest consisting in the protection of consumers, it is clear that the Kingdom of Belgium has not demonstrated that the provisions at issue do not go beyond what is necessary in order to ensure the attainment of the objective relied upon.

Consequently, it must be held that, by adopting and maintaining the tax reduction in respect of contributions paid to a savings pension in so far as that reduction is applicable only in respect of payments to institutions and funds established in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU.

Case C-296/12 Commission v Belgium [2014] not published vet §40, 47, 52

Next, it must be observed that the contested Belgian legislation, first, has the effect of discouraging Belgian residents from using the services of banks established in other Member States and from opening and keeping savings accounts with banks which are not established in Belgium, since interest payments by those banks are not eligible for the tax exemption in question where those banks are not established in Belgium. Moreover, that legislation is such as to discourage holders of a savings account with a bank established in Belgium, who therefore benefit from that exemption, from transferring their account to a bank established in another Member State.

Accordingly, it must be held that the legislation in question constitutes an obstacle to the freedom to provide services, prohibited, in principle, by Article 56(1) TFEU.

In accordance with well-established case-law, the prevention of tax evasion and avoidance can be accepted as justification only if the legislation is aimed at wholly artificial arrangements the objective of which is to circumvent the tax laws, which precludes any general presumption of tax evasion. Consequently, a general presumption of tax avoidance or tax evasion cannot justify a fiscal measure which compromises the objectives of the Treaty (see, to that effect, Case C-72/09 *Établissements Rimbaud* [2010] ECR I-10659, paragraph 34 and the case-law cited). ***In the present case, the contested national legislation not only prevents tax avoidance and evasion, but also the legitimate exercise of the freedom to provide services where taxpayers prove that their objective is not one of tax evasion.***

**Case C-383/10 Commission v Belgium [2013] not published vet §47, 48, 64**

In the light of all of the foregoing, the answer to the question referred is that Article 49 EC must be interpreted as ***precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which payments made by a resident taxpayer to a non-resident company for supplies or services are not to be regarded as deductible business expenses where the non-resident company is not subject, in the Member State of establishment, to tax on income or is subject, as regards the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in the former Member State, unless the taxpayer proves that such payments relate to genuine and proper transactions and do not exceed the normal limits, whereas, under the general rule, such payments are to be regarded as deductible business expenses if they are necessary for acquiring or retaining taxable income and if the taxpayer demonstrates the authenticity and amount of those expenses.***

**Case C-318/10 SIAT [2012] not published vet §60**

*(available only in French)*

En ce qui concerne l'article 40, paragraphe 2, point 2, troisième phrase, de l'InvFG et l'article 40, paragraphe 2, point 2, deuxième phrase, de l'ImmoInvFG, selon lesquels ***seuls des établissements de crédit et des fiduciaires économiques nationaux peuvent être désignés comme représentants fiscaux, il convient d'observer que le terme «national» implique que seule une personne établie en Autriche, ou du moins présente sur le territoire de cet État membre, peut être désignée en tant que représentant fiscal.*** La République d'Autriche ne conteste d'ailleurs pas que le terme «national» revête cette portée. Il s'ensuit que ces dispositions empêchent une personne d'assumer la fonction de représentant fiscal de manière transfrontalière en Autriche.

Quant à la considération avancée par ledit État membre, selon laquelle, par le terme «national», le législateur autrichien aurait voulu transposer les directives 85/611 et 2009/65, ***il suffit d'observer que lesdites directives portent sur des conditions d'établissement de certains organismes de placement collectif en valeurs mobilières et la commercialisation de telles valeurs, lesdites conditions ne revêtant cependant aucun rapport avec la question faisant l'objet du présent litige, à savoir la délivrance de la preuve de revenus considérés comme distribués aux fins de la détermination de l'impôt sur le revenu dû.***

Une telle exigence d'établissement constitue, dès lors, une entrave à la libre prestation des services.

**Case C-387/10 Commission v Austria [2011] ECR I-142 § 23, 24, 25**

It should be recalled that, according to well-established case law, *although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with European Union law* (see, *inter alia*, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 16; and Case C-540/07 *Commission v Italy* [2009] ECR I-0000, paragraph 28).

Case C-233/09 Dijkman [2010] ECR I-6649 §20

Such legislation would have the *effect of deterring taxpayers resident in Italy from attending university courses at establishments established in another Member State. Furthermore, it would also hinder the offering of education by private educational establishments established in other Member States to taxpayers resident in Italy* (see, to that effect, *Schwarz and Gootjes-Schwarz*, paragraph 66, and Case C-318/05 *Commission v Germany* [2007] ECR I-6957, paragraph 40).

In the light of the foregoing considerations, Article 49 EC must be interpreted as:

- *precluding national legislation which allows taxpayers to deduct from gross tax the costs of attending university courses provided by universities situated in that Member State but excludes generally that possibility for university tuition fees incurred at a private university established in another Member State;*
- *not precluding national legislation which allows taxpayers to deduct from gross tax university tuition fees incurred at a private university established in another Member State up to the maximum amount set for the corresponding costs of attending similar courses at the national State university nearest to the taxpayer's residence for fiscal purposes.*

Case C-56/09 Zanotti [2010] ECR I-4517 §41, 66

In that regard, the Court has indeed accepted, in relation to direct taxation, *that the situation of residents and the situation of non-residents in a given Member State are not generally comparable, since there are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay tax or the possibility of account being taken of their personal and family circumstances* (see, *inter alia*, *Schumacker*, paragraphs 31 to 33, and Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 59).

Case C-169/08 Presidente del Consiglio dei Ministri v Regione Sardegna [2009] ECR I-10821 §34

It should be noted here that it is not necessary for that *private financing to be provided principally by the pupils or their parents*. According to consistent case-law, Article 50 EC does not require that the service *be paid for by those for whom it is performed* (see, for example, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 56; *Smits and Peerbooms*, paragraph 57; and *Skandia and Ramstedt*, paragraph 24).

Case C-76/05 Schwarz v Finanzamt Bergisch Gladbach [2007] ECR I-6849 §41

Case C-318/05 Commission v Germany [2007] ECR I-6957 §68, 69, 70, 71, 72

Tax legislation of a Member State [...] *makes the granting of tax relief subject to the condition that schooling costs be incurred in private schools approved by that Member State*, or authorised or recognised by the law of the relevant Land, which presupposes that they are established in that Member State.

That legislation generally excludes the possibility for German taxpayers *of deducting from their taxable income part of the school fees linked to sending their children to a private school situated in another Member State, whereas that possibility exists as regards school fees paid to certain German private schools*.

It therefore involves a higher tax burden for those taxpayers who, like the Schwarzes, send their children to a private school situated in another Member State and not to a private school situated in German territory.

Case C-76/05 Schwarz v Finanzamt Bergisch Gladbach [2007] ECR I-06849 §64, 65

Finally, as regards the obligation [...] for an insurance undertaking established in another Member State *to appoint a representative in Belgium*, it must be found that such an obligation, as a result of *the costs and constraints which it entails*, including for undertakings in possession of authorisation within the meaning of Article 5 of Directive 2002/83, is liable to dissuade those undertakings from offering their services in Belgium. Consequently, such legislation also constitutes an obstacle to the freedom to provide services.

Case C-522/04 Commission v Belgium [2007] ECR I-5701 §41

It follows that *the difficulties connected with the exchange of information* in view of Directive 77/799, insofar as the latter does not permit effective verification of whether foreign pension schemes meet the conditions to which the contested legislation makes deductibility or exemption subject, *do not justify the obstacles set out in paragraph 45 of the present judgment*.

It follows that, by refusing in general to grant a tax advantage in respect of contributions paid to a pension institution established in another Member State, the contested legislation cannot be justified by the need to guarantee the cohesion of the tax system.

Case C-150/04 Commission v Denmark [2007] ECR I-1163 §55, 74

It follows that Articles 59 and 60 of the EEC Treaty must be interpreted as *not precluding*:

- national legislation under which a *procedure of retention of tax at source* is applied to payments made to *providers of services not resident in the Member State in which the services are provided, whereas payments made to providers of services resident in that Member State are not subject to such a retention*;
- national legislation under which liability is incurred by a recipient of services who has failed to make the retention at source that he was required to make.

The answer to Question 3(a) must therefore be that Articles 59 and 60 of the EEC Treaty must be interpreted as *precluding* national legislation *which does not allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses which that service provider has reported to him and which are directly linked to his activity in the Member State in which the services are provided*, whereas *a provider of services residing in that State is taxable* only on his net income, that is, the income received after deduction of business expenses.

The answer to Question 3(b) must therefore be that Articles 59 and 60 of the EEC Treaty must be interpreted as *not precluding* national legislation under which only *the business expenses directly linked to the activity that generated the taxable income in the Member State in which the service is provided, which the service provider established in another Member State has reported to the payment debtor, are deducted in the procedure for retention at source, and expenses that are not directly linked to that economic activity can be taken into account if appropriate in a subsequent refund procedure*.

In the light of the above considerations, the answer to Question 3(c) must be that Articles 59 and 60 of the EEC Treaty must be interpreted as *not precluding* a rule that the tax exemption granted under the Germany-Netherlands Convention *to a non-resident provider of services who has carried on activity in Germany can be taken into account by the payment debtor in the procedure for retention of tax at source, or in a subsequent procedure for exemption or refund, or in proceedings for liability brought against him, only if a certificate of exemption stating that the conditions laid down to that end by that convention are satisfied is issued by the competent tax authority*.

It follows that *the EEC Treaty does not extend the benefit of those provisions to providers of services who are nationals of non-member countries*, even if they are established within the Community and an intra-Community provision of services is concerned.

Consequently, the answer to Question 2 and Question 3(d) must be that *Article 59 of the EEC Treaty* must be interpreted as *not being applicable in favour of a provider of services who is a national of a non-member country*.

Case C-290/04 FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel [2006] ECR I-9461 §39, 49, 52, 61, 68, 69

The answer to the first question must therefore be that *Article 59 of the Treaty must be interpreted as not precluding the introduction, by legislation of a national or local authority, of a tax on mobile and personal communications infrastructures used to carry on activities provided for in licences and authorisations, which applies without distinction* to national providers of services and to those of other Member States and affects in the same way the provision of services within one Member State and the provision of services between Member States.

Joined cases C-544/03 and C-545/03 Mobistar [2005] ECR I-7723 §35

In that case, however, the Court was considering the compatibility with the Treaty provisions on the freedom of establishment of *national tax rules applying to resident and non-resident undertakings*, whereas the main proceedings in the present case involve an assessment of the compatibility with the Treaty of *national tax provisions which confer a benefit on companies established in a Member State* in return for the provision of services provided on their behalf in that Member State alone. *Such provisions are contrary to Article 49 EC* because they are, albeit indirectly, based upon the place of establishment of the provider of services and are consequently liable to restrict its cross-border activities.

Although *the promotion of research and development may*, as argued by the French Government, *be an overriding reason relating to public interest*, the fact remains that *it cannot justify a national measure such as that at issue in the main proceedings, which refuses the benefit of a tax credit for research for any research not carried out in the Member State concerned*. Such legislation is directly contrary to the objective of the Community policy on research and technological development which, according to Article 163(1) EC is, inter alia, ‘strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level’. Article 163(2) EC provides in particular that, for this purpose, the Community is to ‘support [undertakings] efforts to cooperate with one another, aiming, notably, at enabling [them] to exploit the internal market potential to the full, in particular through ... the removal of legal and fiscal obstacles to that cooperation.’

However, *national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred and satisfies the prescribed requirements cannot be justified in the name of effectiveness of fiscal supervision*. The possibility cannot be excluded a priori that the taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States (see *Baxter and Others*, paragraphs 19 and 20).

Accordingly, the answer to the questions referred must be that *Article 49 EC precludes legislation of a Member State which restricts the benefit of a tax credit for research only to research carried out in that Member State*.

Case C-39/04 Laboratoires Fournier SA [2005] ECR I-2057 §18, 23, 25, 26

With regard to the question of whether the levying by municipal authorities of a tax such as the advertising tax constitutes an *impediment incompatible* with Article 49 EC, it must first of all be noted that such a tax is applicable without distinction to any provision of services entailing outdoor advertising and public bill-posting in the territory of the municipality concerned. The rules on the levying of this tax do not, therefore, draw *any distinction based on the place of establishment of the provider or recipient* of the bill-posting services *or on the place of origin of the goods or services* that form the subject-matter of the advertising messages disseminated.

Next, *such a tax is applied only to outdoor advertising activities involving the use of public space* administered by the municipal authorities and *its amount is fixed at a level which may be considered modest in relation to the value of the services provided which are subject to it*. In

those circumstances, *the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services* to be carried out in the territory of the municipalities concerned, including the case in which the provision of services is of a cross-border nature on account of the place of establishment of either the provider or the recipient of the services.

It follows from the foregoing considerations that *Article 49 EC* must be interpreted as *not precluding the levying of a tax* such as the municipal tax on advertising imposed by Legislative Decree No 507/93.

Case C-134/03 Viacom Outdoor [2005] ECR I-1167 §37, 38, 39

With regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that *the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services* (see, to that effect, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56).

Case C-243/01 Gambelli and Others [2003] ECR I-13031 §61

As the application of the *fixed levy is restricted* under Article 125 A I of the CGI *to investment or life assurance contracts where the debtor is resident or established in France*, it has the effect of *discouraging* taxpayers who are resident in France from *entering into contracts of this type with companies which are established in another Member State*. Article 49 EC precludes the application of any national legislation which has the effect of *making the provision of services between Member States more difficult* than the provision of services exclusively within one Member State (see, inter alia, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 23).

The legislation in question *also has a restrictive effect* as regards companies established in other Member States as *it prevents them from raising capital in France, given that the proceeds of contracts taken out with those companies are treated less favourably from a tax point of view than proceeds payable by a company which is established in France*. This means that their contracts are less attractive to investors residing in France than those of companies which are established in that Member State (for a similar situation, see Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 35, and Case C-478/98 *Commission v Belgium* [2000] ECR I-7587, paragraph 18).

The latter relies on the *need to ensure payment of taxes and effective fiscal supervision*. It is true that the Court has repeatedly held that the prevention of tax avoidance and the need for effective fiscal supervision may be relied upon to justify restrictions on the exercise of fundamental freedoms guaranteed by the Treaty (see Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 18, and *Commission v Belgium*, cited above, paragraph 39). *However, a general presumption of tax avoidance or fraud is not sufficient to justify a fiscal measure which compromises the objectives of the Treaty* (see, to that effect, the judgment in *Commission v Belgium*, cited above, paragraph 45).

In the present case, *deduction at source*, operated directly by debtors resident in France, will admittedly be a straightforward process for the tax authorities. Where *debtors are resident in other Member States*, it may prove *more difficult to ascertain whether all the conditions necessary for the application of a particular rate of levy have been met. However, that involves disadvantages of a purely administrative nature which are not*, as the Advocate General has noted at points 29 and 30 of his Opinion, *sufficient to justify a restriction on the freedom to provide services and on the free movement of capital of the type which the legislation in question gives rise to.*

As regards *less restrictive solutions that may be available*, the French Government has itself recognised that the practical difficulties could be avoided by, for example, providing for a *voluntary annual declaration of income received from companies established in other Member States to be included in tax returns, for the purpose of the operation of the fixed levy*. A solution of that kind would fully resolve issues of supervision and, for the reasons given at point 31 of the Advocate General's Opinion, it would not affect the stability of the tax system in question.

The French Government has therefore failed to justify the measure in question. The Commission's application should accordingly be granted, and it should be held that *by excluding altogether application of the rate of the fixed levy to income arising from the investments and contracts referred to in Articles 125-0 A and 125 A of the Code général des impôts where the debtor is not resident or established in France, the French Republic has failed to fulfil its obligations under Articles 49 and 56 EC.*

Case C-334/02 Commission v France [2004] ECR I-2229 §23, 24, 27, 29, 30, 34

Since no precise argument has been put before the Court to justify such a difference in treatment, *Articles 59 and 60 must be held to preclude* a national provision such as that at issue in the main proceedings in so far as it *excludes the possibility for partially taxable persons to deduct business expenses from their taxable income, whereas such a possibility is granted to wholly taxable persons.*

However, those articles of the Treaty *do not preclude* that same provision in so far as, as a general rule, it subjects the *income of non-residents to a definitive tax at the uniform rate of 25%*, deducted at source, whilst *the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance.*

Case C-234/01 Arnoud Gerritse [2003] ECR I-5933 §29, 55

It should first be recalled that *Directive 77/799 may be relied on by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax* (see Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 26), or all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer according to the legislation which it applies (see *Wielockx*, cited above, paragraph 26, and *Danner*, paragraph 49).



*A Member State is therefore in a position to check whether contributions have actually been paid by one of its taxpayers to an insurance company established in another Member State.* In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting contributions provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested (see, to that effect, *Bachmann*, paragraphs 18 and 20, *Commission v Belgium*, paragraphs 11 and 13, and *Danner*, paragraph 50).

In that regard, as it pointed out in *Danner* in paragraph 55, the Court held in paragraph 34 of its judgment in *Safir* that, in that case, *the need to fill the fiscal vacuum arising from the non-taxation of savings in the form of capital life assurance policies taken out with companies established in a Member State other than the one where the saver is resident was not such as to justify the national measure at issue, which restricted freedom to provide services.* The Court has also held, in general terms, *that any tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State.* Such compensatory tax arrangements prejudice the very foundations of the single market (see Case C-294/97 *Eurowings Luftverkehrs* [1999] ECR I-7447, paragraphs 44 and 45).

Finally, the Court has held that *the need to prevent the reduction of tax revenue is not one of the grounds listed in Article 56 of the EC Treaty* (now, after amendment, Article 46 EC) *or a matter of overriding general interest* (see *Danner*, paragraph 56) which would justify a restriction on the freedom to provide services.

In the light of the foregoing observations, the answer to the question referred must be that *Article 49 EC precludes an insurance policy issued by an insurance company established in another Member State which meets the conditions laid down in national law for occupational pension insurance, apart from the condition that the policy must be issued by an insurance company operating in the national territory, from being treated differently in terms of taxation*, with income tax effects which, depending on the circumstances in the individual case, may be less favourable.

Case C-422/01 Skandia and Ramstedt [2003] ECR I-6817 §42, 43, 51, 52, 53, 62

In light of the foregoing considerations, the answer to the question submitted must be that Article 59 of the Treaty is to be interpreted as *precluding a Member State's tax legislation from restricting or disallowing the deductibility for income tax purposes of contributions to voluntary pension schemes paid to pension providers in other Member States* while allowing such contributions to be deducted when they are paid to institutions in the first-mentioned Member State, *if that legislation does not at the same time preclude taxation of the pensions paid by the abovementioned pension providers.*

Case C-136/00 Danner [2002] ECR I-8147 §57

*Since the duty to abide by the rules relating to the freedom to provide services applies to the actions of public authorities* (Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17), *it*

*is, in that respect, irrelevant that the tax measure in question was adopted, as in the main proceedings, by a local authority and not by the State itself.*

Case C-17/00 De Coster [2001] ECR I-9445 §27

## 5.12 CONCESSION SERVICES

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Moreover, *even though service concessions do not come within the scope of Directive 2004/18 by virtue of Article 17 thereof, the public authorities which grant such a concession are required to comply with the fundamental rules of the TFEU*, the principles of non-discrimination on grounds of nationality and equal treatment, and also the obligation of transparency thereunder, since that concession is of certain cross-border interest (see, to that effect, inter alia Case C-347/06 *ASM Brescia* [2008] ECR I-5641, paragraphs 58 and 59 and the case-law cited).

A certain *cross-border interest* may result, inter alia, from the *financial value of the planned agreement, from the location where it is to be performed* (see, to that effect, *ASM Brescia*, paragraph 62 and the case-law cited) or *from its technical characteristics* (see, by analogy, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraph 24).

Furthermore, there is certain cross-border interest, without its being necessary that an economic operator actually has manifested its interest. This is particularly true when, as in the main proceedings, the dispute concerns the *lack of transparency* surrounding the agreement in question. In such a case, economic operators established in other Member States do not have a genuine opportunity to manifest their interest in obtaining that concession (see, to that effect, *Coname*, paragraph 18, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 55).

Moreover, once it has been established that there is certain cross-border interest in a given service concession, *the obligation of transparency to be complied with by the concession-granting authority benefits any potential tenderer* (see, to that effect, Case C-91/08 *Wall* [2010] ECR I-2815, paragraph 36), *even where it is established in the same Member State as those authorities*.

It should be observed that European Union law also imposes the same requirements on the concession-granting authority where the agreement at issue in the main proceedings did not oblige the tenderer to engage in the transferred activity, with the result that that agreement then confers authorisation to engage in an economic activity. Such an authorisation is no different from a service concession in terms of the obligation to comply with the fundamental rules of the Treaty and the principles flowing therefrom, as the exercise of that activity is liable to be of potential interest to economic operators in other Member States (see, to that effect, inter alia Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraphs 46 and 47, and Case C-64/08 *Engelmann* [2010] ECR I-8219, paragraphs 51 to 53).

It should be borne in mind that since such a concession is of certain cross-border interest, its award, in the absence of any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to *a difference in treatment to the detriment of*

*undertakings which might be interested in that concession but which are located in other Member States.* In excluding those undertakings, that difference in treatment works primarily to their detriment and therefore amounts to *indirect discrimination on grounds of nationality, which is, in principle, prohibited by Articles 49 TFEU and 56 TFEU* (see, to that effect, *ASM Brescia*, paragraphs 59 and 60 and the case-law cited).

Such a measure might, exceptionally, be allowed on one of the grounds set out in Article 52 TFEU or justified by overriding reasons in the public interest, in accordance with the Court's case-law (see, by analogy, *Engelmann*, paragraphs 51 and 57 and the case-law cited, and Joined Cases C-357/10 to C-359/10 *Duomo Gpa and Others* [2012] ECR, paragraph 39 and the case-law cited). On this last point, it is clear from a combined reading of paragraphs 51 and 57 of *Engelmann* that no distinction need be drawn between objective circumstances and overriding reasons in the public interest. ***Objective circumstances must, ultimately, be accepted as overriding reasons in the public interest.***

It is, moreover, settled case-law with respect to a risk of depreciation of an economic activity carried on by a public entity under a pre-existing contractual framework which turns out to be unsuitable due to technical and commercial developments that ***grounds of an economic nature cannot be accepted as overriding reasons in the public interest, justifying a restriction of a fundamental freedom guaranteed by the Treaty*** (see Joined Cases C-72/10 and C-77/10 *Costa and Cifone* [2012] ECR, paragraph 59 and the case-law cited).

**Case C-221/12 Belgacom NV [2013] not published yet §28, 29, 31, 32, 33, 37, 38, 41**

It should also be noted that, according to the Court's case-law, ***the question whether it is a service concession or a public service contract and, in the latter case, whether the value of the contract reaches the threshold provided for under the EU rules has no effect on the Court's answer to the question referred for a preliminary ruling, given that the exception to the application of the rules of EU law where the 'similar control' conditions are fulfilled is applicable in all those situations*** (see, to that effect, Case C-573/07 *Sea* [2009] ECR I-8127, paragraphs 31 to 40).

Where the position of a contracting authority within a jointly owned successful tenderer does not provide it with the ***slightest possibility of participating in the control of that tenderer***, that would, in effect, ***open the way to circumvention of the application of the rules of EU law regarding public contracts or service concessions, since a purely formal affiliation to such an entity or to a joint body managing it would exempt the contracting authority from the obligation to initiate a tendering procedure in accordance with the EU rules, even though it would take no part in exercising the 'similar control' over that entity*** (see, to that effect, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 24).

**Joined cases C-182/11 and C-183/11 Econord SpA [2012] not published yet §26, 31**

It should, in addition, be pointed out that the essential characteristic of the concession is that ***it is the concessionaire himself who bears the main, or at least the substantial, operating risk*** (see to that effect, with regard to concessions relating to public services, Case C-206/08 *Eurawasser* [2009] ECR I-0000, paragraphs 59 and 77).

In any event, with regard to the *duration of concessions*, there are *serious grounds*, including the need to guarantee competition, *for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order*, as stated by the Advocate General in points 96 and 97 of his Opinion (see, to the same effect, Case C-454/06 pressetext *Nachrichtenagentur* [2008] ECR I-4401, paragraph 73).

[C-451/08 Helmut Müller \[2010\] ECR I-2673 §75, 79](#)

As European Union law now stands, *service concession contracts are not governed by any of the directives by which the legislature has regulated the field of public procurement* (see *Coname*, paragraph 16, and Case C-347/06 *ASM Brescia* [2008] ECR I-5641, paragraph 57). However, *the public authorities concluding them are bound to comply with the fundamental rules of the EC Treaty, including Articles 43 EC and 49 EC, and with the consequent obligation of transparency* (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 to 62; *Coname*, paragraphs 16 to 19; and *Parking Brixen*, paragraphs 46 to 49).

That *obligation of transparency applies where the service concession in question may be of interest to an undertaking located in a Member State other than that in which the concession is awarded* (see, to that effect, *Coname*, paragraph 17; see also, by analogy, Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, paragraph 29, and Case C-412/04 *Commission v Italy* [2008] ECR I-619, paragraph 66).

[Case C-91/08 Wall \[2010\] ECR I-2815 §33, 34](#)

[Case C-203/08 Sporting Exchange Ltd \[2010\] ECR I-4695 §39, 40](#)

[Case C-196/08 Acoset \[2009\] ECR I-9913 §46](#)

*The obligation of transparency to be complied with by public authorities concluding service concession contracts consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to allow the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed* (see *Telaustria and Telefonadress*, paragraphs 60 to 62; *Parking Brixen*, paragraphs 46 to 49; and *ANAV*, paragraph 21).

[Case C-410/04 ANAV v Comune di Bari \[2006\] ECR I-3303 §21](#)

In order to ensure *transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession contract, if they are materially different in character from the original contract* and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, by analogy with public contracts, Case C-337/98 *Commission v France* [2000] ECR I-8377, paragraphs 44 and 46, and Case C-454/06 pressetext *Nachrichtenagentur* [2008] ECR I-4401, paragraph 34).

[Case C-91/08 Wall AG \[2010\] ECR I-2815 §37](#)

*Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any*

*potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed* (see, to that effect, Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25, and *Wall*, paragraph 36).

As the Advocate General stated in points 154 and 155 of his Opinion, *the obligation of transparency appears to be a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator*. Such an obligation should apply in the context of a system whereby the authorities of a Member State, by virtue of their public order powers, grant a licence to a single operator, because the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract.

Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695 §41, 47

Besides the principle of non-discrimination on the ground of nationality, *the principle of equal treatment as between tenderers is also to be applied to public service concessions, even in the absence of discrimination on grounds of nationality* (see, inter alia, ANAV, paragraph 20).

The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, *a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That authority's obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and a review of the impartiality of the procurement procedures* (see, inter alia, ANAV, paragraph 21).

It is apparent from case-law that *the award of a public contract to a semi-public company without a call for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment, in that such a procedure would offer a private undertaking with a capital holding in that company an advantage over its competitors* (*Stadt Halle and RPL Lochau*, paragraph 51, and Case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraph 48).

*While the absence of a competitive tendering procedure in connection with the award of services would appear to be irreconcilable with Articles 43 EC and 49 EC and with the principles of equal treatment and non-discrimination, that situation may be rectified by selecting the private participant in accordance with the requirements set out at paragraphs 46 to 49 above and choosing appropriate criteria for the selection of the private participant, since the tenderers must provide evidence not only of their capacity to become a shareholder but, primarily, of their technical capacity to provide the service and the economic and other advantages which their tender brings.*

The use in such a situation *of a double procedure for, first, the selection of the private participant in the semi-private company and, second, the award of the concession to that company, would be liable to deter private entities and public authorities from forming institutionalised public-private partnerships, such as that in question in the main proceedings,*

*on account of the length of time involved in implementing such procedures and the legal uncertainty attaching to the award of the concession to the previously selected private participant.*

Case C-196/08 Acoset [2009] ECR I-9913 §48, 49, 56, 59, 61

As regards *the principles of equal treatment and transparency, the Member States must be recognised as having a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with those principles*, which are binding on contracting authorities in any procedure for the award of a public contract (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-0000, paragraph 44).

*Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches of those principles* (see *Michaniki*, paragraph 56).

Case C-376/08 Serrantoni Srl [2009] ECR I-12169 §31, 32

*(available only in French)*

Sur ce point, la Cour a considéré que l'on est en présence d'une concession de services lorsque le mode de rémunération convenu tient dans le droit du prestataire d'exploiter sa propre prestation et implique que celui-ci prenne en charge le risque lié à l'exploitation des services en question (voir arrêt du 18 juillet 2007, Commission/Italie, C-382/05, Rec. p. I-6657, point 34 et jurisprudence citée).

Il résulte également de la jurisprudence que *l'absence de transfert au prestataire du risque lié à la prestation des services indique que l'opération visée constitue un marché public de services et non pas une concession de services publics* (voir, en ce sens, arrêts du 27 octobre 2005, Contse e.a., C-234/03, Rec. p. I-9315, point 22, et Commission/Italie, précité, points 35 et 37).

Case C-437/07 Commission v Italy [2008] ECR I-153 §29, 30

Public service concession contracts do not fall within the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was applicable at the material time. *Notwithstanding the fact that such contracts fall outside the scope of that directive, the authorities concluding them are bound to comply with the fundamental rules of the EC Treaty, the principles of equal treatment and non-discrimination on grounds of nationality, and the concomitant obligation of transparency* (see, to that effect, *Telaustria and Telefonadress*, paragraphs 60 to 62, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 to 19). *Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed* (see, to that effect, *Telaustria and Telefonadress*, paragraph 62, and *Coname*, paragraph 21).

The application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as of the general principles of which they are the specific expression, is precluded if ***the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority or authorities*** (see, to that effect, *Teckal*, paragraph 50, and *Parking Brixen*, paragraph 62).

Of the relevant facts which can be identified from the order for reference, ***it is appropriate to consider, first, the holding of capital by the concessionaire, secondly, the composition of its decision-making bodies, and thirdly, the extent of the powers conferred on its governing council.***

It is clear from the order for reference that, in the case before the referring court, the concessionaire is an inter-municipal cooperative society whose members are municipalities and an inter-municipal association whose members in turn are solely municipalities, and is not open to private members.

***The fact that Brut  l  's decision-making bodies are composed of representatives of the public authorities which are affiliated to Brut  l   shows that those bodies are under the control of the public authorities, which are thus able to exert decisive influence over both Brut  l  's strategic objectives and significant decisions.***

Thirdly, it is evident from the file that Brut  l  's governing council enjoys the widest powers. In particular, it fixes the charges. It also has the power – but is under no obligation – to delegate to the sector or sub-sector boards the resolution of certain matters particular to those sectors or sub-sectors.

***The question arises as to whether Brut  l   has thus become market-oriented and gained a degree of independence which would render tenuous the control exercised by the public authorities affiliated to it.***

Subject to verification of the facts by the referring court, it follows that, ***despite the extent of the powers conferred on its governing council, Brut  l   does not enjoy a degree of independence sufficient to preclude the municipalities which are affiliated to it from exercising over it control similar to that exercised over their own departments.***

**Case C-324/07 Coditel [2008] ECR I-8457  25, 26, 29, 32, 34, 35, 36, 39**

In that regard, the principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, ***a duty of transparency*** which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, ***a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed*** (see, to that effect, *Telaustria and Telefonadress*, paragraphs 61 and 62, as well as *Parking Brixen*, paragraph 49, both cited above).

**Case C-260/04 Commission v Italy [2007] ECR I-7083  24**

The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, *a duty of transparency* which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, *a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed* (see, to that effect, *Telaustria and Telefonadress*, paragraphs 61 and 62, and *Parking Brixen*, paragraph 49).

Theoretically, *a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency* (*Parking Brixen*, paragraph 50).

However, in the field of public service concessions, *the application of the rules set out in Articles 12 EC, 43 EC and 49 EC*, as well as the general principles of which they are the specific expression, *is precluded if the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority* (*Parking Brixen*, paragraph 62).

It should be made clear that, since it is a matter of a derogation from the general rules of Community law, the two conditions stated in paragraph 24 of this judgment must be *interpreted strictly* and *the burden of proving* the existence of exceptional circumstances justifying the derogation to those rules *lies on the person seeking to rely on those circumstances* (see Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 46, and *Parking Brixen*, paragraph 63).

In the light of the foregoing considerations, the answer to the question referred must be that Articles 43 EC, 49 EC and 86 EC, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency *do not preclude* national legislation which allows *a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital*, provided that the *public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority*.

Case C-410/04 ANAV v Comune di Bari [2006] ECR I-3303 §21, 22, 24, 26, 33

Articles 43 EC and 49 EC, and the principles of equal treatment, non-discrimination and transparency, are to be interpreted as precluding a public authority from awarding, *without putting it out to competition*, a public service concession to a company limited by shares resulting from the conversion of a special undertaking of that public authority, a company whose objects have been extended to significant new areas, whose capital must obligatorily be opened in the short term to other capital, the geographical area of whose activities has been extended to the entire country and abroad, and whose Administrative Board possesses very broad management powers which it can exercise independently.

Case C-458/03 Parking Brixen GmbH [2005] ECR I-8585 §72



## 5.13 EDUCATION SERVICES

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Articles 1(a), 3 and 4 of Directive 92/51 must be interpreted as meaning that *the competent authorities of a host Member State are required*, under Article 3 of that directive, subject to the application of Article 4 of that directive, *to recognise a diploma awarded by a competent authority in another Member State even though that diploma attests to education and training received, in whole or in part, at an establishment located in the host Member State which, according to the legislation of that State, is not recognised as an educational establishment.*

Case C-151/07 Khatzithanasis [2008] ECR I-9013 §34

It is inherent in that system, which does not harmonise the education and training giving access to the regulated professions, that *it is for the competent authorities awarding diplomas giving such access alone to verify, in the light of the rules applicable within the framework of their professional education and training system, whether the conditions necessary for their award are fulfilled.* It may be observed, in this respect, that Article 8(1) of Directive 89/48 expressly obliges the host Member State to accept, in any event, as proof that the conditions for recognition of a diploma are satisfied, the certificates and documents issued by the competent authorities in the other Member States. Consequently, the *host Member State cannot examine the basis on which such documents have been issued*, although they do have the *possibility of carrying out a review as regards those of the conditions* laid down in Article 1(a) of Directive 89/48 *which, on the face of those documents, do not appear to have been satisfied already.*

*Consequently, it is also solely in the light of the rules applicable within the framework of the professional education and training system of the Member State to which the competent authority awarding a diploma belongs that it can be assessed whether the educational establishment in which the holder received his education and training is ‘a university or establishment of higher education’ or ‘another establishment of equivalent level’* within the meaning of the second indent of the first paragraph of Article 1(a) of Directive 89/48.

Case C-274/05 Commission vs. Greece [2008] ECR I-7969 §31, 32

It should be noted here that it is not necessary for that private financing to be provided principally by the pupils or their parents. According to consistent case-law, *Article 50 EC does not require that the service be paid for by those for whom it is performed* (see, for example, Case 352/85 Bond van Adverteerders and Others [1988] ECR 2085, paragraph 16; Joined Cases C-51/96 and C-191/97 Deliège [2000] ECR I-2549, paragraph 56; Smits and Peerbooms, paragraph 57; and Skandia and Ramstedt, paragraph 24).

It follows that *Article 49 EC is applicable* to facts such as those in the main proceedings, *where taxpayers of a given Member State send their children to a private school established in another Member State which may be regarded as providing services for remuneration, that is to say which is essentially financed by private funds*, which it is for the national court to verify.

Where taxpayers of a Member State send their children to a school situated in another Member State the financing of which is essentially from private funds, *Article 49 EC must be interpreted*

*as precluding legislation of a Member State which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.*

Case C-76/05 Schwarz and Gootjes-Schwarz [2007] ECR I-6849 §41, 47, Operative part

Whilst *the aim of ensuring high standards of university education appears legitimate to justify restrictions on fundamental freedoms*, such restrictions must be suitable for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it (see Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 23).

An *administrative practice* such as the one at issue in the main proceedings, *under which degrees awarded by a university of one Member State cannot be recognised in another Member State when the courses of preparation for those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments, is incompatible with Article 43 EC.*

Case C-153/02 Neri [2003] ECR I-13555 §46, 51

## 6. LEGAL CONSIDERATIONS

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### 6.1 ARTICLE 56 TFEU

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#### 6.1.1 Interpretation of article 56 TFEU

As the Court held in its judgment of 13 December 1983 (Case 218/82 *Commission v Council* [1983] ECR 4063), when the wording of secondary Community law is open to more than one interpretation, *preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty*. Consequently, the directive should not be construed in isolation and it is necessary to consider whether or not the requirements in question are contrary to the abovementioned provisions of the Treaty and to interpret the directive in the light of the conclusions reached in that respect.

Case 252/83 *Commission v Denmark* [1986] ECR 3713 §15

Case 205/84 *Commission v Germany* [1986] ECR 3755 §62

On these grounds it must be concluded that the provisions of the EEC Treaty, in particular Articles 59, 60 and 65, *must be interpreted as meaning that national legislation may not, by means of a requirement of residence in the territory, make it impossible for persons residing in another Member State to provide services* when less restrictive measures enable the professional rules to which provision of the service is subject in that territory to be complied with.

Case 39-75 *Coenen* [1975] ECR 1547 §12

*The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community.*

Case 2-74 *Reyners* [1974] ECR 631 §24

#### 6.1.2 Direct applicability of article 56 TFEU

According to the well-established case-law of the Court, *Articles 59 and 60 of the EEC Treaty became directly applicable on the expiry of the transitional period, and their applicability was not conditional on the harmonization or the coordination of the laws of the Member States*. Those articles require the removal not only of all discrimination against a provider of a service on the grounds of his nationality but also all restrictions on his freedom to provide services imposed by reason of the fact that he is established in a Member State other than that in which the service is to be provided.

Case 252/83 *Commission v Denmark* [1986] ECR 3713 §16

Case 205/84 *Commission v Germany* [1986] ECR 3755 §25

It must be observed in that regard that *directly applicable provisions of the Treaty are binding on all the authorities of the Member States* and they must therefore comply with them without it being necessary to adopt national implementing provisions. However, as the Court held in its judgment of 20 March 1986 in Case 72/85 (*Commission v Netherlands* [1986] ECR 1219), the right of individuals to rely on directly applicable provisions of the Treaty before national courts *is only a minimum guarantee* and is not sufficient in itself to ensure the full and complete implementation of the Treaty. It is clear from previous judgments of the Court, in particular its judgment of 25 October 1979, cited above, that if a provision of national law that is incompatible with a provision of the Treaty, even one directly applicable in the legal order of the Member States, is retained unchanged, this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law and that maintaining such a provision in force therefore amounts to a failure by the State in question to comply with its obligations under the Treaty.

Case 168/85 Commission v Italy [1986] ECR 2945 §11

Furthermore, that argument is ill-founded. The incompatibility of national legislation with provisions of the Treaty, *even* provisions which are *directly applicable*, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. As the Court has consistently held with regard to the implementation of directives by the Member States, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty.

Case 168/85 Commission v Italy [1986] ECR 2945 §13

The first paragraph of Article 59 of the Treaty requires restrictions on freedom to provide services within the Community to be progressively abolished during the transitional period in respect of nationals of Member States of the Community. As stated by the Court in its judgment of 18 January 1979 (Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35) that provision, interpreted in the light of Article 8 (7) of the Treaty, imposes an obligation to obtain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures. It follows that the essential requirements of Article 59 of the Treaty became directly and unconditionally applicable on the expiry of that period.

Case 279/80 Webb [1981] ECR 3305 §13

Joined cases 110 and 111/78 Van Wesemael [1979] ECR 35 §25, 26

As the Court has already ruled in its judgments of 4 December 1974 in Case 41/74 (*van Duyn v Home Office* [1974] ECR 1337) and 3 December 1974 in Case 33/74 (*van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299) respectively, Article 48 on the one hand and the first paragraph of *Article 59* and *the third paragraph of Article 60* of the Treaty on the other — the last two provisions at least in so *far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided* — have

*a direct effect in the legal orders of the Member States and confer on individuals rights which national courts must protect.*

Case 13/76 Donà [1976] ECR 1333 §20

Case 33/74 Van Binsbergen [1974] ECR 1299 §27

The provisions of Article 59, the application of which was to be prepared by directives issued during the transitional period, therefore became unconditional on the expiry of that period.

Case 33/74 Van Binsbergen [1974] ECR 1299 §24

### 6.1.3 Obligation of Member States to modify laws incompatible with the Treaty

The following principles established by the Court of Justice apply mutatis mutandis to the freedom to provide services.

Second, it must be borne in mind that *the need to ensure that Community law is fully applied requires Member States not only to bring their legislation into conformity with Community law but also to do so by adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know the full extent of their rights and rely on them before the national courts* (see, to that effect, with regard to directives, Case C-360/87 *Commission v Italy* [1991] ECR I-791, paragraph 12, and Case C-220/94 *Commission v Luxembourg* [1995] ECR I-1589, paragraph 10). It is of little consequence in this connection that the provisions of Community law, compliance with which is to be ensured, are directly applicable and that individuals are therefore entitled to rely on them, in judicial proceedings, as against a defaulting Member State (see, to that effect, in particular, Case C-208/90 *Emmott v Minister for Social Welfare and the Attorney General* [1991] ECR I-4269, paragraphs 20 and 21).

In addition, it follows from the case-law of the Court that *the requirement of precision, clarity and transparency which national legislation must satisfy* is also applicable where general principles of constitutional law, such as the general principle of equal treatment, are involved, and is *of particular importance where the provisions of Community law in question are intended to accord rights to nationals of other Member States, inasmuch as those nationals are not normally aware of such principles* (Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23).

Case C-162/99 Commission v Italy [2001] ECR I-541 §22, 23

[...] *by retaining in force* laws, regulations and administrative *provisions restricting the right to register a vessel* in the national register and to fly the national flag to vessels more than half the shares in which are owned by natural persons of French nationality or which are owned by legal persons having a seat in France or legal persons a certain proportion of whose directors, administrators or managers must be French nationals or, in the case of a private limited company, limited partnership, or general commercial or non-commercial partnership, more than half of whose capital must be held by French citizens or all of whose capital must be held by French

persons who fulfil certain conditions, *the French Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the Treaty* (...).

Case C-334/94 Commission v France [1996] ECR I-1307 §24

It has consistently been held that *the incompatibility of national legislation with provisions of the Treaty*, even provisions which are directly applicable, *can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices*, which by their nature are *alterable* at will by the authorities and are not given the appropriate publicity, *cannot be regarded as constituting the proper fulfilment of obligations under the Treaty* (...).

Case C-334/94 Commission v France [1996] ECR I-1307 §30

Case 168/85 Commission v Italy [1986] ECR 2945 §13

[...] the right of individuals to rely on directly applicable provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty. It is clear from previous judgments of the Court, in particular its judgment of 25 October 1979, cited above, that *if a provision of national law that is incompatible with a provision of the Treaty, even one directly applicable in the legal order of the Member States, is retained unchanged, this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty* as to the possibility of relying on Community law and *that maintaining* such a provision in force therefore *amounts to a failure* by the State in question to comply with its obligations under the Treaty.

Consequently, *the Italian Republic cannot escape from its obligation to amend its national law in accordance with the requirements of the Treaty by relying on the direct applicability of the provisions of the Treaty*, on the introduction of certain administrative practices or on the fact that Community citizens have, in its view, an increased awareness of their rights.

Case 168/85 Commission v Italy [1986] ECR 2945 §11, 14

#### 6.1.4 Inefficiency of mere administrative practices

As regards the argument of the Netherlands Government that Directive 95/47 is already observed in the Netherlands in practice although it has not yet been fully implemented in Netherlands law, suffice it to observe that *mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty* (see, in particular, Case C-159/99 *Commission v Italy* [2001] ECR I-4007, paragraph 32). *This is all the more true of mere practices of economic operators.*

Case C-254/00 Commission v Netherlands [2001] ECR I-7567 §7

### **6.1.5 Right to redress in the case of damage attributable to a Member State**

The following principles established by the Court of Justice apply mutatis mutandis to the freedom to provide services.

#### 6.1.5.1 Principle of the right to reparation (corollary of direct effect)

First of all, it should be noted that, as the Court has repeatedly held, ***the principle that the State is liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty*** (judgments in *Francovich and Others*, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-392/93 *The Queen v HM Treasury ex parte British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-0000, paragraph 20).

**Case C-66/95 Sutton [1997] ECR I-2163 §31**

**Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA and Factortame III [1996] ECR I-1029 §31**

The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (...). The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State.

As appears from paragraph 33 of the judgment in *Francovich and Others*, ***the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.***

It is all the more so in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts. In that event, ***the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.***

In this case, it is undisputed that the Community provisions at issue, namely ***Article 30 of the Treaty*** in Case C-46/93 and ***Article 52*** in Case C-48/93, have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. ***Breach of such provisions may give rise to reparation.***

**Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA and Factortame III [1996] ECR I-1029 §20, 22, 23**

### 6.1.5.2 The three pre-conditions for the right to redress (according to European Union law)

According to the abovementioned case-law, *a Member State's obligation to make reparation for the loss and damage so caused is subject to three conditions: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties* (judgments in *Brasserie du Pêcheur* and *Factortame*, paragraph 51; *British Telecommunications*, paragraph 39; *Hedley Lomas*, paragraph 25; *Dillenkofer and Others*, paragraph 21). *Those conditions are to be applied according to each type of situation* (judgment in *Dillenkofer and Others*, paragraph 24).

Case C-66/95 Sutton [1997] ECR I-2163 §32

Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA and Factortame III [1996] ECR I-1029 §51

In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied (...), *the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules* as to the division of powers between constitutional authorities.

Firstly, *those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer*.

Secondly, those conditions correspond in substance to those defined by the Court in relation to Article 215 in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.

*The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress*, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law.

*The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law*. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.

Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA and Factortame III [1996] ECR I-1029 §33, 52, 53, 66, 79

#### 6.1.5.2.1 First condition: attribution of rights to individuals

The first condition is manifestly satisfied in the case of Article 30 of the Treaty, the relevant provision in Case C-46/93, and in the case of Article 52, the relevant provision in Case C-48/93. Whilst Article 30 imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect (Case 74/76 *Iannelli & Volpi v Meroni* [1977])



ECR 557, paragraph 13). Likewise, *the essence of Article 52 is to confer rights on individuals* (Case 2/74 *Reyners* [1974] ECR 631, paragraph 25).

Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA and Factortame III* [1996] ECR I-1029 §54

#### 6.1.5.2.2 *Second condition: breach sufficiently serious*

As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, *the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.*

The factors which the competent court may take into consideration include *the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable*, the fact that *the position taken by a Community institution* may have contributed *towards the omission, and the adoption or retention of national measures or practices* contrary to Community law.

On any view, *a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law* of the Court on the matter from which it is clear that the conduct in question constituted an infringement.

The decision of the United Kingdom legislature to introduce in the Merchant Shipping Act 1988 provisions relating to the conditions for the registration of fishing vessels has to be assessed differently in the case of the provisions making registration subject to a nationality condition, which constitute direct discrimination manifestly contrary to Community law, and in the case of the provisions laying down residence and domicile conditions for vessel owners and operators.

*The latter conditions are prima facie incompatible with Article 52* of the Treaty in particular, but the United Kingdom sought to justify them in terms of the objectives of the common fisheries policy. In the judgment in *Factortame II*, cited above, the Court rejected that justification.

*In order to determine whether the breach of Article 52* thus committed by the United Kingdom was sufficiently serious, the national court might take into account, inter alia, the legal disputes relating to particular features of the common fisheries policy, the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the state of certainty of Community law made by the national courts in the interim proceedings brought by individuals affected by the Merchant Shipping Act.

Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA and Factortame III* [1996] ECR I-1029 §55, 56, 57, 61, 62,

6.1.5.2.3 *Third condition: direct causal link between the breach of the obligation borne by the state and the damage sustained by the injured parties*

As for the third condition, ***it is for the national courts to determine whether there is a direct causal link*** between the breach of the obligation borne by the State and the damage sustained by the injured parties.

**Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA and Factortame III [1996] ECR I-1029 §65**

6.1.5.3 Implementation of redress (according to national law)

Finally, since the judgment in *Francovich and Others*, it has been settled law that, while the right to reparation is founded directly on Community law where ***the three conditions set out above are fulfilled, the national law on liability provides the framework within which the State must make reparation for the consequences of the loss and damage caused, provided always that the conditions laid down by national law relating to reparation of loss and damage must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.***

**Case C-66/95 Sutton [1997] ECR I-2163 §33**

**Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA and Factortame III [1996] ECR I-1029 §67**

***In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria*** for determining the extent of reparation.

Accordingly, the reply to the national court's question must be that the obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

**Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA and Factortame III [1996] ECR I-1029 §83, 96**

### **6.1.6 National remedies**

Accordingly, the answer to the first question must be that the principle of effective judicial protection of an individual's rights under Community law must be interpreted as meaning that ***it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Article 49 EC, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a matter for the national court to establish.***

It follows from the foregoing that the answer to the second question must be that ***the principle of effective judicial protection of an individual's rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are***

*compatible with Community law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights.*

The answer to the third question must therefore be that *the principle of effective judicial protection of an individual's rights under Community law must be interpreted as meaning that, where the compatibility of national provisions with Community law is being challenged, the grant of any interim relief to suspend the application of such provisions until the competent court has given a ruling on whether those provisions are compatible with Community law is governed by the criteria laid down by the national law applicable before that court, provided that those criteria are no less favourable than those applying to similar domestic actions and do not render practically impossible or excessively difficult the interim judicial protection of those rights.*

Case C-432/05 Unibet [2007] ECR I-2271 § 65, 77, 83

## 6.2. SERVICES DIRECTIVE

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### 6.2.1 Scope of Directive (art. 2)

As regards, first, the wording of *Article 2(2)(d)*, it should be noted that the concept of 'services in the field of transport' adopted by the EU legislature as part of Directive 2006/123 corresponds to services *falling within the scope of Title VI of Part Three of the FEU Treaty, which contains Articles 90 to 100 of that Treaty relating to the common transport policy, which are excluded, under Article 58(1) TFEU, from the provisions of that Treaty relating to the free movement of services.*

Although the provisions of Title VI do not provide a definition of the concept of 'transport', it follows from *Article 100(1) TFEU that transport by 'inland waterway' falls under that title.* Thus several maritime transport services have been the subject of specific common rules adopted by the EU legislature under Article 100(2) TFEU, in particular those covered by Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

With respect, next, to the purpose and scheme of Article 2(2)(d) of Directive 2006/123, it should be noted that, as is stated in recital 21 in the preamble to that directive, *the exclusion of services in the field of transport is intended to cover inter alia urban transport services.*

In the present case, it is apparent from the information provided in the order for reference, which was not challenged in the written observations submitted to the Court, that, *even if, prima facie, the service at issue in the main proceedings constitutes transport by 'inland waterway' within the meaning of Article 100(1) TFEU, it is intended to provide the recipients of that service with the pleasant context of a celebration rather than point-to-point transport in the city of Amsterdam.*

Consequently, the answer to the first question in Case C-340/14 is that Article 2(2)(d) of Directive 2006/123 must be interpreted as meaning that, subject to the checks to be carried out by the referring court, an activity, such as that which is the subject of the application for authorisation in the main proceedings, which consists in providing, for payment, a service of carrying passengers on a boat for a waterway tour of a city for event-related purposes, ***does not constitute a service in the ‘field of transport’ within the meaning of that provision which is excluded from the scope of that directive.***

**Case C-340/14 Trijber [2015] not published vet § 47, 48, 49, 56, 59**

In the first place, with regard to the wording of *Article 2(2)(d)* of the Services Directive, it should be noted that the terms used by that provision in all of its language versions, with the exception of that in German, namely ‘*services in the field of transport*’, ***have a wider scope than that of the expression ‘transport services’***, as it is used in recital 21 in the preamble to that directive to designate ‘urban transport, taxis and ambulances as well as port services’.

***It is therefore necessary to interpret that exclusion as covering***, as the Advocate General has stated in point 28 of his Opinion, not only any physical act of moving persons or goods from one place to another by means of a vehicle, aircraft or waterborne vessel, ***but also any service inherently linked to such an act.***

***Roadworthiness tests for motor vehicles are, admittedly, ancillary to the transport service. However, such tests take place as a pre-condition, indispensable to the exercise of the main activity of transport, as is clear from the road-safety objective underlying roadworthiness tests for motor vehicles.***

It should be noted, in the second place, that that interpretation is supported by the purpose of Directive 2009/40 on roadworthiness tests for motor vehicles which, even though, as was held by the Court in the judgment in *Commission v Portugal* (C-438/08, EU:C:2009:651, paragraph 26), it does not contain any provisions on the rules relating to access to the activity of roadworthiness testing, governs the contents of that activity and seeks expressly, as is stated in recital 2 in the preamble thereto, to guarantee road safety. Such a purpose also follows explicitly from recitals 3 and 43 in the preamble to Directive 2014/45, which succeeded Directive 2009/40.

Consequently, ***vehicle roadworthiness tests must be understood as being ‘services in the field of transport’, within the meaning of Article 2(2)(d) of the Services Directive.***

**Case C-168/14 Grupo Itevelesa [2015] not published vet § 41, 46, 47, 48, 50**

In this respect, it should be noted that **certification services** fall within the scope of Directive 2006/123, since they are expressly referred to in recital 33 thereof, in the list of examples of activities covered by that directive.

**Case C-593/13 Rina Services and Others [2015] not published vet § 24**

As regards, first, the wording of *Article 2(2)(f)*, it must be pointed out that the concept of ‘**healthcare services**’ adopted by the European Union legislature is rather broad, in that it includes services relating to human health, whether or not they are provided via healthcare

facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private.

That is also apparent from the handbook on the implementation of the Services Directive ('the handbook'), which merely adds that the exclusion from the scope of Directive 2006/123 of *healthcare services covers activities directly and strictly linked to the state of human health and therefore does not concern services which are designed to enhance well-being or provide relaxation, such as sports or fitness clubs*. That is, incidentally, reflected in Directive 2011/24, Article 3(a) of which defines '*healthcare*' as '*health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices*'.

In that respect, it must be pointed out that, as is clear from recital 7 in the preamble to Directive 2006/123, *that directive establishes a general legal framework which benefits a wide variety of services while taking into account the distinctive features of each type of activity and its system of regulation, as well as other general interest objectives, including public health*. It follows that the European Union legislature expressly sought to ensure the respect of the balance between, on the one hand, the objective of eliminating obstacles to freedom of establishment of service providers and the free movement of services, and, on the other hand, the need to safeguard the specific characteristics of certain sensitive activities, in particular those linked to the protection of human health.

As regards, in the second place, the '*social services*' referred to in *Article 2(2)(j)* of Directive 2006/123, it is clear from a reading of that provision in conjunction with recital 27 in the preamble to that directive that only those services which meet two cumulative conditions fall within the scope of that concept.

The first condition concerns the nature of the activities carried out, which, as explained in the handbook, *must relate to, inter alia, the care and assistance of elderly persons who are permanently or temporarily in a state of need because of a total or partial lack of independence and who thus risk being marginalised*. They must, in other words, be activities which are essential in order to guarantee the *fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity*.

The second condition concerns the status of the service provider, which may be the State itself, a charity recognised as such by the State, or a private service provider mandated by the State.

*As regards the content of that mandate, it must be noted that, as confirmed by the handbook, a private service provider is to be considered as being mandated by the State if it has an 'obligation' to provide the social services which have been entrusted to it.*

From the perspective of the provider, *that 'obligation'* must be understood, as is also clear from the communication and resolution mentioned above, as implying, first, the *binding commitment to provide the services in question and, secondly, the need to do so under certain specific conditions*. Those conditions relate, inter alia, to ensuring that the services are provided in accordance with the established quantitative and qualitative requirements and in such a manner as

to ensure the equality of access to services, subject, in principle, to adequate financial compensation, calculated on the basis of parameters established in advance in an objective and transparent manner (see, by analogy, *Case C-140/09 Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 38 and the case-law cited).

Thus, the fact that, for reasons of public interest, a national authority adopts measures imposing authorisation and operation rules on all of the operators in a given economic sector does not, in itself, constitute such a mandating act for the purposes of the application of Article 2(2)(j) of Directive 2006/123.

Case C-57/12 FERMABEL [2013] not published vet §35, 37, 39,42, 43,44, 46, 47, 49

It is apparent from *Article 2(2)(f)* of Directive 2006/123, read in the light of recital 22 in the preamble thereto, that ***the directive does not apply to healthcare services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided.***

In those circumstances, pursuant to Article 2(2)(f) of Directive 2006/123, the activities of the ***opticians*** at issue in the main proceedings are excluded from the scope of that directive.

Case C- 539/11 Ottica New Line di Accardi Vincenzo [2013] not vet published §18, 22

In order to reply to these questions, it should be noted that, as stated in recital 9 to Directive 2006/123, that directive does not apply to, inter alia, ‘requirements, such as ... rules concerning the development or use of land, town and country planning, building standards ...’.

In addition, under Article 2(2)(j) of Directive 2006/123, that directive does not apply to services relating to ***social housing or to persons permanently or temporarily in need which are provided by the State or by providers mandated by the State.***

Joined Cases C-197/11 and C-203/11 Libert and Others [2013] not published vet §104, 105

## 6.2.2 Relation to Treaty provisions

In those circumstances, ***the national legislation at issue in the main proceedings has to be assessed in the light of the provisions of the TFEU on freedom of establishment, which are applicable directly to transport, and not on the basis of the Title of that Treaty concerning transport*** (see, to that effect, judgment in *Yellow Cab Verkehrsbetrieb*, C-338/09, EU:C:2010:814, paragraph 33).

Case C-168/14 Grupo Itevelesa [2015] not published vet § 53

In addition, it must be noted that, in particular, *the general obligation set out in Article 16(1) of Directive 2006/123, according to which the Member States are to ensure access to and exercise of a service activity within their territory by making that access or exercise subject only to non-discriminatory and objectively justified requirements, stems directly from Article 49 EC.*

Case C-458/08 Commission v Portugal [2010] ECR I-11599 § 88

First of all, in order to address the main argument put forward by the Grand Duchy of Luxembourg in its defence, it must be pointed out that, according to *Article 3(1)(a) thereof, Directive 2006/123 is not intended to replace Directive 96/71 and the latter prevails over the former in the event of conflict.* Therefore, the Grand Duchy of Luxembourg cannot base its arguments on the legislative procedure which led to the adoption of Directive 2006/123 in order to support its interpretation of a provision of Directive 96/71.

C-319/06 - Commission v Luxembourg [2008] ECR I-4323 §23

### 6.2.3 Interpretation of Articles of the Services Directive

#### 6.2.3.1 Article 10

In the present case, as regards, first, *the suitability of the measure* at issue in the main proceedings for achieving the objective pursued, it should be noted that it is apparent from the evidence provided to the Court that *the purpose of the language requirement at issue is, in essence, to strengthen the monitoring of criminal activities related to prostitution by the delegation of part of that monitoring to the operators of prostitution businesses, by giving them the means to identify preventively evidence of the existence of such criminal activities.*

Such a measure appears to be appropriate for achieving the objective pursued, since, by allowing prostitutes to give the operator of prostitution businesses directly and in person any evidence making it possible to establish the existence of an offence related to prostitution, it *is likely to facilitate the performance by the competent national authorities of the necessary checks to ensure compliance with the provisions of national criminal law* (see, by analogy, judgment in Commission v Germany, C-490/04, EU:C:2007:430, paragraph 71).

As regards, secondly, the question of *whether the measure at issue goes beyond what is necessary to achieve the objective pursued, it should, first, be noted that that measure merely requires the use of any language that can be understood by the parties concerned, which is less intrusive on the freedom to provide services than a measure which imposes the exclusive use of an official language of the Member State concerned or another specific language* (see, by analogy, judgment in Las, C-202/11, EU:C:2013:239, paragraph 32).

Next, it does not appear that the measure at issue in the main proceedings requires a high degree of linguistic knowledge, merely *that the parties can understand each other.*

Finally, *there do not appear to be any less restrictive measures capable of securing the legitimate objective of general interest pursued.* In particular, as submitted by the Netherlands

Government, the intervention of a third party, as suggested by Mr Harmsen, could, given the particularities of the type of activities at issue, be the source of harmful interference in the relationship between the operator and the prostitutes, which it is for the referring court to determine. As for camera checks, they do not necessarily allow for the preventive identification of criminal offences.

Consequently, the answer to the third question in Case C-341/14 is that Article 10(2)(c) of Directive 2006/123 must be interpreted as not precluding a measure, such as that at issue in the main proceedings, ***under which the grant of authorisation for the exercise of an activity, such as that at issue in the present case, consisting in the operation of window prostitution businesses by renting rooms out in shifts is subject to the condition that the service provider is able to communicate in a language which is understood by the recipients of those services, in this case prostitutes***, where that condition is such as to ensure that the legitimate objective of general interest pursued — namely the prevention of criminal offences related to prostitution — is secured, and does not go beyond what is necessary to achieve that objective, which is for the referring court to determine.

Case C-340/14 Trijber [2015] not published vet § 72, 73, 74, 75, 76, 77

#### 6.2.3.2 Article 11

In that regard, it should be noted that according to the express wording of Article 11(1) of Directive 2006/123, ***authorisations granted to service providers must not be for a limited period, except in those cases exhaustively listed in Article 11(1)***, which include the case in which the number of available authorisations is limited by an overriding reason relating to the public interest.

It follows that, where ***the number of available authorisations is limited by such an overriding reason relating to the public interest, those authorisations must, in contrast, be for a limited period***.

As noted by the Advocate General in point 68 of his Opinion, no discretion may be conceded, in that regard, to the competent national authorities, without undermining the objective pursued by Article 11 of Directive 2006/123 of securing service providers' access to the market in question.

In the present case, the actual wording of the question shows that ***the referring court has already found that the requirement imposed by the national legislation at issue in the main proceedings — which is that the number of authorisations granted for the exercise of the activity in question is limited — pursues objectives which come under overriding reasons relating to the public interest*** within the meaning of Article 4(8) of Directive 2006/123, namely ***the protection of the environment and public safety***.

It follows that, in the circumstances of the case in the main proceedings, authorisations granted by the competent authorities may not be for an unlimited period.

Case C-340/14 Trijber [2015] not published vet § 61, 62, 63, 64



### 6.2.3.3 Article 14

In this respect, it should be noted, as observed by the Republic of Poland, that an interpretation of Article 3(3) of Directive 2006/123 to the effect that Member States may justify, on the basis of primary law, a requirement prohibited by **Article 14** of that directive would deprive that provision of any practical effect by ultimately undermining the ad hoc harmonisation intended by that directive.

That interpretation would be contrary to the conclusion drawn by the EU legislature in recital 6 in the preamble to Directive 2006/123, *to the effect that barriers to freedom of establishment may not be removed solely by relying on direct application of Article 49 TFEU, owing, inter alia, to the extreme complexity of addressing barriers to that freedom on a case-by-case basis. To concede that the ‘prohibited’ requirements under Article 14 of that directive may nevertheless be justified on the basis of primary law would in fact be tantamount to reintroducing such case-by-case examination, under the FEU Treaty, for all restrictions on freedom of establishment.*

Moreover, *it should be noted that Article 3(3) of Directive 2006/123 does not prevent Article 14 of that directive from being interpreted as meaning that there can be no justification for the prohibited requirements listed in Article 14.* That prohibition, with no possibility of justification, seeks to ensure the systematic and swift removal of certain restrictions on freedom of establishment, regarded by the EU legislature and the case-law of the Court as adversely affecting the proper functioning of the internal market. That aim is consistent with the FEU Treaty.

Accordingly, *even though Article 52(1) TFEU allows Member States to justify, on any of the grounds listed in that provision, national measures constituting a restriction on the freedom of establishment, that does not prevent the EU legislature, when adopting secondary legislation, such as Directive 2006/213, giving effect to a fundamental freedom enshrined in the FEU Treaty, from restricting certain derogations, especially when, as in the present case, the relevant provision of secondary law merely reiterates settled case-law to the effect that a requirement such as that at issue in the main proceedings is incompatible with the fundamental freedoms on which economic operators can rely* (see, to that effect, inter alia, judgment in *Commission v France*, C-334/94, EU:C:1996:90, paragraph 19).

**Case C-593/13 Rina Services and Others [2015] not published vet § 37, 38, 39, 40**

### 6.2.3.4 Articles 16 and 17

In that respect, it must be noted that, as can be seen from Article 4(1) of Directive 2006/123, the *concept of ‘service’ referred to in that directive is the same as that referred to in Article 57 TFEU.*

The activities of collecting societies are subject to the provisions of Article 56 TFEU et seq. relating to the freedom to provide services (*see, to that effect, Case 22/79 Greenwich Film Production [1979] ECR 3275, paragraph 12, Case 7/82 GVL v Commission [1983] ECR 483, paragraph 38; and Joined Cases C-92/92 and C-326/92 Phil Collins and Others [1993] ECR I-5145, paragraph 24).*

That is the case not only as regards the relationship between a collecting society and a copyright holder, as can be seen from the case-law cited in the above paragraph, but also *as regards the relationship between a collecting society, such as OSA, and a user of protected works, such as the spa establishment at issue in the main proceedings.*

Furthermore, as the Commission rightly points out, *it is of little importance, in that regard, whether it is the copyright holder or the user of the protected works which pays for that service. Article 57 TFEU does not require that the service provided be paid for by those who benefit from it* (Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16).

It follows that *a collecting society, such as OSA, must be regarded as providing a ‘service’ within the meaning of both Article 4(1) of Directive 2006/123 and Article 57 TFEU* to the users of protected works, such as the spa establishment at issue in the main proceedings.

As regards the question whether Article 16 of Directive 2006/123 applies to such a service, it must be observed, first of all, that under Article 17(11) of that directive, *Article 16 does not apply to copyright and to neighbouring rights.*

As the Advocate General pointed out in point 64 of her Opinion, since only services can be excluded from the application of Article 16 of Directive 2006/123, *Article 17(11) of that directive must be interpreted as excluding the service relating to copyright* referred to in paragraph 63 of the present judgment from the scope of Article 16.

Case C-351/12 OSA [2014] not published yet §58, 59, 60, 62, 63, 64, 65

#### 6.2.3.5 Article 24

It follows from both the purpose and the context of Article 24 that, as the European Commission correctly submits, *the intention of the EU legislature was not only to put an end to total prohibitions, on the members of a regulated profession, from engaging in commercial communications whatever their form but also to remove bans on one or more forms of commercial communication within the meaning of Article 4(12) of Directive 2006/123, such as, for example, advertising, direct marketing or sponsorship. Having regard to the examples in Recital 100 of that directive, professional rules forbidding the communication, in one or more given media, of information on providers or their activities must also be regarded as total prohibitions proscribed by Article 24(1) of that directive.*

However, under Article 24(2) of Directive 2006/123, read in the light of the second sentence of Recital 100 in its preamble, the Member States retain the right to lay down prohibitions relating to the content or methods of commercial communications as regards regulated professions, *provided that the rules laid down are justified and proportionate for the purposes of ensuring, in particular, the independence, dignity and integrity of the profession, as well as the professional secrecy necessary in its practice.*

*The ban on canvassing*, as laid down by the said Article 12-I, is of broad conception, in that it prohibits any canvassing, whatever its form, content or means employed. *Thus, that ban includes*

*a prohibition of all means of communication enabling the carrying out of that form of commercial communication.*

It follows that such a ban must be regarded as a total prohibition of commercial communications prohibited by Article 24(1) of Directive 2006/123.

Case C-119/09 Société fiduciaire nationale d'expertise comptable [2011] ECR I-2551 § 29, 30, 41, 42

## 6.3 RELATION TO OTHER PRIMARY LAW

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### 6.3.1 Article 4 (3) TEU<sup>10</sup>

The Court notes to begin with that *Article 5 of the Treaty*, referred to in question 1, which provides that Member States must ensure fulfilment of their obligations arising out of the Treaty, *is worded so generally that there can be no question of applying it autonomously when the situation concerned is governed by a specific provision of the Treaty* (see the judgment in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l' Ouest and Others v Receveur Principal des Douanes de La Pallice Port* [1992] ECR I-1847, paragraph 19).

Case C-18/93 Corsica Ferries Italia [1994] ECR I-1783 §18

### 6.3.2 Article 18 TFEU<sup>11</sup>

According to the Court's settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-475/11 *Konstantinides* [2013] ECR, paragraph 44 and the case-law cited).

*That provision of the FEU Treaty therefore has a scope which exceeds the prohibition of discrimination provided for in Article 18 TFEU.*

C-628/11 International Jet Management [2015] not published yet § 57, 58

Consequently, the answer to the questions referred is that *Article 12 EC precludes legislation* of a Member State, such as that at issue in the main proceedings, which, for the organisation of balloon flights in that Member State and subject to administrative sanctions in the event of failure to comply with that legislation,

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<sup>10</sup> See the table of equivalences (Article 10 TEC / 5 EC)

<sup>11</sup> See the table of equivalences (Article 12 TEC / Article 6 EC)

- *requires* a person resident or established in another Member State, who is licensed in that second Member State to operate commercial balloon flights, *to have a place of residence or company seat in the first Member State, and*
- *obliges that person to obtain a new licence*, without due account being taken of the fact that the conditions of issue are, essentially, the same as those which apply to the licence already issued to that person in the second Member State.

Case C-382/08 Neukirchinger [2011] ECR I-139 §44

Since *Articles 43 EC and 49 EC are specific applications of the general prohibition of discrimination on grounds of nationality laid down in Article 12 EC, there is no need to refer to Article 12 EC* in order to answer the question (see, to that effect, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraphs 38 and 39, and Case C-105/07 *Lammers & Van Cleeff* [2008] ECR I-173, paragraph 14).

Case C-91/08 Wall AG [2010] ECR I-2815 §32

With regard to Article 12 EC, of which an interpretation is also requested by the referring court and which enshrines the general principle of non-discrimination on grounds of nationality, it must be recalled that *that provision applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination* (see Case C-40/05 *Lyyski* [2007] ECR I-99, paragraph 33 and the case-law cited).

However, *in relation to the freedom of movement for workers, the right of establishment, the freedom to provide services and the free movement of capital, the principle of non-discrimination was implemented by Articles 39(2) EC, 43 EC, 49 EC and 56 EC respectively* (see, with regard to Article 39(2) EC, *Lyyski*, paragraph 34; with regard to Article 49 EC, Case C-289/02 *AMOK* [2003] ECR I-15059, paragraph 26; and, with regard to Articles 43 EC and 56 EC, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 99).

Case C-222/07 UTECA [2009] ECR I-1407 §37, 38

Secondly, by prohibiting 'any discrimination on grounds of nationality', *Article 6* of the Treaty *requires that persons in a situation governed by Community law be placed entirely on an equal footing with nationals of the Member State* (Case 186/87 *Cowan* [1989] ECR 195, paragraph 10).

Case C-274/96 Bickel and Franz [1998] ECR I-7637 §14

It must be borne in mind that *Article 7 of the EEC Treaty (Article 6 of the EC Treaty), which lays down as a general principle a prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific rules prohibiting discrimination* (see the judgment in Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* [1991] ECR I-5889, paragraph 11). *The question whether legislation* of the kind in question in the main proceedings *is compatible with the Treaty must therefore be examined with reference to the specific rules implementing that principle.*

Case C-379/92 Peralta [1994] ECR I-3453 §18

*In the field of freedom to provide services, the principle of the prohibition of discrimination is given specific expression in Article 59 of the Treaty.*

Case C-18/93 Corsica Ferries Italia [1994] ECR I-1783 §20

It follows that copyright and related rights, which by reason in particular of their effects on intra-Community trade in goods and services, fall within the scope of application of the Treaty, *are necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty, without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty.*

It is undisputed that *Article 7 is not concerned with any disparities in treatment or the distortions which may result, for the persons and undertakings subject to the jurisdiction of the Community, from divergences existing between the laws of the various Member States, so long as those laws affect all persons subject to them, in accordance with objective criteria and without regard to their nationality (judgment in Case 14/68 Wilhelm v Bundeskartellamt [1969] ECR I, paragraph 13).*

Joined cases C-92/92 and C-326/92 Collins [1993] ECR I-5145 §27, 30

*By prohibiting "any discrimination on grounds of nationality" Article 7 of the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State. In so far as this principle is applicable it therefore precludes a Member State from making the grant of a right to such a person subject to the condition that he reside on the territory of that State - that condition is not imposed on the State's own nationals.*

Under Article 7 of the Treaty the prohibition of discrimination applies "within the scope of application of this Treaty" and "without prejudice to any special provisions contained therein". This latter *expression refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given concrete form in respect of specific situations.* Examples of that are the provisions concerning free movement of workers, the right of establishment and the freedom to provide services.

Case 186/87 Cowan [1989] ECR 195 §10, 14

*Article 7 of the Treaty provides that within the scope of application of the Treaty, any discrimination on grounds of nationality shall be prohibited. As regards employed persons and persons providing services, this rule has been implemented by Articles 48 to 51 and 59 to 66 of the Treaty respectively and by measures of the Community institutions adopted on the basis of those provisions.*

Case 13-76 Donà [1976] ECR 1333 §6

### 6.3.3 Article 21 TFEU<sup>12</sup>

Situations governed by Community law include those covered by the freedom to provide services, the right to which is laid down in Article 59 of the Treaty. The Court has consistently held that this right includes the freedom for the recipients of services to go to another Member State in order to receive a service there (Cowan, paragraph 15). Article 59 therefore covers all nationals of Member States who, independently of other freedoms guaranteed by the Treaty, visit another Member State where they intend or are likely to receive services. Such persons - and they include both Mr Bickel and Mr Franz - are free to visit and move around within the host State. Furthermore, pursuant to Article 8a of the Treaty, *'[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'*.

Case C-274/96 Bickel and Franz [1998] ECR I-7637 §15

### 6.3.4 Article 34 TFEU<sup>13</sup>

By its questions 1 and 2, which should be considered together, the referring court asks whether national legislation, such as the amending law of 2011, which, without providing for a transitional period, *introduces a five-fold increase in the flat-rate tax to be paid on slot machines operated in amusement arcades and, in addition, introduces a proportional tax on that activity, constitutes a restriction on the free movement of goods and freedom to provide services, guaranteed by Articles 34 TFEU and 56 TFEU respectively.*

At the outset, it must be noted that legislation of that kind directly affects the activity of operating slot machines. However, the influence of such legislation on that activity *could only indirectly affect the importation of those machines.*

Without there being any need to regard the importation of slot machines as ancillary to their use, it must be noted that, even though the use of such devices is linked to operations to import them, the former activity comes under the provisions of the Treaty relating to the freedom to provide services and the latter under those relating to the free movement of goods (judgment in *Anomar and Others*, C-6/01, EU:C:2003:446, paragraph 55).

However, even assuming that national legislation such as the amending Law of 2011 hinders the importation of slot machines in so far as it limits the opportunities for their use, the Court is unable, in the present proceedings, to rule on the question whether Article 34 TFEU precludes the application of such legislation in the absence of adequate detailed information concerning the practical effect which that legislation has on the importation of slot machines (see, to that effect, judgment in *Läärä and Others*, C-124/97, EU:C:1999:435, paragraph 26).

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<sup>12</sup> See the table of equivalences (Article 18 TEC / Article 8A EC)

<sup>13</sup> See the table of equivalences (Article 28 TEC / 30 EC)

In those circumstances, it is necessary to examine legislation of this kind from the perspective of Article 56 TFEU only.

**Case C-98/14 Berlington Hungary and Others [2015] not published yet §29, 30, 31, 32, 33**

It is clear from the case-law that, *where a national measure relates to both the free movement of goods and the freedom to provide services, the Court will in principle examine it in the light of one only of those two fundamental freedoms if it is apparent that one of them is entirely secondary in relation to the other and may be considered together with it* (see Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22, and Case C-108/09 *Ker-Optika* [2010] ECR I-0000, paragraph 43).

However, *in the field of telecommunications, those two aspects are often intimately linked, one not capable of being regarded as entirely secondary in relation to the other*. That is so in particular where national legislation governs the supply of telecommunications equipment, such as decoding devices, in order to specify the requirements which that equipment must meet or to lay down the conditions under which it can be marketed, so that it is appropriate, in such a case, to examine both fundamental freedoms simultaneously (see, to this effect, Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraphs 29 to 33).

*That said, where legislation concerns, in this field, an activity in respect of which the services provided by the economic operators are particularly prominent, whilst the supply of telecommunications equipment is related thereto in only a purely secondary manner, it is appropriate to examine that activity in the light of the freedom to provide services alone.*

That is so, inter alia, where making such equipment available constitutes only a specific step in the organisation or operation of a service and that activity does not display an end in itself, but is intended to enable the service to be obtained. In those circumstances, the activity which consists in making such equipment available cannot be assessed independently of the activity linked to the service to which that first activity relates (see, by analogy, *Schindler*, paragraphs 22 and 25).

In the main proceedings, the national legislation is not directed at decoding devices in order to determine the requirements which they must meet or to lay down conditions under which they can be marketed. It deals with them only as an instrument enabling subscribers to obtain the encrypted broadcasting services.

Given that *the national legislation thus concerns, above all, the freedom to provide services, whilst the free movement of goods aspect is entirely secondary in relation to the freedom to provide services, that legislation must be assessed from the point of view of the latter freedom.*

**Case C-403/08 Football Association Premier League and Others [2011] ECR I-9083 §78, 79, 80, 81, 82, 83**

In such circumstances, as the Advocate General pointed out at point 76 of his Opinion, *the marketing of non-alcoholic beverages and food in coffee-shops appears to constitute a catering activity characterised by an array of features and acts in which services predominate as opposed to the supply of the product itself* (see, by analogy, Case C-491/03 *Hermann* [2005] ECR I-2025, paragraph 27).

Since the free movement of goods aspect is entirely secondary to that of the freedom to provide services and may be considered together with it, ***the Court will examine the rules at issue in the main proceedings only in the light of the latter fundamental freedom*** (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 46; Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 26; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 34; and Case C-233/09 *Dijkman and Dijkman-Laveleije* [2010] ECR I-0000, paragraph 33).

**Case C-137/09 Josemans [2010] ECR I-13019 §49, 50**

In that regard, it is settled case-law that, where a national measure relates to both the free movement of goods and another fundamental freedom, ***the Court will in principle examine it in relation to one only of those two fundamental freedoms***, if it appears that one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22, and Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, paragraph 35).

Further, it follows from Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraphs 65, 76 and 124, ***that a national measure concerning an arrangement characterised by the sale of goods via the Internet and the delivery of those goods to the customer's home is to be examined only with regard to the rules relating to the free movement of goods and, consequently, with regard to Articles 34 TFEU and 36 TFEU.***

**Case C-108/09 Ker-Optika [2010] ECR I-12213 §43, 44**

As regards the freedom to provide services, it is settled case-law that, ***first, the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the Treaty provisions*** and, secondly, national legislation which only authorises the operation and playing of games in casinos constitutes a barrier to the freedom to provide services (see, to that effect, Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraphs 56 and 75).

**Case C-65/05 Commission v Greece [2006] ECR I-10341 §53**

It cannot however be excluded that the sale of a product may be accompanied by an activity with 'services' aspects. None the less, that fact cannot be sufficient, by itself, to classify an economic operation such as the itinerant sales at issue in the main proceedings as a 'provision of services' within the meaning of Article 49 EC. It must be established, in each case, ***whether that service is or is not wholly secondary in relation to the elements concerning the free movement of goods.*** In the circumstances of the main proceedings, it appears that the latter aspect prevails over that of the freedom to provide services.

In that regard, it is settled case-law that, where a national measure relates to both the free movement of goods and freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms if it appears that one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, Case



C-275/92 Schindler [1994] ECR I-1039, paragraph 22; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 31, and Karner, paragraph 46).

**Case C-20/03 Burmanjer and Others [2005] ECR I-4133 § 34, 35**

However, where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it (see, to that effect, Schindler, paragraph 22; Canal Satélite Digital, paragraph 31; Case C-71/02 Karner, not yet published in the ECR, paragraph 46).

In the circumstances of this case, the aspect of the freedom to provide services prevails over that of the free movement of goods. *The Bonn police authority and the Commission of the European Communities have rightly pointed out that the contested order restricts the importation of goods only as regards equipment specifically designed for the prohibited variant of the laser game and that that is an unavoidable consequence of the restriction imposed with regard to supplies of services by Pulsar.* Therefore, as the Advocate General has concluded in paragraph 32 of her Opinion, *there is no need to make an independent examination of the compatibility of that order with the Treaty provisions governing the free movement of goods.*

**Case C-36/02 Omega [2004] ECR I-9609 §26, 27**

*Where a national measure relates to both the free movement of goods and freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms if it appears that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it* (see, to that effect, Case C-275/92 Schindler [1994] ECR I-1039, paragraph 22; and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 31).

*In the circumstances of the case in the main proceedings, the dissemination of advertising is not an end in itself. It is a secondary element in relation to the sale of the goods in question. Consequently the free movement of goods aspect prevails over the freedom to provide services aspect.* It is thus not necessary to consider Paragraph 30(1) of the UWG in the light of Article 49 EC.

**Case C-71/02 Karner [2004] ECR I-3025 §46, 47**

In connection to the similar *activity of lotteries*, the Court has held that the importation and distribution of advertisements and application forms, and possibly tickets, which are specific steps in the organisation or operation of a lottery, cannot, under the Treaty, be considered independently of the lottery to which they relate. Such activities are not ends in themselves; *rather, their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery* (Schindler, cited above, paragraph 22).

However, without there being any need, by approximate analogy with that reasoning, to regard the importation of slot machines as ancillary to the operation thereof, it suffices to state, as the Court did in paragraphs 20 to 29 of Läärä and Others, cited above, that, *even though the operation of*

*slot machines is linked to operations to import them, the former activity comes under the provisions of the Treaty relating to the freedom to provide services and the latter under those relating to the free movement of goods.*

The answer to the second, third and fifth questions must therefore be that the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the Treaty and, accordingly, *it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.*

Case C- 6/01 Anomar and Others [2003] ECR I-8621 § 54, 55, 56

In the *field of telecommunications*, however, it is difficult to determine generally whether it is free movement of goods or freedom to provide services which should take priority. As the case in the main proceedings shows, *the two aspects are often intimately linked*. The supply of telecommunication equipment is sometimes more important than the installation or other services connected therewith. In other circumstances, by contrast, it is the economic activities of providing know-how or other services of the operators concerned which are dominant, whilst delivery of the apparatus, equipment or conditional-access telecommunication systems which they supply or market is only accessory.

Accordingly, *the question whether the restrictions referred to in paragraph 29 of this judgment are justified must be examined simultaneously in the light of both Article 30 and Article 59 of the Treaty*, in order to determine whether the national measure at issue in the main proceedings pursues an objective of public interest and whether it complies with the principle of proportionality, that is to say whether it is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it (see, in particular, Case C-76/90 Säger [1991] ECR I-4221, paragraph 15; Joined Cases C-369/96 and C-376/96 Arblade and Others [1999] ECR I-8453, paragraph 35; and Corsten, paragraph 39).

Case C-390/99 Canal Satélite Digital [2002] ECR I-607 §32, 33

The same applies to *the grant of fishing rights and the issue of fishing permits*. The activity consisting of making fishing waters available to third parties, for consideration and upon certain conditions, so that they can fish there constitutes a provision of services which is covered by Article 59 et seq. of the EC Treaty (now, after amendment, Article 49 EC et seq.) if it has a cross-frontier character. The fact that those rights or those permits are set down in documents which, as such, may be the subject of trade is not sufficient to bring them within the scope of the provisions of the Treaty relating to the free movement of goods.

*That conclusion cannot be affected by a reference to intellectual property rights*, which, according to Mr Jägerskiöld, are covered by those provisions despite their intangible nature.

Consequently, the answer to be given to the first question must be that fishing rights or fishing permits do not constitute 'goods' within the meaning of the provisions of the Treaty relating to the free movement of goods but form a 'provision of a service' within the meaning of the Treaty provisions relating to the freedom to provide services.

Case C-97/98 Jägerskiöld [1999] ECR I-7319 § 36, 37, 39

It must be remembered, however, that in its judgment in Case C-393/92 *Almelo and Others v Energiebedrijf IJsselmij* [1994] ECR I-1477, paragraph 28, the Court noted that it is accepted in Community law, and indeed in the national laws of the Member States, that *electricity constitutes a good within the meaning of Article 30 of the Treaty. It noted in particular that electricity is regarded as a good under the Community's tariff nomenclature (Code CN 27.16) and that it had already been accepted, in Case 6/64 Costa v ENEL [1964] ECR 585, that electricity may fall within the scope of Article 37 of the Treaty.*

Case C-158/94 Commission v Italy [1997] ECR I-5789 § 17

*Such a prohibition is not analogous to the legislation concerning selling arrangements held in Keck and Mithouard to fall outside the scope of Article 30 of the Treaty.*

According to that judgment, the application to products from other Member States of national provisions restricting or prohibiting, within the Member State of importation, certain selling arrangements is not such as to hinder trade between Member States so long as, first, those provisions apply to all relevant traders operating within the national territory and, secondly, they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The reason is *that the application of such provisions is not such as to prevent access by the latter to the market of the Member State of importation or to impede such access more than it impedes access by domestic products.*

*A prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.*

Case C-384/93 Alpine Investments [1995] ECR I-1141 §36, 37, 38

The reply should accordingly be that on a proper construction *Article 30 of the Treaty does not apply where a Member State, by statute or by regulation, prohibits the broadcasting of televised advertisements for the distribution sector.*

Case C-412/93 Leclerc-Siplec [1995] ECR I-179 §24

*With regard to the fact that the servicing of a vehicle in another Member State may involve a supply of goods (spare parts, oil etc.), it should be noted that such a supply is not an end in itself, but is incidental to the provision of services. Consequently, it does not, as such, fall within the scope of Article 30 of the Treaty (see, to that effect, the judgment in Case C-275/92 Schindler [1994] ECR I-1039).*

Case C-55/93 Van Schaik [1994] ECR I-4837 §14

*The activity pursued by the defendants in the main proceedings appears, admittedly, to be limited to sending advertisements and application forms, and possibly tickets, on behalf of a lottery operator, SKL. However, those activities are only specific steps in the organization or operation of a lottery and cannot, under the Treaty, be considered independently of the lottery to which they relate. The importation and distribution of objects are not ends in themselves. Their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery.*

The point relied on by Gerhart and Jörg Schindler, that on the facts of the main proceedings agents of the SKL send material objects into Great Britain in order to advertise the lottery and sell tickets therein, and that material objects which have been manufactured are goods within the meaning of the Court's case-law, *is not sufficient to reduce their activity to one of exportation or importation.*

Case C-275/92 H.M. Customs and Excise v Schindler [1994] ECR I-1039 § 22, 23

The situation in which students associations distributing the information at issue in the main proceedings are not in cooperation with the clinics whose addresses they publish can be distinguished from the situation which gave rise to the judgment in *GB-INNO-BM* (Case C-362/88 *GB-INNO-BM v Confédération du Commerce Luxembourgeois* [1990] I-667), in which the Court held that a prohibition on the distribution of advertising *was capable of constituting a barrier to the free movement of goods and therefore had to be examined in the light of Articles 30, 31 and 36 of the EEC Treaty.*

Case C-159/90 Grogan and Others [1991] ECR I-4685 §25

It should be observed in limine that it follows from the *Sacchi* judgment that television broadcasting falls within the rules of the Treaty relating to services and that since a television monopoly *is a monopoly in the provision of services, it is not as such contrary to the principle of the free movement of goods.*

Case C-260/89 ERT [1991] ECR I-2925 §13

Pursuant to Article 60 of the Treaty, *services provided for remuneration are considered to be 'services' within the meaning of the Treaty, in so far as they are not governed by the provisions relating inter alia to the free movement of goods.*

Accordingly, it must be stated in reply to the first question that *legislation of a Member State laying down the conditions governing the sale by a trader established in another Member State of goods belonging to him does not fall within the scope of Article 59 of the Treaty.*

Case C-239/90 SCP Boscher and Others v British Motors Wright and Others [1991] ECR I-2023 §9, 10

The provisions on the freedom to supply services invoked by the Irish Government, on the other hand, are not concerned with the movement of goods but the freedom to perform activities and have them carried out; they do not lay down any specific rule relating to particular barriers to the free movement of goods. Consequently, *the fact that a public works contract relates to the*

*provision of services cannot remove a clause in an invitation to tender restricting the materials that may be used from the scope of the prohibitions set out in Article 30.*

Case C-45/87 Commission v Ireland [1988] ECR 4929 § 17

In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to *free movement of goods*, such is however the case, as appears from Article 60, only insofar as they are governed by such provisions.

On the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals *are subject to the rules relating to freedom of movement for goods*. As a result, although the existence of a monopoly with regard to television advertising is not in itself contrary to the principle of free movement of goods, such a monopoly would contravene this principle if it discriminated in favour of national material and products.

In the same way, the fact that an undertaking of a Member State has an exclusive right to transmit advertisements by television is not as such incompatible with the free movement of products, the marketing of which such advertisements are intended to promote. It would however be different if the exclusive right were used to favour, within the Community, particular trade channels or particular commercial operators in relation to others.

As is stressed by Article 3 of the Commission Directive of 22 December 1969 on the abolition of measures having an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (OJ L 13/29 of 19 January 1970), measures governing the marketing of products where the restrictive effect exceeds the effects intrinsic to trade rules are capable of constituting measures having an effect equivalent to quantitative restrictions.

Such is the case, in particular, where the restrictive effects are out of proportion to their purpose, in the present case the organization, according to the law of a Member State, of television as a service in the public interest.

Case 155/73 Sacchi [1974] ECR 409 §6, 7, 8

### 6.3.5 Article 45 TFEU<sup>14</sup>

In the first place, it is important to bear in mind that Chapter 2, paragraph 2, of Annex XII to the 2003 *Act of Accession derogates from the free movement of workers by not applying, on a temporary basis, Articles 1 to 6 of Regulation No 1612/68 to Polish nationals*. Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession provides that, for a period of two years from 1 May 2004 – the date of the Republic of Poland’s accession to the European Union – the Member States are to apply national measures, or those resulting from bilateral agreements,

<sup>14</sup> See the table of equivalences (Article 39 TEC / 48 EC)

regulating access to their labour markets by Polish nationals. That provision also provides that the Member States may continue to apply such measures until the end of the five-year period following the date of the accession of the Republic of Poland to the European Union.

In the second place, it follows from the case-law of the Court that *where an undertaking hires out, for remuneration, staff who remain in the employ of that undertaking, no contract of employment being entered into with the user, its activities constitute an occupation which satisfies the conditions laid down in the first paragraph of Article 57 TFEU and must accordingly be considered a 'service' within the meaning of that provision* (see Case 279/80 Webb [1981] ECR 3305, paragraph 9, and order of the Court of 16 June 2010 in Case C-298/09 RANI Slovakia, not published in the ECR, paragraph 36).

However, the Court has acknowledged that such activities may have an impact on the labour market of the Member State of the party for whom the services are intended. *First, employees of agencies for the supply of manpower may in certain circumstances be covered by the provisions of Articles 45 TFEU to 48 TFEU and the European Union regulations adopted in implementation thereof* (see Webb, paragraph 10).

Secondly, owing to the special nature of the employment relationships inherent in the making available of labour, pursuit of that activity directly affects both relations on the labour market and the lawful interests of the workforce concerned (Webb, paragraph 18).

In view of all of the foregoing considerations, the answer to the first question is that *Articles 56 TFEU and 57 TFEU do not preclude a Member State from making, during the transitional period provided for in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, the hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, on its territory, of workers who are Polish nationals subject to the obtaining of a work permit.*

Joined cases C-307/09, C-308/09 and C-309/09 Vicoplus [2011] ECR I-453 §26, 27, 28, 29, 41  
Case C-490/04 Commission v Germany [2007] ECR I-6095 §89

The provisions of the Treaty on freedom of movement for persons are intended to facilitate the *pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State* (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 94; Case C-232/01 *Van Lent* [2003] ECR I-11525, paragraph 15; and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 52).

Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an *obstacle to that freedom even if they apply without regard to the nationality of the workers concerned* (*Bosman*, paragraph 96).

However, in order to be capable of constituting such an obstacle, *they must affect access of workers to the labour market* (Case C-190/98 *Graf* [2000] ECR I-493, paragraph 23).

The manner in which an activity is pursued is liable also to affect access to that activity. Consequently, *legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement within the meaning of that case-law.*

It is clear that the original scheme, in so far as it remains applicable, could, *on account of the obligation to register in Denmark a company car made available to the employee by an employer established in another Member State, deter such an employer from taking on an employee resident in Denmark for work which is not the employee's principal employment and, consequently, impede access to such employment by residents in Denmark.*

In that respect, it must be noted that, in the framework of Article 39 EC, *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 must be considered to be a worker.* Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is entitled to freedom of movement as a worker (see, to that effect, Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraphs 16 and 17, and Case C-138/02 Collins [2004] ECR I-2703, paragraph 26).

However, the fact that a worker resident in Denmark, who uses a company car of an employer established in another Member State, is employed in work in that State which is not his principal employment *cannot form the basis for a general presumption of abuse.*

Case C-464/02 Commission v Denmark [2005] ECR I-7929 §34, 35, 36, 37, 46, 64, 67

It is common ground that the main proceedings concern *businesses established in Member States other than the Federal Republic of Germany who have posted their own workers for a fixed period to construction sites in Germany for the purposes of providing services*, a situation which falls within Articles 59 and 60 of the Treaty.

However the national court, Finalarte Sociedade de Construção Civil Ld.a and Portugaia Construções Ld.a consider that Article 48 of the Treaty also applies to the cases in the main proceedings, in that the chances of workers being taken on and posted abroad are reduced to the extent that an employer may be deterred, as a result of the extension of the paid leave scheme, from exercising its freedom to provide services by pursuing activities in the Federal Republic of Germany.

*The Court has held that workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work* (Case C-113/89 Rush Portuguesa [1990] ECR I-1417, paragraph 15, and C-43/93 Vander Elst [1994] ECR I-3803, paragraph 21).

*It follows that Article 48 of the Treaty does not apply in the circumstances of the main proceedings.* Consequently, it is not necessary to consider the questions submitted in the light of that provision.

Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 Finalarte [2001] ECR I-7831 §20, 21, 22, 23

It should be pointed out at the outset that the activities of a tourist guide may be subject to two distinct sets of rules. A tourist agency may itself employ guides but it may also engage self-employed tourist guides. *In the latter case, the service is provided by the tourist guide to the tourist agency and constitutes an activity carried on for remuneration within the meaning of Article 60 of the Treaty* (Case C-198/89 Commission v Greece [1991] ECR I-727, paragraphs 5 and 6).

Case C-398/95 SETTG [1997] ECR I-3091 §7

It follows that *Articles 48 and 59 of the Treaty are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community nationals at a disadvantage when they wish to extend their activities beyond the territory of a single Member State* (see the *Stanton and Wolf* judgments, cited above, paragraph 13 in each case).

Case C-106/91 Ramrath [1992] ECR I-3351 §28

The two cases described above thus relate to the provision of services by the tour company to tourists and by the self-employed tourist guide to the tour company respectively. Such services, which are of limited duration *and are not governed by the provisions on the free movement of goods, capitals and persons*, constitute activities carried on for remuneration within the meaning of Article 60 of the EEC Treaty.

Case C-198/89 Commission v Greece [1991] ECR I-727 §6

See also: Case C-180/89 Commission v Italy [1991] ECR I-709 §6

and: Case C-154/89 Commission v France [1991] ECR I-659 §7

The French Government has sought to emphasize in this connection the special nature of the activity in question, which although covered by the expression "services" in Article 60 of the Treaty ought to receive special consideration inasmuch as it may be covered as well both by provisions concerning social policy and by those concerning the free movement of persons. Whilst employees of agencies for the supply of manpower may in certain circumstances be covered by the provisions of *Articles 48 to 51* of the Treaty and the Community regulations adopted in implementation thereof, *that does not prevent undertakings of that nature which employ such workers from being undertakings engaged in the provision of services, which therefore come within the scope of the provisions of Article 59 et seq. of the Treaty.* As the Court has already declared, in particular in its judgment of December 1974 (Case 33/74 *Van Binsbergen* [1974] ECR 1299), the special nature of certain services does not remove them from the ambit of the rules on the freedom to supply services.

Case 279/80 Webb [1981] ECR 3305 §10



### 6.3.6 Article 49 TFEU<sup>15</sup>

Thus, *services* within the meaning of the Treaty may cover *services varying widely in nature, including services which are provided over an extended period*, even over several years, where, for example, *the services in question are supplied in connection with the construction of a large building*. Services within the meaning of the Treaty may likewise be constituted by services which a business established in a Member State supplies *with a greater or lesser degree of frequency or regularity, even over an extended period*, to persons established in one or more other Member States, for example *the giving of advice or information for remuneration*.

The answer to the question referred for a preliminary ruling must therefore be that Community law on freedom to provide services precludes a business from being subject to an *obligation to be entered on the trades register which delays, complicates or renders more onerous* the provision of its services in the host Member State if *the conditions prescribed by the directive governing recognition of professional qualifications* which is applicable to pursuit of that activity in the host Member State *are satisfied*.

*The mere fact that a business established in one Member State supplies identical or similar services in a repeated or more or less regular manner in a second Member State, without having an infrastructure there* enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, *cannot be sufficient for it to be regarded as established in the second Member State*.

Case C-215/01 Schnitzer [2003] ECR I-14847 §30, 40

Although the *representative activity of a patent agent before a national patent office*, consisting among other things of the filing and pursuit of patent applications and their protection, includes a series of activities which extend over a period of time, *it could not be said that such activity necessarily involves a stable and continuous participation in the economic life of the host Member State*. In addition, there is nothing to prevent a client instructing a patent agent with a view to a single action or several occasional actions connected with the carrying-on of the activity in question. The disadvantages which such a step would, according to the Italian Government, involve are irrelevant to *whether the activity in question is to be regarded in the host Member State as a provision of services* for the purposes of Community law.

Case C-131/01 Commission v Italy [2003] ECR I-1659 §24

In so far as the question referred concerns Article 49 EC, there is no need to reply to it. *Since the main proceedings relate to the approval of a draft amendment to the statutes of a company which benefits from the regime of the Treaty relating to the right of establishment*, as has been pointed out at paragraph 25 of this judgment, *Article 49 EC, which relates to the freedom to provide services, is not relevant in the context of the present proceedings*.

Case C-79/01 Pavroll and Others [2002] ECR I-8923 §38

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<sup>15</sup> See the table of equivalences (Article 43 TEC / 52 EC)

*The provisions of the chapter on services are subordinate to those of the chapter on the right of establishment* in so far, first, as the wording of the first paragraph of Article 59 assumes that the provider and the recipient of the service concerned are "established" in two different Member States and, second, as the first paragraph of Article 60 specifies that the provisions relating to services apply only if those relating to the right of establishment do not apply.

A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services.

Case C-55/94 Gebhard [1995] ECR I-4165 §22, 39

(see also §27, 28, 37, 38)

It is to be noted that provisions such as those contained in the Belgian legislation at issue constitute a restriction on freedom to provide services. *Provisions requiring an insurer to be established in a Member State* as a condition of the eligibility of insured persons to benefit from certain tax deductions in that State operate to deter those seeking insurance from approaching insurers established in another Member State, and thus constitute a restriction of the latter's freedom to provide services.

Case C-204/90 Bachmann [1992] ECR I-249 §31

See also: Case C-300/90 Commission v Belgium [1992] ECR I-305 §22

In particular, *a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services*. Such a restriction is all the less permissible where, as in the main proceedings, and unlike the situation governed by the third paragraph of Article 60 of the Treaty, the service is supplied without its being necessary for the person providing it to visit the territory of the Member State where it is provided.

Case C-76/90 Säger [1991] ECR I-4221 §13

It should further be pointed out that Articles 59 and 60 of the Treaty require not only the abolition of any discrimination against a person providing services on account of his nationality but also the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than the one in which the service is provided. In particular, the Member State cannot make the performance of the services in its territory subject to observance of *all the conditions required for establishment*; were it to do so the provisions securing freedom to provide services would be deprived of all practical effect.

Case C-198/89 Commission v Greece [1991] ECR I-727 §16

See also: Case C-180/89 Commission v Italy [1991] ECR I-709 §15

and: Case C-154/89 Commission v France [1991] ECR I-659 §12

It is apparent from the judgment in *Knoors*, supra, that Article 52 of the EEC Treaty cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals where the latter, owing to the fact that they have lawfully resided in the territory of another Member State and have there acquired a vocational qualification which is recognized by the provisions of Community law are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and *liberties guaranteed by the Treaty* ( paragraph 24 ).

Case C-61/89 Bouchoucha [1990] ECR I-3551 §13

In that respect, it must be acknowledged *that an insurance undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment*, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency. *In the light of the aforementioned definition contained in the first paragraph of Article 60, such an insurance undertaking cannot therefore avail itself of Articles 59 and 60 with regard to its activities in the Member State in question.*

Case 205/84 Commission v Germany [1986] ECR 3755 §21

Similarly, as the Court held in its judgment of 3 December 1974 (Case 33/74 *van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299) a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. *Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.*

Case 205/84 Commission v Germany [1986] ECR 3755 §22

Case 33-74 Van Binsbergen [1974] ECR 1299 §13

The principal aim of the third paragraph in Article 60 is to enable the provider of the service to pursue his activities in the Member State where the service is given without suffering discrimination in favour of the nationals of that State. However, *it does not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States.*

Case 279/80 Webb [1981] ECR 3305 §16

### 6.3.7 Article 58 TFEU<sup>16</sup>

According to the Court's settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-475/11 *Konstantinides* [2013] ECR, paragraph 44 and the case-law cited).

*That provision of the FEU Treaty therefore has a scope which exceeds the prohibition of discrimination provided for in Article 18 TFEU.*

Therefore, *while the Member States are entitled, under Article 58(1) TFEU, to impose certain restrictions on the provision of air transport services in respect of the routes between third countries and the European Union in so far as, as it was observed in paragraph 39 above, the EU legislature has not exercised the power conferred upon it by Article 100(2) TFEU to liberalise that type of service, those States nevertheless remain subject to the general principle of non-discrimination on grounds of nationality enshrined in Article 18 TFEU.*

Case C-628/11 International Jet Management [2014] not published yet § 57, 58, 59

In order to answer that question, it is to be stressed that *free movement of services in the transport sector is not governed by Article 56 TFEU, which concerns freedom to provide services in general, but by a specific provision, namely Article 58(1) TFEU*, according to which '[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport' (see, to that effect, Case 4/88 *Lambregts Transportbedrijf* [1989] ECR 2583, paragraph 9).

Case C-338/09 Yellow Cab Verkehrsbetrieb [2010] ECR I-13927 §29

First of all, *it should be borne in mind that the applicability of Article 22 of Regulation No 1408/71 – and specifically, in the present case, of Article 22(1)(a)(i) – does not mean that Article 49 EC cannot apply at the same time. The fact that national legislation may be in conformity with Regulation No 1408/71 does not have the effect of removing that legislation from the scope of the provisions of the EC Treaty* (see, to that effect, Case C-372/04 *Watts* [2006] ECR I-4325, paragraphs 46 and 47).

Case C-211/08 Commission v Spain [2010] ECR I-5267 §45

*The scope of Community law must in no case be extended to cover abuses on the part of a trader, that is to say, activities which are not carried out in the context of normal commercial transactions, but only with the aim of circumventing the rules of Community law* (see to this

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<sup>16</sup> See the table of equivalences (Article 51 TEC / 61 EC)

effect, in particular, Case 125/76 *Cremer* [1977] ECR 1593, paragraph 21; Case C-8/92 *General Milk Products* [1993] ECR I-779, paragraph 21, and *Halifax*, paragraph 69).

**Case C-456/04 Agip Petroli [2006] ECR I-3395 §20**

By its second question, the national court asks, essentially, whether the combined provisions of Regulation No 4055/86 and Article 59 of the Treaty preclude legislation of a Member State from requiring shipping companies established in other Member States, when their vessels make a port stop in the first-mentioned Member State, to use, for a charge, the services of local mooring groups holding exclusive concessions.

According to settled case-law, Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to nationals providing services and to those of other Member States, when that restriction is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 16).

As the Advocate General pointed out at paragraph 35 of his Opinion, *the impugned legislation would not appear to contain any overt or covert discrimination contrary to Article 59 of the Treaty and Article 9 of Regulation No 4055/86.*

**Case C-266/96 Corsica Ferries France v Gruppo Antichi Ormeggiatori del porto di Genova and Others [1998] ECR I-3949 §55, 56, 57**

On the basis of Article 84(2) the Council adopted Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1). That regulation entered into force on 1 January 1987. It was therefore applicable at the time of the events in question.

However, *Article 84 does not exclude the application of the Treaty to transport, and marine transport remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty* (see the judgment in Case 167/73 *Commission v France* [1974] ECR 359, paragraphs 31 and 32).

**Case C-379/92 Peralta [1994] ECR I-3453 §13, 14**

It should be borne in mind first of all that, according to Article 61(1) of the Treaty, freedom to provide services *in the field of transport is to be governed by the provisions of the Title relating to transport*. As the Court stated in its judgment in Case 13/83 *Parliament v Council* [1985] ECR 1513, paragraph 62, application of the principles governing freedom to provide services, as established in particular by Articles 59 and 60 of the treaty, must be achieved, according to the Treaty, by introducing a common transport policy.

**Case C-17/90 Pinaud Wieger [1991] ECR I-5253 §7**

### **6.3.8 Article 63 TFEU<sup>17</sup>**

As the Advocate General has observed, in essence, in point 67 of his Opinion, *national legislation whose purpose relates principally to the provision of financial services falls within the Treaty provisions relating to the freedom to provide services, even though it could result in or involve capital movements.*

That being so, to require, in order for measures to fall within Article 64(1) TFEU, that they relate directly to the financial service providers as such and that they govern the carrying out and supervision of their financial transactions and their authorisation or liquidation would effectively call into question the demarcation between the Treaty provisions relating to the freedom to provide services and those governing the free movement of capital.

*The interpretation that Article 64(1) TFEU is not intended to cover situations falling within the freedom to provide services is also confirmed by the fact that, in contrast to the chapter concerning the free movement of capital, the chapter regulating the freedom to provide services does not contain any provision which enables service providers who are nationals of third countries and established outside the European Union to rely on those provisions, as the objective of the latter chapter is to secure the freedom to provide services for nationals of Member States* (judgment in *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 25).

It follows that national legislation which, in applying to capital movements to or from third countries, restricts the provision of financial services falls within Article 64(1) TFEU (see, by analogy with capital movements involving direct investment or establishment within the meaning of Article 64(1) TFEU, judgments in *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 183, and *Holböck*, C-157/05, EU:C:2007:297, paragraph 36).

In the present instance, *the acquisition of units in investment funds situated in the Cayman Islands and the receipt of the dividends deriving from them involve the existence of financial services provided by those investment funds to the investor concerned*. Such investment may be distinguished from direct acquisition of company shares on the market by an investor in that, as a result of those services, the investor can benefit, in particular, from increased asset diversification and better spreading of risk.

National legislation such as that at issue in the main proceedings, which provides for flat-rate taxation, combined with the investor's inability to be taxed on the income which he has actually received, when the non-resident investment fund does not fulfil the conditions laid down in Paragraphs 17(3) and 18(2) of the *AusInvestmG*, is liable to deter resident investors from acquiring units in non-resident investment funds and therefore results in those investors having recourse to the services of such funds less frequently.

Consequently, having regard to all the foregoing, the answer to the first question is that Article 64 TFEU must be interpreted as meaning that *national legislation, such as that at issue in the main proceedings, which provides for flat-rate taxation of the income of holders of units in a non-*

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<sup>17</sup> See the table of equivalences (Article 56 TEC / 73b EC)

*resident investment fund when the latter has not fulfilled certain statutory obligations constitutes a measure which relates to movement of capital involving the provision of financial services within the meaning of that article.*

Case C-560/13 Wagner-Raith [2015] not published yet §32, 35, 36, 45, 46, 47, 48

It is apparent from settled case-law that, *in order to determine whether national legislation falls within the scope of one or other of the fundamental freedoms guaranteed by the Treaty, the purpose of the legislation concerned must be taken into consideration* (see, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22 and the case-law cited).

Case C-233/09 Dijkman [2010] ECR I-6649 §26

Case C-356/08 Commission v Austria [2009] ECR I-108 §32

However, *it is apparent from the case-law that the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the main proceedings, that one of them is entirely secondary in relation to the other and may be considered together with it* (Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 34; see also, by analogy, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-0000, paragraph 37).

Case C-233/09 Dijkman [2010] ECR I-6649 §33

*(available only in French)*

Les dispositions litigieuses peuvent relever du champ d'application matériel des dispositions du traité CE relatives à la liberté d'établissement et à la libre prestation des services, dans la mesure où ces dispositions sont susceptibles d'exercer une influence *sur l'établissement en Haute-Autriche des médecins et des banques d'autres États membres ainsi que la prestation de services par ces banques et la réception de services par des médecins dans ce Land.*

En revanche, s'agissant d'une éventuelle restriction à la libre circulation des capitaux, il y a lieu de souligner *que les prestations de services bancaires constituent des services au sens de l'article 50 CE et que l'article 49 CE s'oppose à l'application de toute réglementation nationale qui, sans justification objective, entrave la possibilité pour un prestataire de services d'exercer effectivement cette liberté* (voir, en ce sens, arrêts du 3 octobre 2002, *Danner*, C-136/00, Rec. p. I-8147, points 25 à 27; du 26 juin 2003, *Skandia et Ramstedt*, C-422/01, Rec. p. I-6817, points 22 à 24, ainsi que du 30 janvier 2007, *Commission/Danemark*, C-150/04, Rec. p. I-1163, point 37).

Case C-356/08 Commission v Austria [2009] ECR I-108 §33, 34

In that regard, it is apparent from the wording of Article 49 EC and Article 56 EC, and the position *which they occupy in two different chapters of Title III of the Treaty, that, although closely linked, those provisions were designed to regulate different situations and they each have their own field of application.*

That is confirmed, in particular, by Article 51(2) EC, *which distinguishes between banking and insurance services connected with movements of capital and the free movement of capital, and which provides that the free movement of those services must be achieved ‘in step with the liberalisation of movement of capital’.*

It has been argued before the Court that, in such circumstances and in the light of the wording of the first paragraph of Article 50 EC, the provisions concerning the freedom to provide services apply *as an alternative* to those which govern the free movement of capital.

That argument cannot be accepted. Although in the definition of the notion of ‘services’ laid down in the first paragraph of Article 50 EC it is specified that the services ‘are not governed by the provisions relating to freedom of movement for goods, capital and persons’, that relates to the definition of that notion and does not *establish any order of priority between the freedom to provide services and the other fundamental freedoms. The notion of ‘services’ covers services which are not governed by other freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms.*

Where a national measure relates to the freedom to provide services and the free movement of capital at the same time, it is necessary to consider *to what extent the exercise of those fundamental liberties is affected and whether, in the circumstances of the main proceedings, one of those prevails over the other* (see by analogy Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 47; Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 27; and the judgment of the EFTA Court in Case E-1/00 *State Management Debt Agency/Islandsbanki-FBA* [2000] EFTA Court Report 2000-2001, p. 8, paragraph 32). The Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it (see by analogy Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 31; *Karner*, paragraph 46; *Omega*, paragraph 26; and Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, paragraph 35).

Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521 §28, 29, 31, 32, 34

In the circumstances of this case, *the aspect of the freedom to provide services prevails over that of the free movement of goods.* The Bonn police authority and the Commission of the European Communities have rightly pointed out that *the contested order restricts the importation of goods only as regards equipment specifically designed for the prohibited variant of the laser game and that that is an unavoidable consequence of the restriction imposed with regard to supplies of services by Pulsar.* Therefore, as the Advocate General has concluded in paragraph 32 of her Opinion, there is no need to make an independent examination of the compatibility of that order with the Treaty provisions governing the free movement of goods.

Case C-36/02 *Omega* [2004] ECR I-9609 §27

In those circumstances, the reasons cited by the Swedish Government, namely the impossibility of applying to capital life assurance policies taken out with companies not established in Sweden the same tax regime as that applied to such insurance policies taken out with companies which are established in Sweden and the need to fill the fiscal vacuum arising from the non-taxation of



savings in the form of capital life assurance policies taken out with companies not established in Sweden are not such as to justify the inclusion in national legislation on the taxation of capital life assurance of elements *as restrictive of the freedom to provide services* as those contained in the legislation in question in the main proceedings.

In view of the foregoing considerations, it is not necessary to determine whether such legislation is also incompatible with Articles 6, 73b and 73d of the Treaty.

Case C-118/96 Safir v Skattemyndigheten i Dalarnas län [1998] ECR I-1897 §34, 35

*Article 61(2) of the Treaty thus allows Member States, where there has been no liberalization of movements of capital, to retain measures designed to restrict those movements, without its being possible to contest such measures under Articles 59 and 60 of the EEC Treaty on the ground that they constitute indirect obstacles to the free provision of services.*

It follows that the only case in which the Treaty provisions on services do not apply to banking services is where there is a restriction on the free movement of capital relating to such transactions which is compatible with Community law.

Case C-222/95 SCI Parodi v Banque de Barv [1997] ECR I-3899 §9, 10

It should also be noted that by virtue of Article 61(2) of the Treaty *'the liberalization of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalization of movement of capital'*. Since transactions such as building loans provided by banks constitute services within the meaning of Article 59 of the Treaty, it is also necessary to ascertain whether the rule referred to by the national court is compatible with the Treaty provisions on freedom to provide services.

Case C-484/93 Svensson and Gustavsson v Ministre du Logement and de l'Urbanisme [1995] ECR I-3955 §11

It must therefore be stated in reply to the national court that the provisions of the Treaty *on the free movement of capital and the freedom to provide services* must be interpreted as not precluding legislation of a Member State which prohibits a broadcasting organization established in that State from investing in a broadcasting company established or to be established in another Member State and from providing that company with a bank guarantee or drawing up a business plan and giving legal advice to a television company to be set up in another Member State, where those activities are directed towards the establishment of a commercial television station whose broadcasts are intended to be received, in particular, in the territory of the first Member State and those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation.

Case C-148/91 Veronica [1993] ECR I-487 §15

Those articles require the abolition of all restrictions on the free movement of the provision of services, as thus defined, subject nevertheless to the provisions of Article 61 and those of Articles 55 and 56 to which Article 66 refers. Although those provisions are not at issue in these proceedings, the Italian Government has made the observation that, according to Article 61 (2), the liberalization of insurance services connected with movements of capital must be effected in

step with the progressive liberalization of the movement of capital. In that respect it should however be pointed out that the First Council Directive *for the implementation of Article 67 of the Treaty* of 11 May 1960 (Official Journal, English Special Edition 1959-1962, p. 49) *already provided that Member States were to grant all foreign exchange authorizations required for capital movements in respect of transfers in performance of insurance contracts as and when freedom of movement in respect of services was extended to those contracts in implementation of Article 59 et seq. of the Treaty.*

Although *the rules on movements of capital are therefore not of such a nature as to restrict the freedom to conclude insurance contracts in the context of the provision of services under Articles 59 and 60*, it is, however, necessary to determine the scope of those articles in relation to the provisions of the Treaty on the right of establishment.

Case 205/84 Commission v Germany [1986] ECR 3755 §19, 20

By virtue of Article 59 of the Treaty, restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof, which fulfils *the objective of liberalizing all gainful activity not covered by the free movement* of goods, persons and *capital*.

By basing the General Programme for the Abolition of Restrictions on the Freedom to provide Services partly on Article 106 of the Treaty, its authors *showed that they were aware of the effect of the liberalization of services on the liberalization of payments. In fact, the first paragraph of that article provides that any payments connected with the movement of goods or services are to be liberalized to the extent to which the movement of goods and services has been liberalized between Member States.*

Among the restrictions on the freedom to provide services which must be abolished, the General Programme mentions, in section C of Title III, impediments to payments for services, particularly where, according to section D of Title III and in conformity with Article 106 (2), *the provision of such services is limited only by restrictions in respect of the payments therefor. By virtue of section B of Title V of the General Programme, those restrictions were to be abolished before the end of the first stage of the transitional period, subject to a provision permitting limits on "foreign currency allowances for tourists" to be retained during that period.* Those provisions were implemented by Council Directive 63/340/EEC of 31 May 1963 on the abolition of all prohibitions on or obstacles to payments for services where the only restrictions on exchange of services are those governing such payments (Official Journal, English Special Edition 1963- 1964, p. 31). Article 3 of that directive also refers to foreign exchange allowances for tourists.

Joined cases 286/82 and 26/83 Luisi and Carbone [1984] ECR 377 §10, 13, 14

### 6.3.9 Articles 37 and 106 TFEU<sup>18</sup>

As a preliminary point it should be noted that, *as far as any impediment to the freedom to provide mooring services* is concerned, reference need merely be made to the Court's reasoning, earlier in this judgment, regarding the application of the derogation from the rules of the Treaty which is provided for in Article 90(2) of the Treaty, to conclude that such an impediment, *if it exists, is not contrary to Article 59 of the Treaty since the conditions for application of Article 90(2) are satisfied.*

Case C-266/96 Corsica Ferries France [1998] ECR I-3949 §59

As regards Article 37 of the Treaty, the Court has already held in Case 155/73 *Sacchi* [1974] ECR 409 that *it refers to trade in goods and cannot relate to a monopoly in the provision of services.*

Case C-17/94 Gervais [1995] ECR I-4353 §35

In this connection, it is sufficient to observe that it appears from the judgment in Case C-202/88 *France v Commission* [1991] ECR I-1223, at paragraph 22, that even though *Article 90 of the Treaty presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty. Such compatibility must be assessed in the light of the different rules to which Article 90(1) refers.*

It follows that, in order to establish *whether a Member State may exclude the provision of certain services from free competition, it is a matter of determining whether the restrictions on the freedom to provide services thereby created can be justified on the grounds relating to the general interest set out above* (paragraphs 17 and 18).

Case C-353/89 Mediawet II [1991] ECR I-4069 §34, 35

*Nevertheless, it follows from Article 90(1) and (2) of the Treaty that the manner in which the monopoly is organized or exercised may infringe the rules of the Treaty, in particular those relating to the free movement of goods, the freedom to provide services and the rules on competition.*

The reply to the national court must therefore be that Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest. However, *the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services* or the rules on competition.

It should be *observed in limine* that it follows from the *Sacchi* judgment that television broadcasting falls within the rules of the Treaty relating to services and that since a television monopoly is *a monopoly in the provision of services, it is not as such contrary to the principle of the free movement of goods.*

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<sup>18</sup> See the table of equivalences (Articles 31 and 86 TEC / 37 and 90 EC)

As has been indicated in paragraph 12 of this judgment, although the existence of a monopoly in the provision of services is not as such incompatible with Community law, ***the possibility cannot be excluded that the monopoly may be organized in such a way as to infringe the rules relating to the freedom to provide services. Such a case arises, in particular, where the monopoly leads to discrimination between national television broadcasts and those originating in other Member States, to the detriment of the latter.***

Accordingly the reply to the national court must be ***that Article 59 of the Treaty prohibits national rules which create a monopoly comprising exclusive rights*** to transmit the broadcasts of the holder of the monopoly and to retransmit broadcasts from other Member States, where such a monopoly gives rise to discriminatory effects to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers.

Case C-260/89 ERT [1991] ECR I-2925 §11, 12, 13, 20, 26

***Article 37*** concerns the adjustment of State monopolies of a commercial character. It follows both from the place of this provision in the Chapter on the elimination of quantitative restrictions and from the use of the words 'imports' and 'exports' in the second indent of Article 37 (1) and of the word 'products' in Article 37 (3) and (4) ***that it refers to trade in goods and cannot relate to a monopoly in the provision of services.*** Thus televised commercial advertising, ***by reason of its character as a service, does not come under these provisions.***

However, ***for the performance of their tasks these establishments remain subject to the prohibitions against discrimination and,*** to the extent that this performance comprises activities of an economic nature, ***fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights.***

Such would certainly be the case with an undertaking possessing a ***monopoly*** of television advertising, if it imposed unfair charges or conditions on users of its services or if it ***discriminated*** between commercial operators or national products on the one hand, and those of other Member States on the other, as regards access to television advertising.

Case 155-73 Sacchi [1974] ECR 409 §10, 14, 17

### ***6.3.10 Charter of Fundamental Rights and European Convention on Human Rights***

Moreover, it should be noted that, where a Member State relies on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the freedom to provide services, ***such justification must also be interpreted in the light of the general principles of EU law, in particular the fundamental rights now guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter')***. Thus, the national rules in question can fall under the exceptions provided for only if they are compatible with the fundamental rights the observance of which is ensured by the Court (see, to that effect, judgments in ERT, C-260/89, EU:C:1991:254, paragraph 43; Familiapress, C-368/95, EU:C:1997:325, paragraph 24, and Ålands Vindkraft, C-573/12, EU:C:2014:2037, paragraph 125).

In that regard, it should be noted that, *when the national legislature revokes licences that allow their holders to exercise an economic activity, it must provide, for the benefit of those holders, a transitional period of sufficient length to enable them to adapt or reasonable compensation system* (see, to that effect, European Court of Human Rights, *Vékony v. Hungary*, no. 65681/13, §34 and 35, 13 January 2015).

In that regard, it should be noted that *national legislation that is restrictive from the point of view of Article 56 TFEU is also capable of limiting the right to property enshrined in Article 17 of the Charter. Likewise, the Court has already held that an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter, in relation to Article 17 thereof (Pfleger and Others, C-390/12, EU:C:2014:281, paragraphs 57 and 59).*

It follows that, in the present case, the examination, carried out in paragraphs 56 to 73 of the present judgment, of the restriction represented by legislation such as that at issue in the main proceedings from the point of view of Article 56 TFEU also covers possible limitations of the exercise of the right to property guaranteed by Article 17 of the Charter, so that a separate examination is not necessary (see, to that effect, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 60).

C-98/14 *Berlington Hungary and Others* [2015] not published yet §74, 85, 90, 91

*National legislation that is restrictive from the point of view of Article 56 TFEU, such as that at issue in the main proceedings, is also capable of limiting the freedom to choose an occupation, the freedom to conduct a business and the right to property enshrined in Articles 15 to 17 of the Charter.*

Under Article 52(1) of the Charter, *for such a limitation to be admissible, it must be provided for by law and respect the essence of those rights and freedoms*. Furthermore, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

As the Advocate General states in points 63 to 70 of her Opinion, in circumstances such as those at issue in the main proceedings, *an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter.*

It follows that, in the present case, an examination of the restriction represented by the national legislation at issue in the main proceedings from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.

Case C-390/12 *Pfleger and Others* [2014] not published yet §57, 58, 59, 60

In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in

particular the representation of acts of homicide, *corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany*. It should also be noted that, *by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary* in order to attain the objective pursued by the competent national authorities.

Case C-36/02 Omega [2004] ECR I-9609 §39

In view of all the foregoing, the answer to the question referred to the Court is that *Article 49 EC*, read in the light of the *fundamental right to respect for family life*, is to be interpreted as *precluding*, in circumstances such as those in the main proceedings, *a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country*.

Case C-60/00 Carpenter [2002] ECR I-6279 §46

According to settled case-law, where national legislation falls within the field of application of Community law, *the Court*, when requested to give a preliminary ruling, *must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the European Convention of Human Rights - the observance of which the Court ensures*. However, *the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law* (see the judgment in Case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan and Others* [1991] ECR I-4685, paragraph 31).

Case C-177/94 Perfili [1996] ECR I-161 §20

*It is settled law that fundamental rights*, including those guaranteed by the European Convention on Human Rights, *form an integral part of the general principles of law, the observance of which the Court ensures* (see in particular Case C-260/89 *Elliniki Radiophonia Tileorasi* [1991] ECR I-2925, paragraph 41, and *Commission v Netherlands*, cited above).

In *Commission v Netherlands*, cited above, paragraph 30, the Court held *that the maintenance of the pluralism which the Netherlands broadcasting policy seeks to safeguard is intended to preserve the diversity of opinions, and hence freedom of expression, which is precisely what the European Convention on Human Rights, is designed to protect*.

Case C-23/93 TV10 [1994] ECR I-4795 §24, 25

The information to which the national court's questions refer is not distributed on behalf of an economic operator established in another Member State. On the contrary, the information *constitutes a manifestation of freedom of expression and of the freedom to impart and receive information* which is independent of the economic activity carried on by clinics established in another Member State.

Case C-159/90 Grogan [1991] ECR I-4685 §26

A cultural policy understood in that sense may indeed constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services. The maintenance of the pluralism which that Dutch policy seeks to safeguard is connected with *freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms*, which is one of the fundamental rights guaranteed by the Community legal order (Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 13).

Case C-288/89 Mediawet I [1991] ECR I-4007 §23

With regard to Article 10 of the European Convention on Human Rights, referred to in the ninth and tenth questions, it must first be pointed out that, *as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories* (see, in particular, the judgment in Case C-4/73 *Nold v Commission* [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case C-5/88 *Wachauf v Federal Republic of Germany* [1989] ECR 2609, paragraph 19, *the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.*

As the Court has held (see the judgment in Joined Cases C-60 and C-61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] ECR 2605, paragraph 25, and the judgment in Case C-12/86 *Demirel v Stadt Schwaebisch Gmund* [1987] ECR 3719, paragraph 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine *whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.*

In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, *must be interpreted in the light of the general principles of law and in particular of fundamental rights.* Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 *only if they are compatible with the fundamental rights the observance of which is ensured by the Court.*

It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, *including freedom of expression*, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.

The reply to the national court must therefore be that the limitations imposed on the power of the Member States to *apply the provisions referred to in Articles 66 and 56* of the Treaty on grounds of public policy, public security and public health *must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights*.

Case C-260/89 ERT [1991] ECR I-2925 §41, 42, 43, 44, 45

## 6.4 RELATION TO SECONDARY EU LAW

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### 6.4.1 Sector-based directives

Contrary to the Spanish Government's contentions, the two judgments that it relies on cannot constitute, per se, proof of the transposition of the Directive into the Spanish legal system.

As the Commission has pointed out, these are isolated cases and must be read narrowly and are solely concerned with the application of Article 248(2) of the Criminal Code to the sale or distribution of unauthorised decoding cards. *Even if the decisions came from the supreme court, it would be necessary in any event to show that the Spanish legal system contains provisions for attaining the objectives referred to in the Directive by prohibiting all the activities stipulated in the Directive, in particular in Article 4 thereof*.

It is true that the Court has held that *transposing a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision of national law and that the general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner* (see inter alia Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23, Case 247/85 *Commission v Belgium* [1987] ECR 3029, paragraph 9, and Case C-217/97 *Commission v Germany* [1999] ECR I-5087, paragraph 31).

Case C-58/02 Commission v Spain [2004] ECR I-621 §24, 25, 26

First of all, it should be noted that *Article 57(2) of the Treaty authorizes the Parliament and the Council to issue directives* concerning the taking-up and pursuit of activities as self-employed persons, *with a view to abolishing obstacles* to the right of establishment and *the freedom to provide services*. It was apparent that such an obstacle was to be found in the fundamental differences between the deposit-guarantee systems existing in the various Member States. Consequently, the laws on those systems were harmonized in order to facilitate the activity of credit institutions at Community level.

In those circumstances, *the export prohibition cannot be considered to be contrary to Article 57(2) solely on the ground that there are situations which are not to the advantage of the branches of credit institutions authorized in one particular Member State*. When harmonization takes place, traders established in one Member State may lose the advantage of national legislation which was particularly favourable to them.



Second, *it is true that the export prohibition is an exception to the minimum harmonization and mutual recognition which the Directive generally seeks to achieve*. However, in view of the complexity of the matter and the differences between the legislation of the Member States, the Parliament and the Council were empowered to achieve the necessary harmonization progressively (see, to that effect, Case C-193/94 *Skani and Chryssanthakopoulos* [1996] ECR I-929, paragraph 27).

In that regard it suffices to point out that, although consumer protection is one of the objectives of the Community, it is clearly not the sole objective. As has already been stated, *the Directive aims to promote* the right of establishment and *the freedom to provide services in the banking sector*.

Admittedly, there must be a high level of consumer protection concomitantly with those freedoms; however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State. The reduction in the level of protection which may thereby result in certain cases through the application of the second subparagraph of Article 4(1) of the Directive does not call into question the general result which the Directive seeks to achieve, namely a considerable improvement in the protection of depositors within the Community.

**Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405 §41, 42, 43, 48**

*Where national legislation, though applicable without discrimination to all vessels whether used by national providers of services or by those from other Member States, operates a distinction according to whether those vessels are engaged in internal transport or in intra-Community transport*, thus securing a special advantage for the domestic market and the internal transport services of the Member State in question, that legislation must *be deemed to constitute a restriction on the freedom to provide maritime transport services* contrary to Regulation No 4055/86.

**Case C-381/93 Commission v France [1994] ECR I-5145 §21**

It must first be stated that both Directive *75/362/EEC* of 16 June 1975, concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services ( Official Journal 1975 L 167, p . 1 ) and Directive *75/363/EEC* also of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors ( Official Journal 1975 L 167, p . 14 ) relate only to the profession of "doctor ". Moreover, there are no Community provisions governing the exercise of *professions allied to medicine* such as, in particular, osteopathy. It must also be noted that the abovementioned directives contain no Community definition of what activities are to be regarded as those of a doctor.

**Case C-61/89 Bouchoucha [1990] ECR I-3551 §8**

The directive *therefore does not lay down a uniform and exhaustive body of Community rules*. Within the framework of the common rules which it contains, the *Member States remain free to maintain or adopt substantive and procedural rules in regard to public works contracts on*

*condition that they comply with all the relevant provisions of Community law and, in particular, the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.*

Joined cases 27/86, 28/86 and 29/86 CEI [1987] ECR 3347 §15

In those circumstances the German Government's argument to the effect that only the requirement of an authorization can provide an effective means of ensuring the supervision which, having regard to the foregoing considerations, is justified on grounds relating to the protection of the consumer both as a policy-holder and as an insured person, must be accepted. Since a system such as that proposed in the draft for a *second directive, which entrusts the operation of the authorization procedure to the Member State in which the undertaking is established*, working in close cooperation with the State in which the service is provided, can be set up only by legislation, it must also be acknowledged that, in the present state of Community law, it is for the State in which the service is provided to grant and withdraw that authorization.

Case 205/84 Commission v Germany [1986] ECR 3755 §46

As the Court held in its judgment of 13 December 1983 (Case 218/82 *Commission v Council* [1983] ECR 4063), when the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty.

Consequently, *the directive should not be construed in isolation and it is necessary to consider whether or not the requirements in question are contrary to the abovementioned provisions of the Treaty and to interpret the directive in the light of the conclusions reached in that respect.*

Case 252/83 Commission v Denmark [1986] ECR 3713 §15

Case 205/84 Commission v Germany [1986] ECR 3755 §62

It should be noted that the result of that interpretation of *Directive 71/305* is in conformity with the scheme of the Treaty provisions concerning the provision of services. To make the provision of services in one Member State by a contractor established in another Member State conditional upon the possession of an establishment permit in the first State would be to deprive Article 59 of the Treaty of all effectiveness, the purpose of that article being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided.

Accordingly, the reply to the first question must be that Council *Directive 71/305* must be interpreted as precluding a Member State from requiring a tenderer established in another Member State to furnish proof by any means, for example by an establishment permit, other than those prescribed in Articles 23 to 26 of that directive, that he satisfies the criteria laid down in those provisions and relating to his good standing and qualifications.

Case 76/81 Transporoute [1982] ECR 417 §14, 15

## 6.5 RELATION TO NATIONAL LAW

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### 6.5.1 General principles

In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law ***must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law*** (principle of effectiveness) (see, inter alia, Case 33/76 *Rewe*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Courage and Crehan*, paragraph 29; *Eribrand*, paragraph 62; and *Safalero*, paragraph 49).

Case C-432/05 Unibet [2007] ECR I-2271 §43

Although the Court cannot substitute its assessment for that of a national court, which is the only forum competent to establish the facts of the case before it, it must be pointed out that ***the application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States*** (Case C-441/93 *Pafitis and Others*, cited above, paragraph 68). In particular, ***it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it.***

Case C-367/96 Kefalas [1998] ECR I-2843 §22

***In the absence of harmonization of the conditions of access to a particular profession, the Member States are entitled to*** specify the knowledge and qualifications needed in order to pursue it and to require the production of a diploma certifying that the holder has the relevant knowledge and qualifications (see the judgment in Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097, paragraph 10, and in Case C-340/89 *Vlassopoulou v Ministerium fuer Justiz, Bundes-und Europaangelegenheiten Baden-Wuerttemberg* [1991] ECR I-2357, paragraph 9).

Case C-104/91 Colegio Oficial de Agentes [1992] ECR I-3003 §7

Secondly, it must be observed ***that in so far as there is no Community definition*** of medical acts, the definition of acts restricted to the medical profession ***is, in principle, a matter for the Member States***. It follows that in the absence of Community legislation on the professional practice of osteopathy ***each Member State is free to regulate*** the exercise of that activity within its territory, without discriminating between its own nationals and those of the other Member States.

Case C-61/89 Bouchoucha [1990] ECR I-3551 §12

In order to rule on the compatibility of such a limit with the directive as a whole, the purpose and object of the directive must be borne in mind. The purpose of Directive 71/305 is to ensure that the realization within the Community of freedom of establishment and freedom to provide services in regard to public works contracts involves, in addition to the elimination of restrictions, the coordination of national procedures for the award of public works contracts.

Such coordination 'should take into account as far as possible the procedures and administrative practices in force in each Member State' (second recital in the preamble to the directive). Article 2 *expressly provides that the authorities awarding contracts are to apply their national procedures* adapted to the provisions of the directive.

Joined cases 27/86, 28/86 and 29/86 CEI [1987] ECR 3347 §14

In the course of the proceedings before the Court, the German Government and the governments intervening in its support have shown that considerable differences exist in the national rules currently in force concerning technical reserves and the assets which represent such reserves. In the absence of harmonization in that respect and of any rule requiring the supervisory authority of the Member State of establishment to supervise compliance with the rules in force in the State in which the service is provided, *it must be recognized that the latter State is justified in requiring and supervising* compliance with its own rules on technical reserves with regard to services provided within its territory, provided that such rules do not exceed what is necessary for the purpose of ensuring that policy-holders and insured persons are protected.

Case 205/84 Commission v Germany [1986] ECR 3755 §39

With regard to the first complaint, it must be stated that *no provision of Community law prevents a Member State from requiring insurance undertakings and their branches which are established on its territory to obtain an authorization not only in respect of business conducted on its territory but also for business conducted in other Member States in the context of the provision of services*. On the contrary, such a requirement is consistent with the principles laid down in Directive 73/239. Article 7 (1) of that directive provides that an insurance undertaking may request and obtain an official authorization to carry on its business only in a part of the national territory. In that case, if it wishes to extend its business beyond such part, it is required under Article 6 (2) (d) to request further authorization and, in accordance with Article 8 (2), a new scheme of operations must be submitted with that request.

Case 252/83 Commission v Denmark [1986] ECR 3713 §28

Furthermore, that argument is ill-founded. The incompatibility of national legislation with provisions of the Treaty, *even provisions which are directly applicable*, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. As the Court has consistently held with regard to the implementation of directives by the Member States, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty.

Case 168/85 Commission v Italy [1986] ECR 2945 §13

In the absence of any directive issued under Article 57 for the purpose of harmonizing the national provisions relating, in particular, to professions such as that of avocat, the practice of such professions *remains governed by the law of the various Member States*.

Case 2-74 Revners [1974] ECR 631 §48

### 6.5.2 National criminal legislation

It should be emphasised at the outset, in the context of the case at issue in the main proceedings, that, *where a monopoly system has been established in a Member State for games of chance and that system is incompatible with Article 49 EC, an infringement by an economic operator cannot be penalised by criminal penalties* (Joined Cases C-338/04, C-359/04 and C-360/04 Placanica and Others [2007] ECR I-1891, paragraphs 63 and 69).

Case C-347/09 Dickinger and Ömer [2011] ECR I-8185, §43

Although, generally speaking, criminal legislation and the rules of criminal procedure - such as the national rules in issue, which govern the language of the proceedings - are matters for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power in that respect. *Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law* (see, to that effect, *Cowan*, paragraph 19).

Case C-274/96 Bickel and Franz [1998] ECR I-7637 §17

The reply to the first question referred to the Court by the Pretore di Lodi must therefore be that a Member State *may not enforce a penal measure* in respect of the improper practice of the profession of veterinary surgeon against a national of another Member State, who is entitled to practise as a veterinary surgeon in his own country, on the ground that he is not enrolled on the register of veterinary surgeons of the first Member State, where such enrolment is refused in *breach of Community law*.

Case 5/83 Rienks [1983] ECR 4233 §11

In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. *The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom*.

The reply to those questions should therefore be that with regard to capital movements and transfers of currency which the Member States are not obliged to liberalize under the rules of Community law, *those rules do not restrict the Member States' power to adopt control measures and to enforce compliance therewith by means of criminal penalties*.

Case 203/80 Casati [1981] ECR 2595 §27, 29

## 7. EXTRA-UNION ASPECTS OF THE PROVISION OF SERVICES

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### 7.1 THE PRESENCE OF THIRD-COUNTRY NATIONALS IN THE FREE PROVISION OF SERVICES

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In that connection, it must be recalled that Chapter 1, paragraph 2, of Annex X to the Act of Accession of 2003 derogates from the freedom of movement for workers by excluding the application of Articles 1 to 6 of Regulation No 1612/68 to Hungarian nationals for a transitional period. Under that provision, for a two-year period from 1 May 2004, the Member States may apply national measures or those resulting from bilateral agreements regulating access to their labour markets by Hungarian nationals. That provision also states that Member States may continue to apply such measures until the end of the five year period following the date of accession to the European Union of the Republic of Hungary.

*Chapter 1, paragraph 13, of Annex X to that act derogates from the freedom to provide services where that involves a temporary movement of workers.* It is applicable only to the Federal Republic of Germany and the Republic of Austria and was the result of negotiations initiated by those Member States with a view to providing for a transitional scheme in respect of all the provisions of services referred to in Article 1(3) of Directive 96/71 (see, by analogy, judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64). It lists the sensitive sectors for which those two Member States are entitled to limit the freedom to provide services involving a temporary movement of workers. The hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, constitutes such a supply of services.

In the judgment in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64, paragraph 32), the Court held, as regards measures that the Kingdom of the Netherlands had adopted with regard to Polish workers, that legislation of a Member State making the hiring-out of foreign workers subject to a work permit must be regarded as being a measure regulating access of Polish nationals to the labour market of that State within the meaning of Chapter 2, paragraph 2, of Annex XII to the Act of Accession of 2003, which as regards the Republic of Poland, a measure identical in substance to Chapter 1, paragraph 2 of Annex X to that act, applicable in the present case.

It followed from that finding that the right to restrict the hiring-out of workers, within the meaning of Article 1(3)(c) of Directive 96/71, was not reserved to the Federal Republic of Germany and the Republic of Austria, which negotiated a specific derogation in that regard, but also applied to all the other Member States of the European Union at the date of access of the Republic of Poland (see, to that effect, judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 40).

Since Chapter 2, paragraph 2, and paragraph 13, of Annex XII to the Act of Accession of 2003 is identical in substance to Chapter I, paragraphs 2 and 13 of Annex X to that act, the reasoning concerning the Republic of Poland, in the judgment in *Vicoplus and Others* (C-307/09 to C-309/09, EU:C:2011:64) is applicable by analogy to the Republic of Hungary.

***It follows that the States which were already Members of the European Union at the date of accession of the Republic of Hungary are entitled to restrict the hiring-out of workers within the meaning of Article 1(3)(c) of Directive 96/71, on the basis of Chapter 1, paragraph 2, of Annex X to the Act of Accession of 2003.***

Case C-586/13 *Martin Meat* [2015] not published yet § 21, 22, 23, 24, 25, 26

It should be noted at the outset that under Article 56 TFEU restrictions on freedom to provide services within the Union ***are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.***

Accordingly, it is the Court's established case-law that the freedom to provide services conferred by Article 56 TFEU on Member State nationals, and thus on European Union citizens, ***includes 'passive' freedom to provide services, namely the freedom for recipients of services to go to another Member State in order to receive a service there, without being hindered by restrictions*** (*Luisi and Carbone*, paragraph 16; *Case 186/87 Cowan* [1989] ECR 195, paragraph 15; *Bickel and Franz*, paragraph 15; *Case C-348/96 Calfa* [1999] ECR I-11, paragraph 16; and *Case C-215/03 Oulane* [2005] ECR I-1215, paragraph 37).

Article 56 TFEU therefore covers all European Union citizens who, independently of other freedoms guaranteed by the FEU Treaty, visit another Member State where they intend or are likely to receive services (see, to that effect, *Bickel and Franz*, paragraph 15). ***According to that case-law, tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services*** (*Luisi and Carbone*, paragraph 16).

As regards the status conferred on Turkish nationals under the Association Agreement, Article 41(1) of the Additional Protocol lays down – as is apparent from its very wording – in clear, precise and unconditional terms, ***an unequivocal 'standstill' clause, which prohibits the Contracting Parties from introducing new restrictions on freedom of establishment and freedom to provide services with effect from the date of entry into force of the Additional Protocol*** (see, with regard to restrictions on freedom of establishment, *Case C-37/98 Savas* [2000] ECR I-2927, paragraph 46).

It is the Court's established case-law that Article 41(1) of the Additional Protocol has ***direct effect***. As a consequence, that provision may be relied on by the Turkish nationals to whom it applies before the courts or tribunals of the Member States (see, to that effect, *Savas*, paragraph 54; *Joined Cases C-317/01 and C-369/01 Abatay and Others* [2003] ECR I-12301, paragraphs 58 and 59; *Case C-16/05 Tum and Dari* [2007] ECR I-7415, paragraph 46; and *Soysal and Savatli*, paragraph 45).

It should be noted that the ‘standstill’ clause prohibits generally the introduction of any new measure having the object or effect of making the exercise by a Turkish national of such economic freedoms in the territory of a Member State subject to stricter conditions than those which applied at the time when the Additional Protocol entered into force with regard to that Member State (see, to that effect, Savas, paragraphs 69 and the fourth indent of paragraph 71; Abatay and Others, paragraph 66 and the second indent of paragraph 117; and Tum and Dari, paragraphs 49 and 53).

***The Court has already held that Article 41(1) of the Additional Protocol may be relied on by an undertaking established in Turkey which lawfully provides services in a Member State and by Turkish nationals who are lorry drivers employed by such an undertaking*** (Abatay and Others, paragraphs 105 and 106).

It is apparent from *Soysal and Savatli* that the ‘standstill’ clause in Article 41(1) of the Additional Protocol precludes the introduction, from the date of entry into force of that protocol, of a requirement that Turkish nationals are to have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, prior to that date, such a visa was not required.

It should be noted that ***there are differences between the Association Agreement and its Additional Protocol on the one hand, and the Treaty on the other, on account, inter alia, of the link that exists between freedom to provide services and freedom of movement for persons within the European Union. In particular, the objective of Article 41(1) of the Additional Protocol and the context of that provision are fundamentally different from those of Article 56 TFEU, especially in so far as concerns the applicability of those provisions to recipients of services.***

Consequently, irrespective of whether freedom of establishment or freedom to provide services in invoked, ***it is only where the activity in question is the corollary of the exercise of an economic activity that the ‘standstill’ clause may relate to the conditions of entry and residence of Turkish nationals within the territory of the Member States.***

By contrast, under European Union law, ***protection of passive freedom to provide services is based on the objective of establishing an internal market, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market. It is precisely that objective which distinguishes the Treaty from the Association Agreement, which pursues an essentially economic purpose,*** as stated at paragraph 50 above.

In those circumstances, the answer to the first question is that the notion of ‘freedom to provide services’ in Article 41(1) of the Additional Protocol must be interpreted as not encompassing freedom for Turkish nationals who are the recipients of services to visit a Member State in order to obtain services.

**Case C-221/11 Demirkan [2013] not published vet § 33, 35, 36, 37, 38, 39, 40, 41, 49, 55, 56, 63**

In the first place, it is important to bear in mind that Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession derogates from the free movement of workers by not applying, on a



temporary basis, Articles 1 to 6 of Regulation No 1612/68 to Polish nationals. Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession provides that, for a period of two years from 1 May 2004 – the date of the Republic of Poland’s accession to the European Union – the Member States are to apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. That provision also provides that the Member States may continue to apply such measures until the end of the five-year period following the date of the accession of the Republic of Poland to the European Union.

*However, the Court has acknowledged that such activities may have an impact on the labour market of the Member State of the party for whom the services are intended. First, employees of agencies for the supply of manpower may in certain circumstances be covered by the provisions of Articles 45 TFEU to 48 TFEU and the European Union regulations adopted in implementation thereof (see Webb, paragraph 10).*

Consequently, that legislation, by which, during the transitional period provided for in Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession, the hiring-out, within the meaning of Article 1(3)(c) of Directive 96/71, of Polish nationals in the territory of that State continues to be subject to the obtaining of a work permit, is compatible with Articles 56 TFEU and 57 TFEU.

Joined cases C-307/09, C-308/09 and C-309/09 Vicoplus and Others [2011] ECR I-453 § 26, 28, 33

*The Court has, admittedly, held that disturbing the balance and reciprocity of a bilateral international agreement concluded between a Member State and a non-member country may constitute an objective justification for the refusal by a Member State party to that agreement to extend to nationals of other Member States the advantages which its own nationals derive from that agreement (see, inter alia, Case C-307/97 Saint-Gobain ZN [1999] ECR I-6161, paragraph 60, and Gottardo, paragraph 36).*

Nevertheless, contrary to the situations at issue in those cases and that which gave rise to the judgment in D., on which the Federal Republic of Germany relies, application of the German-Polish Agreement concerns, since the accession of the Republic of Poland to the Union, two Member States, with the result that the provisions of that agreement can apply to relations between those Member States only in compliance with Community law, in particular with the Treaty rules on the free provision of services (see, by analogy, inter alia, Case 235/87 Matteucci [1988] ECR 5589, paragraphs 16 and 19 to 21, and Case C-478/07 Budějovický Budvar [2009] ECR I-0000, paragraphs 97 and 98).

In so doing, the Federal Republic of Germany has failed to put forward any convincing argument which could be based on one of the grounds set out in Article 46 EC, *since economic considerations and mere practical difficulties in the implementation of the German-Polish Agreement are not, in any event, sufficient to justify restrictions on a fundamental freedom* (see, by analogy, inter alia, Case C-18/95 Terhoeve [1999] ECR I-345, paragraph 45) or, a fortiori, a derogation under Article 46 EC, which presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

Case C-546/07 Commission v Germany [2010] ECR I-439 § 43, 44, 51

Second, as expressly stated by the Luxembourg Government with regard to the requirement referred to in paragraphs 32 to 35 of this judgment, the Grand Ducal Regulation of 12 May 1972 is intended to prevent the national labour market from being disrupted by a flood of workers who are nationals of non-member countries.

It should in this regard be borne in mind that, *although the desire to avoid disturbances on the labour market is undoubtedly an overriding reason of general interest* (see, to that effect, Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 13), *workers employed by an undertaking established in a Member State and who are deployed to another Member State for the purposes of providing services there do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work* (see *Rush Portuguesa*, paragraph 15; *Vander Elst*, paragraph 21; and *Finalarte*, paragraph 22).

Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191 § 37, 38

*Workers employed by an undertaking established in one Member State who are temporarily sent to another Member State to provide services do not in any way seek access to the labour market in that second State*, if they return to their country of origin or residence after completion of their work (see the judgment in Case C-113/89 *Rush Portuguesa v Office National d'Immigration* [1990] ECR I-1417). Those conditions were fulfilled in the present case.

The answer to the questions referred to the Court must therefore be that Articles 59 and 60 of the Treaty are to be interpreted as *precluding a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs, with the imposition of an administrative fine as the penalty for infringement.*

Case C-43/93 *Vander Elst* [1994] ECR I-3803 §21, 26

That argument cannot be accepted. *A Member State's power to control the employment of nationals from a non-member country may not be used in order to impose a discriminatory burden on an undertaking from another Member State* enjoying the freedom under Articles 59 and 60 of the Treaty to provide services.

It is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means. However, it is not possible to describe as an appropriate means any rule or practice which imposes a general requirement to pay social security contributions, or other such charges affecting the freedom to provide services, on *all persons providing services who are established in other Member States and employ workers who are nationals of non-member countries*, irrespective of whether those persons have complied with the legislation on minimum wages in the Member State in which the services are

provided, because such a general measure is by its nature unlikely to make employers comply with that legislation or to be of any benefit whatsoever to the workers in question.

The answer to the questions submitted by the Cour de Cassation of the Grand Duchy of Luxembourg must therefore be that Community law precludes a Member State from requiring an employer who is established in another Member State and temporarily carrying out work in the first-named Member State, *using workers who are nationals of non-member countries*, to pay the employer's share of social security contributions in respect of those workers when that employer is already liable under the legislation of the State in which he is established for similar contributions in respect of the same workers and the same periods of employment and the contributions paid in the State in which the work is performed do not entitle those workers to any social security benefits. Nor would such a requirement be justified if it were intended to offset the economic advantages which the employer might have gained by not complying with the legislation on minimum wages in the State in which the work is performed.

Joined cases 62 and 63/81 Seco [1982] ECR 223 §12, 14, 15

## 7.2 SERVICES TO THIRD-COUNTRY NATIONALS IN THE EC

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Consequently, *the provisions of Article 59 must apply in all cases where a person providing services offers those services in a Member State other than that in which he is established, wherever the recipients of those services may be established.*

Case C-198/89 Commission v Greece [1991] ECR I-00727 §10

Case C-180/89 Commission v Italy [1991] ECR I-00709 §9

Case C-154/89 Commission v France [1991] ECR I-00659 §100