BARRIERS TO THE PROVISION OF SERVICES AND JUSTIFICATION

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In the present study two types of service activity are discussed: provision of services in the strict meaning of the term as defined in Article 56 Treaty of the Functioning of the European Union (hereinafter TFEU), this type is in other words 'cross border service provision' on one hand, and provision of services within the framework of establishment on the other. In the latter case the service provider provides the service by making use of the freedom of establishment enshrined in Article 49 TFEU.

Barriers to the freedom to provide services as defined in Article 56 TFEU cannot be described separately from the freedom of establishment. The barriers to the two basic freedoms are closely related. If there are barriers to the provision of services within the framework of establishment, in the majority of cases it affects cross border service provision as well. The close logical connection is also reflected in the structural composition of the TFEU, where the provisions on the freedom of establishment are immediately followed by the provisions on the freedom to provide services. Furthermore, based on Article 62 TFEU provisions concerning the possibility of justification of restrictions on the freedom of establishments, issuing directives and companies (Articles 51-54 of the TFEU) also apply to the freedom to provide services.

Finally, reference must be made to *Directive 2006/123/EC on services in the internal market*[1] (hereinafter the 'Services Directive' or 'Directive'), the scope of which also extends to both types of services, namely services within the framework of establishment and cross border service provision. Thus, the Directive also interprets the service provision in two dimensions: as i) service provision in the framework of establishment and as ii) the freedom of cross border service provision.[2]

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[1] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006, 36-68.

[2] Recital (5) of the Services Directive: '[…] Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the free movement of services […].'

The present study also interprets service provision as the Directive does, in the framework of establishment and 'in the classical meaning' as cross border service provision. In the case of a service provided within the framework of the freedom of establishment, the service provider provides the service making use of the freedom of establishment ensured by Article 49 TFEU, while in the case of cross border service provision it carries out its activity based on Article 56 TFEU. We talk about economic activity in both cases, but while in the case of service provision in the framework of establishment the service provider carries out its activity permanently - establishing itself in another member state -, in the case of the free provision of services (cross border services) the service provider provides its services only in a temporary nature for a citizen established in another member state.

The present study tries to give a picture on barriers to services and their justification focusing mainly but not exclusively on the Services Directive.

The Direct Applicability of Primary Law and the Services Directive

The primary source of the freedom of establishment and the freedom to provide services is the TFEU.[3] The direct effect of the provision on the freedom to provide services was already stated by the European Court of Justice (hereinafter the Court or the ECJ) in its early case-law, in case *Van Binsbergen,*[4] and has been applied continuously since then. The direct applicability of the provision on the freedom of establishment had already been declared by the ECJ in case *Reyners*[5] preceding the *Van Binsbergen* case. Thus the decisions in the two cases referred to made it obvious that both the freedom of establishment and the freedom to provide services are freedoms at the infringement of which the persons entitled can directly refer to the provisions of the TFEU before their national courts.

In order, however, to fully realise the freedom of establishment and the freedom of service providers to provide services, the harmonisation of the national laws of the individual member states had become necessary. This was the idea behind the creation of the Services Directive. Recital 6 of the Directive underlines that barriers to the freedom to provide services cannot be eliminated on a case by case basis, relying exclusively on the direct application of the provisions of the Directive, the elimination of barriers requires a systematic harmonisation of the legal systems of the member states.[6]

[3] As to the early development of the freedom of services and its legislative history, see Steindorff, Ernst: Freedom of Services in the EEC. *Fordham International Law Journal*, Vol. 11 (1987) Issue 2, 347.

[4] Case 33/74 Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299, [27].

[5] Case C-2/74 *Reyners v. Belgian State* [1974] ECR 631, [32].

[6] Recital (6) of the Services Directive: "Those barriers cannot be removed solely by relying on

The Directive was adopted in 2006 following several years of preparatory work, and member states were to adopt the provisions of the Directive into their legal systems by 28 December 2009.[7] Prior to the adoption of the Directive there had been fierce political debates as to which member state's law shall apply to the service provider in the case of cross border service provision (Art. 56 TFEU), *either the law of the member state where* it has established itself and from which it provides the service (the country of origin principle) *or the law of the country where* it provides its service temporarily (the 'host state' principle).[8] Finally, this latter principle prevailed and is reflected in Article 16 of the Directive; nevertheless, political compromise left its traces in the not entirely coherent, rather complicated provisions of the Directive that also contains several exceptions.[9]

In the end a comprehensive and horizontal, no service industry-specific Directive was delivered. The scope of the Directive extends to services provided within the framework of the freedom of establishment and cross border services alike, involving thus both the freedom of establishment and the freedom to provide services. The Directive, on the other hand, excludes from its scope several service industries, and the area of taxation does not belong under its scope either.[10] On the basis of Article 3 the Directive is not applicable in areas regulated by other community legal act either. Not taking into account the excluded industries and areas the Directive covers more than

direct application of Articles 43 and 49 of the Treaty, since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation. As the European Parliament and the Council have recognised, a Community legislative instrument makes it possible to achieve a genuine internal market for services."

[7] As to implementation in member states, see Stelkens, Ulrich – Weiß, Wolfgang – Mirschberger, Michael (eds.): *The Implementation of the EU Services Directive – Transposition, Problems and Strategies*. T.M.C. Asser Press, The Hague, The Netherlands, Springer, 2012. On 14 March 2016, the European Court of Auditors (ECA) published its special report No 5/2016 entitled *'Has the Commission ensured effective implementation of the Services Directive*?' (hereinafter: ECA's report). The ECA's report gives a comprehensive picture on the implementation of the Services Directive but its special focus concerns the Commission's obligation to ensure the implementation of the Directive. In this report the ECA stated that only eight member states implemented the Directive by the end of 2009 (see point 19, p. 14). http://www.eca.europa.eu/Lists/ECADocuments/SR16_05/SR_SERVICES_EN.pdf.

[8] See: Craig, Paul – de Búrca, Gráinne *EU Law – Text, Cases and Materials*. Oxford University Press, fifth ed., 2011. pp. 813-817.

[9] Article 17 of the Services Directive.

[10] The Directive applies the 'negative approach' and mentions only those areas which it does not cover (see Articles 2 and 3 of the Services Directive). The Directive shall not apply to e.g. financial services, electronic communications services, transport services, healthcare services, audiovisual services, gambling, social services, private security services.

half of the service industry, thus it has great significance from the point of view of the regulation of the internal market.[11]

It follows from the above that if an opinion shall be adopted in the question whether a certain measure of a member state infringes the freedom to provide services, the provisions of the TEU and the TFEU and the provisions of the Services Directive govern, together with the EU laws governing the given activity specifically or horizontally (e.g. Directive 2005/36/EC[12]).

Barriers to Services

With attention to the fact that the provision of services can also be realised in a way that the service provider settles in another member state in order to provide service there, or in a way that it does not make use of its freedom of establishment and provides its service from „home", its own member state to another member state, barriers can vary. It may happen that a given member state measure is a barrier to both types of service provision simultaneously. At the same time there are cases when there is a barrier only to one or only the other type of service. Thus it needs to be examined in both cases separately whether the given national measure serves as a barrier to the freedom of establishment, the cross border service provision or both at the same time.

Due to their nature some restrictions have a more disadvantageous effect on those who provide services cross border, since these barriers can essentially be interpreted only referring to these service providers – an example for this is if a member state prescribes an establishment in the given state. This particular prescription affects those who provide cross border services extremely disadvantageously, since due to its effect it is suitable to force economic players to establish, thus depriving them of their freedom granted to them within Article 56 TFEU. The opposite of this restriction, when a member state prohibits the service provider from creating several establishments on the territory of the country, makes those service providers suffer who make use of their freedom of establishment.

The absolute common element that member states need to apply in the case of both types of service provision, however, is the prohibition of discriminatory requirements based on citizenship (registered office), the positive content of which is represented by the principle of equal treatment. It means economic players wishing to provide services either in the framework of establishment or cross border service provision should be

[11] For the data, see: Corugedo, Emilio Fernández –Ruiz, Esther Pérez: *The EU Services Directive: Gains from Further Liberalization* [IMF Working Paper (WP/14/113), International Monetary Fund 2014], 3. It is worth noting that the authors characterise the implementation of the Services Directive as „challenging and half-hearted" (Ibid. 3).

[12] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. OJ L 255, 30 September 2005, 22-142.

able to do so with the same conditions the given member state prescribes for its own citizens.

The main barriers to the freedom to provide services are discrimination based on citizenship (registered office) and the violation of the principle of equal treatment. The violation of the principle of equal treatment is established on one hand through applying the same rule to persons in a different situation, or through applying different rules to persons being in the same situation.[13]

Article 49 TFEU and the last paragraph of Article 57 appears to prohibit only discrimination based on citizenship. However, the case law of the ECJ highlights the fact that the aim of the Treaty is the creation of a single market which can only be realised if not only barriers based on citizenship and establishment are removed from the free movement of services but all barriers are eradicated. The free movement of services can be impeded not only by national regulations that make the provision of a certain service dependent on the fact whether the provider of the service is the citizen of the given member state or whether they have an establishment in the given state, but by other, theoretically any national regulation prescribing a barrier can impede the provision of service.

In case *Grupo Itevelesa SL and others*[14] the ECJ repeatedly held that Article 49 TFEU prohibits all national measures suitable to disturb the exercise of the freedom of establishment or that make it less attractive. The notion of barrier includes measures passed by the member state which – although they are to be applied free of discrimination – influence businesses of other states in their market access, thus they impede trade within the Union.

In order to decide, therefore, whether a given measure is a restriction on the freedom of services, the only aspect to be taken into consideration is whether the measure has the – either real or possible – potential to impede trade within the EU, that is, whether it can make the activity of service provision in a certain state less attractive for service providers. The fact that the measures serving as barriers can be justified by public interest is a different question.

As a first step a position needs to be adopted invariably whether the given measure is potentially suitable to jeopardise the internal market of the EU and only then can the necessity and proportion of the barrier be examined.

The restriction on service provision can theoretically be any member state measure, whether it is a regulation, some other provision (e.g. the regulations of chambers) or inappropriate application of the law. The barrier is typically created by the member state on the territory of which the service provider wishes to provide the service. However, it may also happen that the service provider is impeded in its economic

[13] Case C-390/96 *Lease Plan Luxembourg v. Belgische Staat* [1998] ECR I- 2553, [34]; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, [115].

[14] Case C 168/14 *Grupo Itevelesa and Others* [2015] not yet published, Judgement of the Court 15 October 2015 [67].

activity in another member state by the very member state it is established in. It also counts as a barrier if the member state impedes the recipient to access services in another state (the so-called passive freedom to provide services).

In case *Watts* [15] the Court found a regulation of the United Kingdom to infringe Article 56 TFEU that primarily infringed the freedom of the recipient of the service. The complainant of the case is Mrs. Watts, resident of the United Kingdom, who travelled to France to undergo a medical operation in a French health institution, an operation which she could have received only after a long time spent on the waiting list in the United Kingdom, however, her medical condition necessitated the operation to be performed as soon as possible. The regulations of the United Kingdom prescribe that a prior authorisation must be obtained for a refund to be awarded after an operation carried out abroad. Mrs. Watts nevertheless did not apply for the prior authorisation for the treatment abroad due to the lengthy authorisation procedure and her medical condition. Subsequently she asked the authorities of the UK to reimburse her for her related medical costs but due to the lack of prior authorisation she was denied it. The ECJ decided that according to Article 49 (now Article 56 TFEU) Mrs. Watts received a cross border service.

The Court repeatedly found that the freedom of providing services is infringed by all national legislation that hinders service provision or making use of the services between member states. At the same time the Court decided the practice of a member state to prescribe compulsory prior authorisation for the reimbursement of the costs of a medical treatment abroad does not in itself preclude the freedom of providing services, if its justification is recognised in the Treaty and if it also satisfies the requirement of proportionality. The ECJ held that the authorisation system of the UK presents a barrier to the freedom to provide services because it provides authorities a discretionary power not properly defined by legislative guarantees, thus it makes patients unsure of making use of services provided in another member state or even prevents them from it. The Court therefore concluded that the system of authorisation may pose a barrier to the freedom of providing services both in the case of patients and service providers abroad.

The question arises whether the infringement of the freedom to provide services can be established in the case of acts of private organisations or private persons besides member state measures, that is, whether the provisions of the TFEU regulating the freedom to provide services has a horizontal effect.[16] Regarding services provided on the basis of the freedom of establishment the decision of the ECJ in case *Viking Line* held that it is adequate that the service provider refers to Article 49 TFEU in the case of the demonstrative acts of trade unions.[17]

[15] Case C 372/04 *Watt*s [2006] ECR I-4325, [94] [98] [113] [118].
[16] See, Craig-de Búrca: *op. cit.* 767-768.
[17] Case C 438/05 The International Transport Workers' Federation and The Finnish Seamen's Union [2007] ECR I-10779 [61] [66].

Summarising the above it can be concluded that the barriers to the freedom of the provision of services can be realised in several forms and ways, through the measures of a state institution or any other institution with public authority, as well as through acts of private organisations. There can also be a barrier if the measure is not discriminative on a citizenship (registered office) basis, however, the most drastic form is discrimination based on citizenship (registered office).

There is an infinite number of services the range of which is constantly increasing with the development of society. Similarly, there is an ever increasing range of measures that represent barriers. The Services Directive on the other hand contains provisions that define particular types of barriers, the so-called prohibited requirements and requirements to be evaluated. The barriers defined by the Directive can be divided into two main groups: prohibited restrictions (Article 14) and restrictions to be evaluated (so-called 'requirements to be evaluated'), and within this the Directive regulates the requirements restricting the establishment of service providers (Article 15) and the requirements restricting the free provision of services (cross border provision of services) (Article 16) separately.

Prohibited Requirements in the Directive

As their name suggests, prohibited requirements represent barriers that, based on the case law of the ECJ, are the most serious barriers to service provision in the framework of establishment, that is why their application is permitted under no circumstances and member states need to consider eliminating these barriers also in industries that do not belong under the Services Directive.[18] Among these barriers there are the direct and indirect forms of discrimination based on citizenship – in the case of companies based on registered office. A direct and explicit discrimination is realised if the member state makes the provision of the service subject to citizenship. It can refer not only to the citizenship of the service provider but their employees as well, and in the case of companies to the citizenship of their owners (members of their supervisory or management boards). An indirect form of discrimination is e.g. the prescription of the requirement of residence.

A prohibited requirement is if a member state makes it a precondition to the operation of a service provider that it shall not be established in any other member state or that it shall not have membership of a professional body in another member state.

It is considered to be a very strong therefore prohibited requirement if the member state makes it a precondition to the activity of the service provider that the service provider shall principally be established on the territory of the given member state, or if

[18] Handbook on the implementation of the Services Directive, p. 28. http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf.

the member state restricts the right of the service provider to determine the form of its secondary establishment (subsidiary, branch, office).

Another prohibited requirement is when the prerequisite for the provision of the service is member state reciprocity, the obligatory economic test of the service provider. The requirement to provide financial guarantee is not prohibited, what is more it is desirable in several instances, since it aims at creditor protection, nevertheless, the regulation that prescribes that a financial guarantee can only be accepted if it is provided by a service provider established in a certain member state is considered to be prohibited.

Although the prohibited requirements are to be found in the part of the Directive on the freedom of establishment, the cases listed in Article 14 affect not only those providing service in the framework of establishment but also cross border service providers.

The prohibited requirements of Article 14 are based on the case law of the ECJ, several provisions of the Directive are the codification of the case law of the Court. After the adoption of the Directive relatively few decisions were made as to the interpretation of the Directive.

One of these is the decision of the Court in the *Rina case*[19] that refers to the possible justification of the prohibited requirements listed in Article 14. The activity of the companies belonging to Rina holding was certification in Italy. According to Italian law certification activity can only be carried out by companies the registered office of which is located in Italy. The ECJ held that the requirement concerning the location of the registered office infringes Article 14 (1) of the Directive and at the same time the provision of Article 14 (3) that prohibits the choice between a principal or a secondary establishment. The Italian government held that the prohibited requirements listed in the Directive can also be justified since Article 52 TFEU, that is, primary law serves as a basis for this, consequently the provisions of the Directive cannot be interpreted differently either. The Court did not agree with this standpoint and decided that the exclusion of the possibility of justification is not contrary to Article 52 of the TFEU. In its argumentation it referred to the fact that the Directive was created exactly because the case-by-case enforcement was not an effective means of the protection of the basic freedoms. The provisions of the Directive themselves are based on primary law, the case law of the Court, thus the interpretation excluding the justification of prohibited requirements is in line both with the TFEU and the objective of the Directive.[20] The argumentation of the Court in *Rina* case was confirmed in case *Commission v. Hungary* (so-called '*Cafeteria case*') as well.[21]

[19] Case C 593/13 *Rina Services and Others* (not yet published), Judgment of the Court (Grand Chamber) of 16 June 2015.

[20] Ibid. [40].

[21] Case C-179/14 *Commission v. Hungary*, not yet published, Judgment of the Court (Grand Chamber) of 23 February 2016, [45-47].

Requirements to Be Evaluated in the Directive

Article 15 (2) and Article 16 (2) of the Directive lists the restrictive cases, the so-called 'requirements' of which member states must notify the Commission in a so-called notification procedure from 28 December 2009.[22] The requirements mentioned in Article 15 typically infringe the freedom of establishment, while the requirements listed in Article 16 basically restrict cross border services. Article 15 (2) lists the following restrictions:

a) quantitative or territorial restrictions,

b) the requirement of a specific legal form of a service provider,

c) requirements which relate to the shareholding of a company,

d) the reservation of access to the service activity to particular providers,

e) a ban on having more than one establishment in the territory of the same State,

f) requirements fixing a minimum number of employees,

g) fixed minimum and/or maximum tariffs for service provision,

h) an obligation on the provider to supply other specific services jointly with its service.

In case *Grupo Itevelesa* the ECJ held that the Spanish regulation that prescribed that a minimum distance between technical checkpoints and the market share of service providers is a prerequisite of authorisation restricts the freedom of establishment.[23]

It qualifies as a restriction of legal form if provision of service can only be carried out by certain types of legal persons or only legal persons or only natural persons. In case *Commission v. Hungary* ('*Cafeteria* case') the ECJ decided that the prescription of company form, and within this the prescription of a certain form of company infringes the freedom of establishment and the freedom to provide services alike.[24]

The prohibition of several places of establishment is similar to the prohibition expressed in Article 14 (2) of the Directive, but while the latter potentially prevents the service provider from establishing in the given member state and providing service there, the prohibition in Article 15 does not prohibit the service provider from establishing but restricts them from providing their service from several establishments within the member state.

The requirement fixing a minimum number of employees imposes wage costs on the service provider thus it is suitable to restrict the service provider in choosing the

[22] Article 15 (7) and Article 39 (5) of the Services Directive. As to the deficiency of the notification obligation, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Upgrading the Single Market: more opportunities for people and business* [Brussels, 28 October 2015, COM (2015) 550 final] (hereinafter: Communication). See point 4.2: *'Improving the delivery of the Services Directive by reforming the notification procedure*', pp. 17-18. https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-550-EN-F1-1.PDF.

[23] Case C 168/14 *Grupo Itevelesa and* Others, [84].

[24] Case C-179/14 *Commission v. Hungary*, [63].

member state applying this kind of prescription as the place it provides its services from.

The obligation of the service provider to provide the recipients of the service other services besides its main service (e.g. a customer service office) is also a burden on service providers. The aim of provisions containing such restrictions is usually consumer protection.

Article 16 (2) of the Directive list further barriers with an illustrative and non-exhaustive nature that typically affect cross border service providers. These restrictions include:

a) an obligation to have an establishment in their territory;

b) an obligation on the provider to obtain an authorisation including entry in a register,

c) a ban on setting up infrastructure (e.g. an office);

d) the application of specific contractual arrangements;

e) an obligation on the provider to possess an identity document;

f) requirements which affect the use of equipment and material,

g) provisions that may restrict the recipient of the service from making use of the cross border service.

The most frequently applied restriction from the above is the obligation to obtain an authorisation or entry in a register, thus the Directive devotes a specific section to the requirements for systems of authorisation.

In case *Commission* v. *Portuguese Republic*, the Committee launched an infringement procedure because Portugal prescribed a stringent system of authorisation for construction services which was discriminative against cross border service providers. In the authorisation procedure those service providers who were established in Portugal were to fulfil the same requirements as those providing cross border services. The Court held that the Portuguese system of authorisation infringes the freedom to provide services because it does not take into account the fact that the activity of providers providing cross border services had already been authorised by their own member state, thus the Portuguese system of authorisation is a double burden on construction companies providing cross border services. The Court – similarly to the Watts case – repeatedly referred to the fact that the system of prior authorisation can only be justified if it contains non-discriminatory, objective and predictable elements to avoid the arbitrary consideration of authorities. During the procedure Portugal claimed that the reason for the stringent regulations is consumer protection, the safety requirements of construction works and environment protection. The Court acknowledged that these reasons are theoretically suitable to introduce measures restricting the freedom to provide services, but it did not examine them more closely because it held the strictness of regulations disproportionate already.25

[25] Case C-458/08 *Commission v. Portugal* [2010] ECR I-11599, [89] [99] [107].

Justification for the Restrictions, Necessity and Proportionality

The freedom of establishment and the freedom to provide services cannot be restricted as a matter of principle, however, they are not granted absolute protection, Articles 51 and 52 TFEU contain the reasons that make it possible to justify member state restrictions. In reality, Article 51 TFEU does not contain a justification possibility but it exempts member states from their obligation to apply the provisions for basic freedoms in the case of activities related to the exercise of public power as well.[26] The Court has argued about the conditions necessary for an activity to be recognised as the exercise of public power in several decisions. In accordance with consistent case law a basic characteristic of the exercise of public power is the discretionary power of decision, the power of assessment and the possibility to impose sanctions.

In case *Rina Services* the ECJ held that the activity of the certifying organisations does not constitute an exception to the freedom of establishment because the certifying private entities do not have decision-making powers, they carry out their control activity under direct state supervision, thus their activity does not constitute a direct and specific connection with the exercise of official authority.[27]

In case *Grupo Itevelesa* Spain also unsuccessfully referred to Article 51 TFEU since the Court did not regard the roadworthiness testing of motor vehicles as an activity connecting with the exercise of official authority even if the testing organisation was entitled to remove vehicles from the market. The Court held that for the purpose of removing vehicles from the market the service provider does not have powers of coercion, it is the police that is competent to enforce the sentence.[28]

Regarding the profession of lawyers the ECJ already decided early in its case law that it cannot be considered as participation in the exercise of public power. The Court pointed out in the *Reyners case* that an activity that is not integrally connected to the activity of courts cannot be regarded as the exercise of public power, the given activity must demonstrate public power character overall.[29] In the infringement procedure against *Greece* the court ruled that the activity of notaries cannot be regarded as exercise of public power either, at the same time it explained that it is the nature of the activity that is considered and not the status of the person carrying it out.[30]

While Article 51 of the TFEU excludes a full scope of activities from basic freedoms, Article 52 contains the reasons a member state can refer to in order to restrict a basic freedom. Justification for restrictions can be public order, public security and public health. The already mentioned, rather broad concepts were given meaning to by the case law of the Court, at the same time introducing the concept of 'overriding

[26] See, Craig-de Búrca: *op. cit.* 769.
[27] Case C 593/13 Rina Services and Others, [19].
[28] Case C 168/14 *Grupo Itevelesa and Others*, [56] [60 - 61].
[29] Case C-2/74 *Reyners v. Belgian State*, par. [46], [51] [53-54].
[30] Case C-61/08 *Commission v. Greece* [2011] ECR I-4399 [105].

reasons relating to the public interest'. The scope of overriding reasons relating to the public interest is also rather broad; however, all of them originate from one of the three reasons defined in Article 52 TFEU. The overriding reasons relating to the public interest are listed by Article 4 (8) Services Directive referring to the case law of the ECJ.

The restriction of the basic freedoms can be justified by the overriding reasons relating to the public interest - but only those overriding reasons that actually exist, but not if there are other reasons behind the restrictions.

In the infringement procedure against *Spain*[31] and in case *Belgacom*[32] the ECJ held that objectives of purely economic nature cannot constitute overriding reason relating to the public interest.

An objective reason in the public interest is a necessary but insufficient ground for the justification of restrictions, the ECJ introduced the proportionality test as a further requirement. The principle of proportionality includes the requirement that the restrictive measure shall be suitable for the attainment of the general interest objective (e.g. consumer protection, environment protection etc.) and that the same objective shall not be possibly realised by a less restrictive measure.

Replicating the case law of the Court the Services Directive clearly defines the system of conditions that can justify a measure restricting the freedom of providing services in the course of the services notification.[33] In the notification procedure member states have to verify the existence of all of the following conditions: the restriction must be necessary (based on overriding reasons of public interest), proportionate and non-discriminatory.

Summary

The freedom to provide services and the freedom of establishment have evolved through the following stages: i) the elaboration of a case law covering the prohibition of discrimination based on citizenship; ii) the prohibition of potential restrictions independent of discrimination whether real or potential; iii) the publication of the Services Directive and the introduction of the services notification for the services covered by it.

In this evolution the three overriding reasons of public interest gradually broadened and became compelling reasons, parallel to which the Court also introduced the proportionality test. The Court is making the necessity and proportionality test of restrictions more and more sophisticated with time. The requirement that requires the restrictions to be in harmony also with the fundamental rights protected by the EU Charter of Fundamental Rights can more and more often be found in case law. In

[31] C-400/08 *Commission v. Spain* [2011] ECR I-01915.

[32] Case C-400/08 *Commission v. Spain*, [74]; Case C-221/12 *Belgacom* (published in the online, electronic Reports of Cases), Judgment of the Court of 14 November 2013, [41].

[33] Article 15 (1) (3) and Article 16 (1) (3) of the Services Directive.

relation to the proportionality test, on the other hand, the requirement has emerged that it should be coherent and systematic.[34]

The member state restriction of basic freedoms is tied to a rather stringent system of conditions that is not easy to fulfil, a fact that is proven by the large number of infringement or preliminary ruling procedures for the infringement of Articles 49 and 56 TFEU. It is supposed at the same time that the cases that are brought before the Court are only the tip of the iceberg. The increasing number of cases before the ECJ justifies the necessity of the Services Directive, and at the same time it highlights the fact that the issue of the Directive did not solve the problem in itself, since although it specified the system of regulations of the Treaty, it cannot ensure the enforceability of the requirements.[35] In the long run the solution to ensure the requirements as fully as possible is in the hands of the member states, who should ensure the decrease in the number of restrictive provisions through their own national legislation in accordance with the EU law.

[34] Case C-258/08 Ladbrokes Betting & Gaming and Ladbrokes International [2010] ECR I-4757, [21-24].

[35] In the ECA's report, see Recommendation 5: '*The legislator should introduce a standstill period for the notification of draft requirements* […]', p. 43. [In its reply the European Commission accepted this recommendation (Ibid. 59)]. The recommended 'standstill period' means that the member state shall notify their draft legislation concerning requirements listed in Articles 15 (2) and 16 (2) Services Directive and the notified draft legislation can only be promulgated after the standstill period. During the standstill period the Commission and other member states can make their observation on the notified draft legislation. The problem is that the Services Directive provides only for the notification obligation of new national requirements but it does not say anything regarding whether member states shall notify their draft or final legislation and there are no consequences of the omission of the notification. Regarding that the Services Directive was reached by heavy political debate there is not much willingness from member states to reopen the Directive in order to modify it. For the planned legislative proposal of the Commission concerning the improvement of the notification procedure, see Communication, p. 18.