INTEREULAWEAST

European and International Law Master Programme Development in Eastern Europe

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Handbook

on

Free Provision of Services on the Internal Market

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INTEREULAWEAST

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Free Provision of Services on the Internal Market

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I. Free Provision of Services – Introduction

Services are important economic area, contributing to 96% newly created jobs and appx. 75% national GDP across member states of the European Union. Interstate services are, on the other side, less developed. State's (administration) measures are of crucial importance to foster services. Although there are provisions on freedom to provide services from the very beginning of the establishing of the European Communities, this freedom was less developed for decades; one of the reasons is also the fact that the Member States have problems to supervise service performers and corollary it is difficult to tax them. Having an objective to increase the number of interstates services, European Union adopted *Services directive* (2006/123/EC, Directive on services on the internal market). Services directive is a codification directive, meaning that it is, to large extend, based on jurisprudence of the EU Court. On the other side, it does not cover the whole range of services. These are two reasons why services directive needs to be understood in much broader contexts of the internal market and of the free provision of services (i.e. Art. 56 of TFEU).

The purposes of the handbook are:

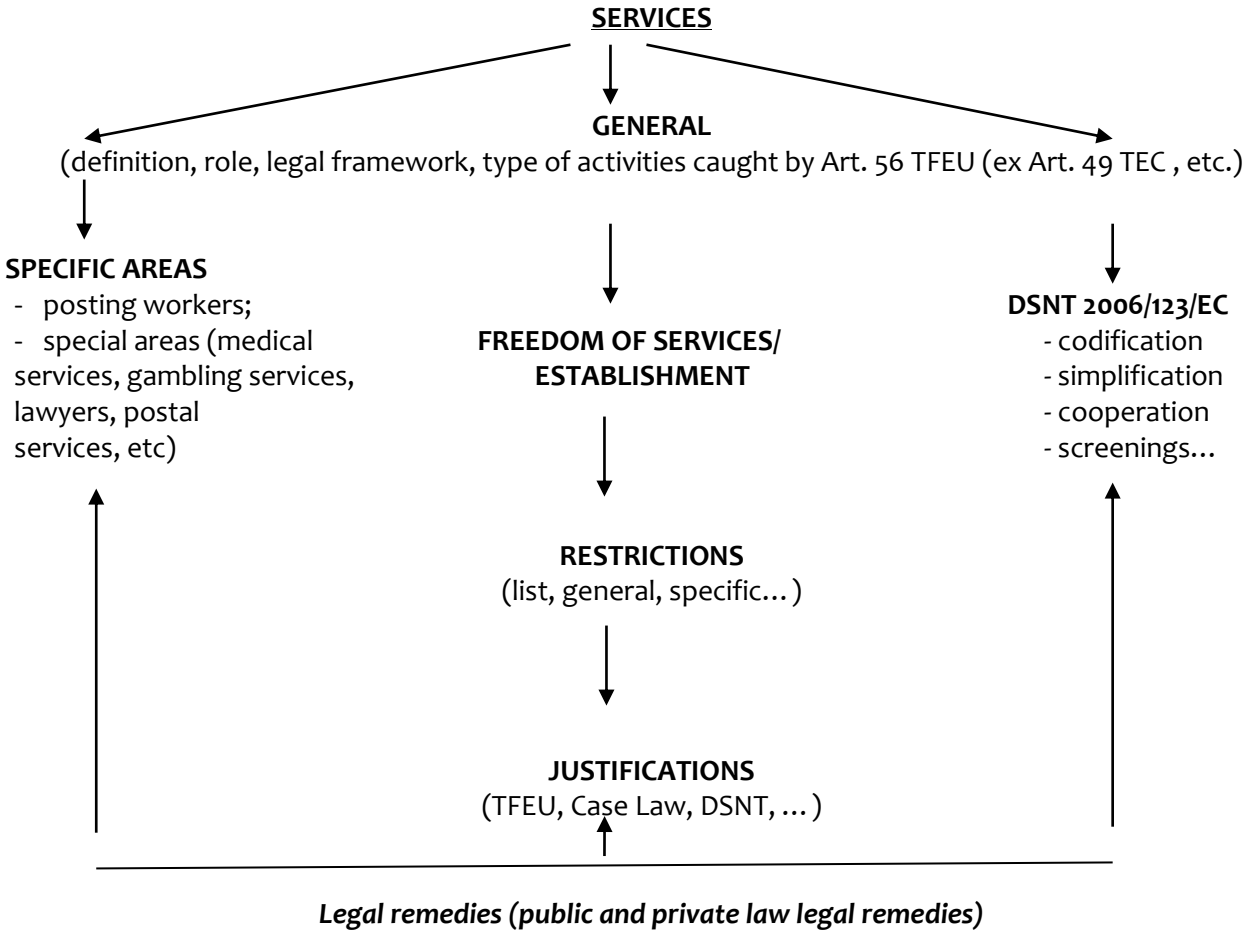
- to complement the knowledge of the internal market law, especially free provision of services, with the element of an application, mining that the student needs to apply rules on free movement of services to actual cases;
- with the help of case solving approach the student s shall also understand the tiny line between application of rules on free provision of services and freedom of establishment;
- to get acquainted with actual and possible cases, applicable to special rules of services, like tourism, posted workers, health services, etc.;
- for students, to get acquainted with back stage of the services directive (2006/123) and its codification purposes;
- to strengthen legal skills how to apply EU law, how to recognise the case where EU law shall be applicable, how to use direct effect and interpretatio europea.

Topics discussed in this handbook*:*

- *Definition of services and rules on freedom to provide services (Art. 56 TFEU)*
- *Links between the freedom to provide services and the freedom of establishment (permanent activities, primary & secondary establishment, etc - Art. 49 TFEU)*
- *Links between the freedom to provide services and the European citizenship*
- *Prohibited restrictions to free provisions of services (discriminative and equally applicable national measures)*
- *Basic exemptions from the freedom to provide services*
- *Rules on mutual recognition of professional qualifications and its role in assuring freedom of establishment / services (Dir. 2005/36 and its amendments)*

The above description of the handbook can be sketch as follows here in the bird-view main features:

Table "bird-view"



II. Definition of services and rules on freedom to provide services (Art. 56 TFEU)

Explain the differences regarding the legal base - the internal market freedoms - among these three cases (so far, you do not have to answer questions asked at the end of the cases' facts):

First case:

ECJ: Austrian gaming legislation contrary to EU law

EGBA - European Gaming and Betting Association

Brussels, 9 September 2010

In a decision published today (1) , the European Court of Justice ruled that the Austrian laws regulating the provision of gaming services are disproportionate and discriminatory and therefore not compliant with EU law.

Only a day after the landmark rulings issued against the German lottery and sports betting monopoly the ECJ out rightly rejects the Austrian gaming provisions as also being in clear breach of EU law.

The Court concluded on a number of questions which will not only lead Austria to modernize its legislation but will also directly impact other Member States:

* "The obligation on persons holding concessions to operate gaming establishments to have their seat in Austria constitutes a restriction on freedom of establishment" (ECJ press release n°80/10)

* "There are in fact various less restrictive measures available to monitor the activities and accounts of such operators. In addition, any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers. Moreover, there is nothing to prevent supervision being carried out on the premises of the establishments" (Idem)

* "The absence of a competitive procedure when the concessions were granted to Casinos Austria AG does not comply with freedom of establishment and freedom to provide services" (Idem)

* Tendering procedures "must be based on objective, non discriminatory criteria, known in advance, in such a way as to circumscribe the exercise of the authorities discretion so that it is not used arbitrarily" (Point 55 of "Engelmann ruling," C-64/08)

Commenting on the case, Sigrid Ligné, Secretary General of the European Gaming and Betting Association said: "Today's ruling against the Austrian gambling laws confirms clearly that Member States cannot require EU licensed online operators to be physically present on their territory. In the Digital age there are obviously other and more efficient means available to monitor the activities of the operators".

"The European Commission has been given new legal arguments to pursue infringement procedures against several Member States that have similar provisions. Commissioner Barnier has now a clear mandate to go ahead with the Green paper and to start discussions on EU regulation for the sector", Ligné added.

1 Engelmann, C-64/08

Questions:

- Who, do you think started the procedure against Austria?
- Could Austria also be faced with a money penalty (fine, penalty payment)?

Second case:

The service provider from Austria, a company, which is engaged in service activities regarding the lightning protection consulting, is prohibited to use advanced lightning protection equipment, named Prevectron (right) and imported from France. There is no decision on the side of the Austrian governmental authorities, only the architects and engineers do not want to use it since there is no provision in Austrian legislation which would explicitly allow its use. Austrian rules are allowing only classic lightning conductors but not the one based on ionization process. The Austrian Chamber of Engineers is not supporting its use and they demand in order for the investors to obtain the building and operation permit to include also classic conductors. That way the investors are faced with double costs. Consequently, only a few new constructions are equipped with this lightning conductor.

PREVECTRON LIGHTNING CONDUCTOR

Consult Austrian service provider where and on which basis to conduct the appropriate procedure? Also, is it possible to commence two or more procedures at the same time?

Third case:

Person A from Germany would like to use *ski-lift* services at Weinebene and he cannot get the family-ticket… since he lives in Slovenia, not in Austria/Steiermark.

Please, help me; What do you think, what should I do? What is a link between the Union Citizenship and Free Provisions of Services? Namely, family ticket can only be obtained by the authorities of the Land Steiermark.

_____
_____
_____
_____

Ermäßigte Familienpakete können **ausnahmslos** nur gegen Vorweis eines gültigen Familienschipasses, des **Familienpasses des Landes Steiermark** oder eines aktuellen Familiennachweises der Wohnsitzgemeinde (Namen, Geburtsdaten und Adresse der Familienmitglieder) ausgegeben werden.

Your main task is:

Answer whether in these three cases rules on services apply or not and state arguments?

III. The Services under the TFEU

- The definition of services (in general, Art. 56 PDEU)

Free services	CHAPTER 3 - SERVICES
	ARTICLE 56
EP gains co-decision	*X***
Restrictions prohibited	Within the framework of the provisions set out below, restrictions on freedom to provide services within the **Union** shall be 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.
Rights can be extended to 3rd country persons by qualified majority	**The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend** the provisions of the Chapter to nationals of a third country who provide services and who are established within the **Union**.

- **Possible modes of services:**
  - A service provider performs service in another MS to service recipient
  - A service recipient receives service in another MS from the service provider
  - A service recipient offers a service to service providers in another MS without moving there (supply without moving)
  - A service provider performs service to service recipient (might be with the seat/domicile in the same MS) in another MS

- **The role of services (statistics):**
  ... app. 70% GDP of the MS,
  … app. 68% of employment (jobs in the EU),
  … app. 96% of new jobs
  ... *however, only 20% of the interstate trade*

- **Definition of services (in particular):**
  * Economic activity
  * Cross border character
  * Temporary character
  * Active and passive freedom to provide services

III.1. Freedom to provide services & Freedom of establishment – how to differ?

As you might have learned already above (the first three cases), there is a tiny line between the application of the rules on services and the rules on establishment (Art. 56 and respectively Art. ???). The CJEU made this line as clear as possible.

- For the tiny line of difference between the two freedoms see the following cases:
    - C-205/84, *Insurance Services* vs. C-55/94, *Gebhard*
    - C-215/01, *Schnitzer*: let's underline the *erga omnes* applicable rules set by the CJEU:

28 The Court has held that the temporary nature of the activity of the person providing the service in the host Member State has to be determined in the light not only of the duration of the provision of the service but also of its regularity, periodical nature or continuity. The fact that the activity is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question (Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 27, and Case C-131/01 Commission v Italy [2003] ECR I-1659, paragraph 22).

29 The Court has distinguished that situation from that of a Member State national 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 Member State. The Court has drawn the conclusion that such a national comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services (see Gebhard, cited above, paragraph 28).

30 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.

31 No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty.

32 It follows that the mere fact that a business established in one Member State supplies identical or similar services with a greater or lesser degree of frequency or regularity 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, is not sufficient for it to be regarded as established in the second Member State.

33 In the main proceedings, although this is a matter for the national court to determine, the Portuguese undertaking does not appear to have an infrastructure in Germany allowing it to be regarded as established in that Member State, or to be seeking illegitimately to evade the obligations imposed by that Member State's national legislation.

And in case C-208/07, Chamier-Glisczinski, ECR 2009, I-6095, the Court stated:

74. Next, as for Article 49 EC, it should be noted at the outset that no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service can no longer be regarded as the provision of services within the meaning of the Treaty. 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 (see, to that effect, Case C -215/01 Schnitzer [2003] ECR I -14847, paragraphs 30 and 31, and Case C -171/02 Commission v Portugal [2004] ECR I -5645, paragraph 26).

Questions:

- **What criteria is the Court of the EU using to differ between services and establishment?**
    a) subjective;
    b) objective;
    c) time based criteria;
    d) economic criteria;
    e) genuine integration criteria;
    f) equipment criteria;
    g) anything else_____

- **Why to differ?**
    - Does the consequences and effects matter?
    - For instance: can the service provider use facilities, infrastructure premises, got indistinctly access to ownership, to housing, credit or loans etc

_____
_____
_____
_____
_____
_____

- **Case task:**

There is a Croatian company engaged in the business in Slovenia. It runs a construction project of one power plant. It will take several years to finish with the construction. The company is not registered in Slovenia, neither the branch office. Market inspector is of the opinion that the company performs its activities in Slovenia and that it is necessary to establish a branch office. It orders (with a decision) to establish a branch. If the company is not respecting the decision in 30 days, it will order to stop the activities. This is exactly what happened. The company is now filed a lawsuit to annual the decision of the inspectorate.

Anticipate the development of the case, list and discuss arguments of both parties!

_____
_____
_____
_____
_____

III.2. The direct effect/direct applicability and Legal remedies– enforcement of the free provisions of services

The EU legal system, similarly as lot of modern legal systems, differs between public and private legal remedies. It is rather crucial that the student understands the difference. Namely, actually every case can be resolved in one or/and another system. If there is a violation of certain rule, the subject who violates it can be liable in a procedure where the individual is acting against it (private law remedies) and also in a case, where certain state authority is acting against it (like an inspection) and the later is called public law remedies system.

Since Art. 56 TFEU is capable of direct effect, individual can bring action against state measures, which violates it at the domestic courts, relying on direct effect doctrine. The individual will therefore exerciser the private law remedies scheme. At the same time, the Commission can also start action against the Member State which adopted the measure, contrary to Art. 56.

Below, we can find a table, trying to sketch the system. Attached is also a constitutional protection, which is an element important for national legal systems, but also for EU legal systems. Namely, the CJEU, performs also constitutional legal review; this is possible under Art. 263 TFEU (the action for annulment).

Try to get deeply involved to the scheme, understand it into details and then try to apply it on the cases below.

The main elements of legal remedies scheme are:

- The direct effect of Art. 56 TFEU (ex Art. 49 TEC)
- Vertical effect
- Horizontal effect
- Private law legal remedies
- Public law legal remedies
- Combination of private and public law legal remedies

Discuss Legal Remedies Scheme:

A RIGHT TO BE PROTECTED

PRIVATE LAW REMEDIES	PUBLIC LAW REMEDIES	CONSTITUTIONAL PROTECTION
- **who?** - **against whom?** - **what to claim?** - **where to claim?**	- **who?** - **against whom?** - **what to claim?** - **where to claim?**	- **who?** - **against whom?** - **what to claim?** - **where to claim?**

Questions:

- Why is important to understand the differences among these three systems?
- Are all three systems compatible / can they be used simultaneously?
- Is it the same structure possible in the national and EU legal order?

Cases & exercises:

A) Apply/discuss the *Slovene vignettes case above* to the above scheme:

- What could a driver, being penalized for not using the vignette, do? Is he obliged to respect duty to mitigate damage?
- Is it class action possible?
- Could any MS did/does anything?
- What can be done by the Commission?

B) *(Right) This is one of the most famous caricatures in respect the CJEU decision (C-213/98, Factortame) in the history. Could you discuss it from the legal point of view? Namely, in backstage of the cartoon is a case with important legal rules connected with the individual elements of the cartoon.*

C) XY Bank, a company governed by Macedonian law, with its seat in Skopje, is a subsidiary of *Bank Holding*, a company governed by Slovene law with its seat in Slovenia. XY Bank advertises a sight account remunerated at the rate of 1,5 % per annum. By the decision of the competent Macedonian authority, XY Bank was prohibited from concluding new contracts with residents of Macedonia relating to remunerated sight accounts in Euros and ordered to rescind the clauses in existing contracts which provided for the remuneration of such accounts.

XY Bank appealed against that decision being of the opinion that the prohibition by Macedonian authority relating to banking institutions duly established in its territory from remunerating sight accounts and

Would you agree with XY Bank and advocate how to proceed?

other repayable funds constitute an obstacle to freedom of establishment. XY Bank maintains that Bank Holding (the mother company) cannot perform services in Macedonia throughout the daughter company.

IV. Prohibited restrictions to the rule of freedom to provide services

- Definition of restrictions (prohibition to discriminate, impede, make less attractive, hindrances to market entry, i.e. market penetration, etc…)
- Discriminatory measures (33/74, *Van Binsbergen*…)
- Equally-applicable measures & indistinctly applicable measures
    - Initial case law (i.e. 15/78, *Koestler*, 33/74, *Van Binsbergen*; 205/84, *Insurance Services case* – Arts. 49 & 50 require removal not only of all discrimination based on nationality, but also all restrictions on freedom to provide services imposed by reason that a person is established in a Member State other than in which the services are provided.
    - In 1991 the court established a coherent approach to indistinctly applicable measures in case C-76/90, *Säger*) – parallel to that pioneered in the sphere of goods in the 1970s in *Dassonville* in Cassis de Dijon.
    - Case *Säger*, with some minor deviation (cases 134/03, *Viacom Outdoor* and C-544/03 in 545/03, *Mobistar SA*), still serves as lighthouse to a question how to interpret prohibited measures under Art. 56 TFEU (ex. Art. 49 TEC):
        - AG Jacobs asked in par. 24: *… it may be thought that services should rather be treated* ***by analogy with goods****, and that* ***non-discriminatory restrictions on the provision of services should be approached in the same way as non-discriminatory restrictions on the free movement of goods under the Cassis de Dijon line of case-law****. That analogy seems particularly appropriate, where, as in the present case, the nature of the service is such as not to involve the provider of the service in moving physically between Member States but where instead it is transmitted by post or telecommunications (see Introduction to the Law of the European Communities, by P.J.G. Kapteyn and P. VerLoren van Themaat, 2nd edition, edited by L.W. Gormley, 1989, pp. 443-452).*
            - i.e. the question posed was: is Art. 49 applicable to all service providers, whether established in the MS in which the service was provided or not?

        - par. 12 of the judgement: *…it should first be pointed out that 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 national providers of services and to those of other Member States, when it 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.*

      (underline the case law rule…)

Questions and tasks:

- The conclusion from the case *Säger* would then be (make a choice and state arguments why for all of three possibilities):
    a) Art. 56 TFEU (ex Art. 49 TEC) prohibits indistinctly applicable measures
    b) Art. 56 TFEU (ex Art. 49 TEC) prohibits factual and legal discrimination
    c) Art. 56 TFEU (ex Art. 49 TEC) prohibits any measure (national or professional rules) likely to prohibit or otherwise impede the free provision of services

Discuss your answers and put arguments!

- **The access (penetration) to the market:**

How to include the market access theory into the structure picture of Art. 56 TFEU (ex Art. 49 TEC)?

- Are cases like *Keck, De Agostini, Gourmet* applicable to free provision of services?

- Compare C-384/93, Alpine Investments:

> *Article 59 of the Treaty covers not only restrictions laid down by the State of destination but also those laid down by the State of origin, even if they are generally applicable measures, are not discriminatory and neither their object nor their effect is to put the national market at an advantage over providers of services from other Member States.*

Could you form a rule from this paragraph?

- **State arguments why, if at all, these elements can be considered as restrictions and criteria:** nationality, residence, establishment, diplomas, territorial exclusivity, tax alleviation (deductibility), security for costs, fiscal disadvantages, dissuasive administrative conditions, not allowing the interests for bank accounts, making conditions for services subject to compliance with all the conditions required for establishment, registration with governing bodies or authorities, possessing licences, municipal tax, exclusive rights and monopolies, mandatory legal form of employment relationship, …

Cases:

- Slovene vignettes (part I. – the substantive law part)

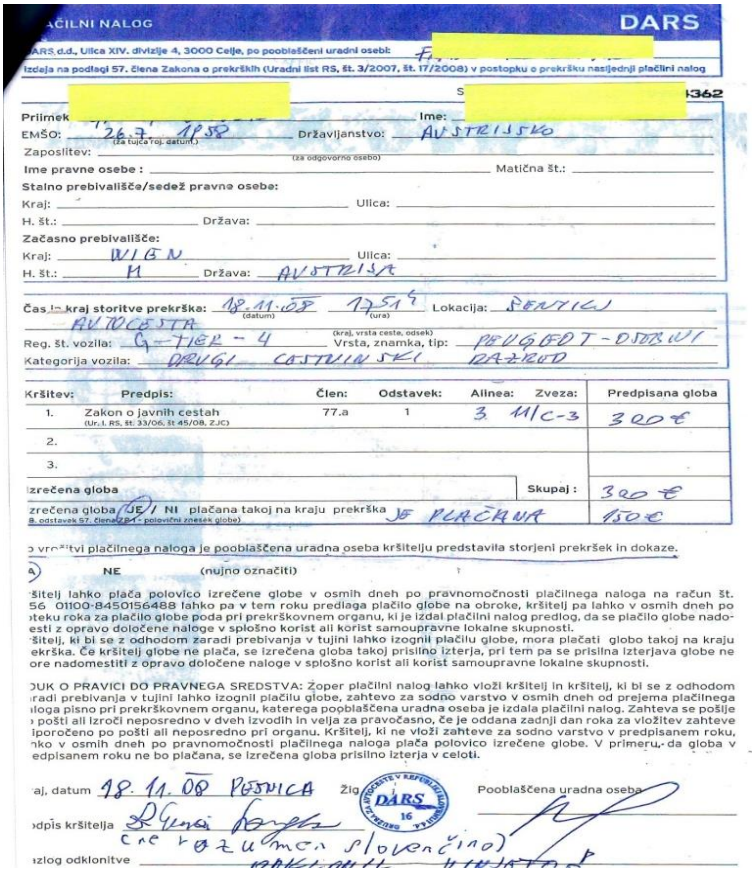
A) *On the right you can see a payment order by the Slovene company competent for high-ways maintenance (DARS). The company got the statutory authorisation to penalize drivers for not obeying the rules on vignettes. The driver, Austrian citizen, needed to pay 300,00 Euros. It was not allowed to continue the journey without the payment.*

The Slovene vignette system was structured in the following way:

a) 6 months vignette
b) 12 months vignette

It was not possible to buy vignettes for any shorter period of time. The same rules were applicable to Slovene citizens and all foreigners, EU citizens and third country nationals (TCN).

- *Comment/discuss the system of vignettes from EU law point of view?*
- *Does any vignette's system influence the EU free provisions of services?*
- *Is there any prohibited discrimination under EU rules regarding the Slovene system?*



ČILNI NALOG DARS

ARS d.d., Ulica XIV. divizije 4, 3000 Celje, po pooblaščeni uradni osebi:

Izdeja na podlagi 57. člena Zakona o prekrških (Uradni list RS, št. 3/2007, št. 17/2008) v postopku o prekršku nasljednji plačilni nalog

Priimek: [redacted] Ime: [redacted]

EMŠO: 26.7. 1958 (za tujca roj. datum) Državljanstvo: AVSTRIJSKO

Zaposlitev: (za odgovorno osebo)

Ime pravne osebe: Matična št.:

Stalno prebivališče/sedež pravne osebe:

Kraj: Ulica:

H. št.: Država:

Začasno prebivališče:

Kraj: WIEN Ulica:

H. št.: 11 Država: AVSTRIJA

Čas in kraj storitve prekrška: 18.11.08 (datum) 17.51 (ura) Lokacija: ŠENTILJ AVTOCESTA (kraj, vrsta ceste, odsek)

Reg. št. vozila: G-TIGL - 4 Vrsta, znamka, tip: PEUGEOT - DOBLO VI

Kategorija vozila: DRUGI CESTNIŠKI DAZIRNO

Kršitev:	Predpis:	Člen:	Odstavek:	Alinea:	Zveza:	Predpisana globa
1.	Zakon o javnih cestah (Ur. l. RS, št. 33/06, št 45/08, ZJC)	77.a	1	3.	11/c-3	300 €
2.						
3.						
Izrečena globa					Skupaj :	300 €
Izrečena globa (8. odstavek 57. člena ZP-1 - polovični znesek globe) JE / NI plačana takoj na kraju prekrška					NE PLAČANA	150 €

o vročitvi plačilnega naloga je pooblaščena uradna oseba kršitelju predstavila storjeni prekršek in dokaze.

a) NE (nujno označiti)

šitelj lahko plača polovico izrečene globe v osmih dneh po pravnomočnosti plačilnega naloga na račun št. 56 01100-8450156488 lahko pa v tem roku predlaga plačilo globe na obroke, kršitelj pa lahko v osmih dneh po teku roka za plačilo globe poda pri prekrškovnem organu, ki je izdal plačilni nalog predlog, da se plačilo globe nadomesti z opravo določene naloge v splošno korist ali korist samoupravne lokalne skupnosti.

šitelj, ki bi se z odhodom zaradi prebivanja v tujini lahko izognil plačilu globe, mora plačati globo takoj na kraju ekrška. Če kršitelj globe ne plača, se izrečena globa takoj prisilno izterja, pri tem pa se prisilna izterjava globe ne ore nadomestiti z opravo določene naloge v splošno korist ali korist samoupravne lokalne skupnosti.

OUK O PRAVICI DO PRAVNEGA SREDSTVA: Zoper plačilni nalog lahko vloži kršitelj in kršitelj, ki bi se z odhodom radi prebivanja v tujini lahko izognil plačilu globe, zahtevo za sodno varstvo v osmih dneh od prejema plačilnega loga pisno pri prekrškovnem organu, katerega pooblaščena uradna oseba je izdala plačilni nalog. Zahteva se pošlje pošti ali izroči neposredno v dveh izvodih in velja za pravočasno, če je oddana zadnji dan roka za vložitev zahteve iporočeno po pošti ali neposredno pri organu. Kršitelj, ki ne vloži zahteve za sodno varstvo v predpisanem roku, nko v osmih dneh po pravnomočnosti plačilnega naloga plača polovico izrečene globe. V primeru, da globa v edpisanem roku ne bo plačana, se izrečena globa prisilno izterja v celoti.

aj, datum 18. 11. 08 PODPIS Žig DARS 16 Pooblaščena uradna oseba

odpis kršitelja [redacted] (ne razumem slovenčino)

zlog odklonitve

B)

Compare the above case with the German case for highways-toll!

Questions: What are the differences?

Search for additional information in media and try to find out why is Germany confident that the system does not breach the EU law?

If the CJEU established a violation, what would be the rights of those who has paid the toll already?

BUSINESS (http://www.dw.com/en/brussels-takes-germany-to-court-over-road-toll/a-35924595, 30.9.2016)

Brussels takes Germany to court over road toll

The European Commission has referred Germany to the European Court of Justice over a planned road toll. Brussels believes that the toll system discriminates against foreign drivers by giving Germans a better deal.

The EU executive on Thursday took Germany to court over the country's planned road toll system for Autobahn highways, which until now have been free to use for passenger cars.
The German parliament last year approved a draft law to introduce a road user charging system that would have granted vehicles registered in Germany a corresponding deduction from annual car taxes.

The system was set to start this year, but was postponed after Brussels challenged it on the grounds that foreign drivers would have to pay the toll with no compensation.

Berlin would have charged drivers up to 130 euros ($145.8) a year to use Germany's Autobahn highways, and drivers of cars registered in the country would get back about the same amount in terms of tax reductions. The EU Commission views this as a clear case of discrimination.

Brussels said that any EU member country was free to introduce road charges for goods vehicles and passenger cars, but if it wanted foreigners to pay, then the charges must apply to all, it argued.
"Despite numerous exchanges with the German authorities since November 2014, the Commission'sfundamental concerns have not been addressed," the EU executive said in a statement, justifying its move to refer the matter to the European Court of Justice.

German Transport Minister Alexander Dobrindt welcomed the Commission's move Thursday, calling it "good news" that Brussels had finally "stopped dragging its feet on the matter." He once again insisted that the proposed road toll did not violate any EU laws.

C) On the right is one of the several jumbo-advertisement prepared by Slovene advertising company as requested by the Slovene Ministry for Economy. This jumbo-advertisement advertises internet service by Slovene service provider. Importantly, also all other jumbo-advertisements advertises different Slovene service providers.

An Austrian internet service provider is not very happy about it. It would like to know if such advertisements are in line with the EU law…

D) *Slovene Order on Rules on the Freedom of Movement and the Freedom to Provide Services by the EU citizens, (bellow,)* adopted only two days before the Slovene entrance in the EU demands the following from the service recipients (translation from the below copy out of the Official Journal):

- to declare of the contract with the service provider at least one day prior the service is commenced;
- to produce evidence (a copy of the contract);
- to produce evidence that the service provider is an EU citizen;
- to fulfil a certain form.

P R A V I L N I K

o vsebini in načinu vodenja evidenc državljanov držav članic Evropske unije, z njimi izenačenih državljanov in njihovih družinskih članov o zaposlitvah, opravljanju dela na podlagi pogodb civilnega prava in o napotenih delavcih, ki v Republiki Sloveniji izvajajo storitve

I. SPLOŠNA DOLOČBA

1. člen

Ta pravilnik ureja obveznost vodenja evidenc državljanov držav članic Evropske unije, z njimi izenačenih državljanov in njihovih družinskih članov (v nadaljnjem besedilu: državljani EU), s katerimi je na podlagi vzajemnosti omogočeno prosto gibanje delavcev in prost pretok storitev in določa zavezance za prijavo in odjavo ter način prijave in odjave v oziroma iz teh evidenc v skladu z Uredbo Sveta (EGS), št. 1612/68 (UL L 257, 19. 10. 1968).

IV. PRIJAVA DELA NA PODLAGI POGODBE CIVILNEGA PRAVA

6. člen

(1) V primeru opravljanja dela na ozemlju Republike Slovenije na podlagi pogodbe civilnega prava, med podjetjem ali fizično osebo s sedežem ali prebivališčem v Republiki Sloveniji in državljanom EU, je zavezanec za prijavo dela dolžan najmanj dan pred začetkom dela prijaviti začetek dela.

(2) Zavezanec za prijavo dela iz prejšnjega odstavka je podjetje ali fizična oseba s sedežem ali prebivališčem v Republiki Sloveniji.

(3) Zavezanec za prijavo dela prijavi začetek opravljanja dela na obrazcu TUJ/EU-delo. K prijavi mora priložiti:

a) kopijo dokazila, s katerim se izkazuje identiteta državljana EU,

b) kopijo pogodbe o opravljanju dela v Republiki Sloveniji.

Discuss the above conditions in the light of the EU law and especially are they all in line with the EU law

V. Justification of restrictions

As it is seen from the sketch below the justification is an important part of solving the EU law cases, which dealt with freedoms of the internal market. Having said this, one has to follow the construction of this sketch to understand the analyses whether certain internal market freedom is violated. The analysis does not end with the assessment that there was a violation, but whether such a violation is perhaps justified or not.

Only when we can be sure, that here is no justification given, we can conclude that certain internal market freedom is indeed violated. To apply to below justification reasons, i.e. so called *justification test*, together with the "overriding reasons in public interests" is a rather substantial part of the legal analyses, and if the court is not preforming it, the substantive law is not correctly applied. It means that all national legal remedies are possible against such a decision under national legal system and its procedural rules.

V.1. The application of Art. 56 (legal qualification, application and analysis)

This is the structure which makes clear, how the assessment (construction of legal analysis) shall be done, when dealing with a case where potential violation of Art. 56 is at stake. The same goes for other freedoms of the internal market.

Is Art. 56 TFEU violated?

↓

1. step	The relevant question is: is it a case about services? **Legal qualification** needs to be done, i.e. can Art. 56 be applicable? Special emphasis is to be given to tiny borderline with Art. 49 – Right of establishment

↓

2. step	In the second step, we have to establish if Art. 56 **is not obeyed,** like discriminatory treatment, market penetration hindrance, unjustified obstacles although equally – applicable rules, etc. This is rather difficult – it is a core step, but it is not the last one. Although the answer is

"yes", the legal analyses in not over yet.

NO

If the answer is no, here is no violation of Art. 56

3. step

YES

If the answer is positive, than there might really be a violation. But to be sure, we have to continue with the analysis – namely, the national measure might be justified

Exceptions in the TFEU:

Art. 52: Exceptions on ground of on grounds of public policy, public security or public health.

Art. 51: *exercise of the official authority*

These two articles allow also **discriminatory national measures**

Overriding reasons in public interest (ORPI)

Under this path of justification we have to apply different methodology as in case od exception under the TFEU (left). This path is about jurisprudence and criteria of justifications developed by CJEU. Here it is necessary, first, to define ORPI. ORPI are defined by CJEU and not by national courts.

It is, however, true, that ORPI are now codified in the Dir. 2006/123 on Services on the Internal Market. See par. 40 of the Preamble and the definition under Art. 4 of the directive.

National measures must be **non-discriminatory**

The analysis and reasoning is not over yet. Once ORPI is found and applied to the case, we have to continue and apply a justification test.

+

JUSTIFICATION TEST

The justification test consists of several elements, which are not all applicable verbatim in all cases decided by CJEU. But one element – proportionality – is always applicable. See relevant part of this handbook, where justification test is analysed more in details.

- proportionality
- appropriatnesnes
- no community measure
- legality of the aim pursued
- nesessity
- no economic justification
- no adminnistrative justification
- no protection in the state of origin

V.2. Justification reasons

Read carefully the below text to find out first, what it is meant by overriding reasons in public interests, where we can find those reasons, who is competent to define those reasons and further on, importantly, which elements constitutes so called justification tasks.

- Statute based (TFEU) justifications – public policy, public security, public health
- Case law based justifications – ***"overriding reasons in public interest"***
- Restrictive interpretation of exceptions
- Arguments in **overriding reasons in public interest**; non-exhaustive list made by the case law… now included in the Dir. 2006/123 (bellow):

- *Why, do you think, the CJEU developed such list?*
- *Are other freedoms (goods, workers…) also subject to the case-law based justifications?*
- *Are the justifications based on certain TFEU' provision?*

(40) The concept of 'overriding reasons relating to the public interest' to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.

V.3. Justification test

The sole justification "reasons" are not enough to justify the national measure. A test for justification **(justification test, i.e. conditions of justified restrictions)** is also important (needs to be performed). It is composed of several criteria. listed below. Elements has to be checked by national courts, when assessing whether certain national measure indeed violates the internal market rules. These elements are to be applied cumulatively, although it is true that CJEU, which defined them, is not using them verbatim in each case. Nevertheless, this is the sole task of the national court. However, it shall be stressed that national courts are not competent to find ("to invent") any new overriding reason in public interest neither any new element for justification task. According to Art. 19 TFEU and Art. 267 TFEU, the CJEU is the sole and exclusively competent court to interpret EU law, except in cases of *acte clair* and *acté eclairé*. Of course, these two last elements are not fulfilled in case of any new overriding reason in public interest or the element for a justification.

The justification test consists of assessment whether there are:

*** <u>No community measure</u>**… the CJEU expresses this by: "…in the absence of common rules…". On the other hand Art. 114 TFEU (ex Art. 95 TEC) defines: "… necessary to maintain national provisions on grounds of major needs…"

*** <u>Legality of the aim pursued</u>**
What does it mean, that the goal is a legal one?

*** <u>Necessity</u>** (Example: C-180/89, Tourist Guides Italy)
What we are looking up here is an answer to a question, whether it is necessary to regulate something…

20 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.

*** <u>Indispensability</u>** (Example: Case C-222/95, Parodi)

What we are looking up here is an answer to the question whether the measure is a condition sine qua non for the attainment of the aims pursued.

If the requirement of 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. ***In order for such a requirement to be acceptable, it must constitute a condition which is indispensable for attaining the objective.***

*** <u>Suitability, appropriateness</u>** (Example: C-369/96 & C-376/96, Arblade)

What we are looking up here is a close connectivity with measure and close interplay among the measure, its aim and purpose.

Res facti: The French construction companies Arblade and Leloup carried out building works in Belgium. Between 1991 and 1993 they deployed workers on the sites concerned to carry out the works in question.

In the course of checks carried out, the representatives of the Belgian Social Law Inspectorate requested the production of various social documents provided for under the Belgian legislation.

Arblade and Leloup considered that they were not obliged to produce those documents. Prosecutions were therefore brought against them before the Tribunal Correctionnel (Criminal Court). The two undertakings argue that they have complied with the applicable French legislation and that the Belgian legislation and regulations constitute an obstacle to freedom to provide services.

The Tribunal Correctionnel has referred to the Court questions concerning the compatibility of the Belgian provisions with Community law.

From the judgement:

The principle of keeping social and labour documents

56 As regards the obligation to draw up labour regulations and to keep a special staff register and an individual account for each worker, it is likewise apparent from the judgment of the national court, and in particular from the wording of the first question referred in each of the two cases, that Arblade and Leloup are already subject, in the Member State in which they are established, to obligations which, while not identical, are at least comparable as regards their objective, and which relate to the same workers and the same periods of activity.

57 As stated in paragraph 49 of this judgment, and despite the objections raised by the Belgian Government, the Court is bound to base its ruling on the facts as stated by the national court.

58 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.

59 Consequently, the imposition of such an obligation constitutes a restriction on freedom to provide services within the meaning of Article 59 of the Treaty.

60 Such a restriction is justifiable only if it is necessary in order to safeguard, effectively and by appropriate means, the overriding public interest which the social protection of workers represents.

61 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.

62 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.

63 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.

64 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.

65 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.

Additional exercise: Which words/sentences would you underlined in above paragraphs as *erga omnes* applicable legal rules to express appropriateness of the otherwise prohibited measure?

*** <u>Proportionality</u>** (Example: Case C-76/90, *Säger*)

What we are looking up here is an answer to the question whether the measure is the most adequate one and there is no other measure that would be less favourable to support freedom of services and which would at the same time attain the same goal…

> *17 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.*

Which part of the paragraph would you underline as a rule applicable *erga omnes* in respect justification under Art. 56 TFEU (ex Art. 49 TEC)?

Test of proportionality vs. the principle of priority for less restrictive measures

Compare the above excerpt from *Säger* case and the following paragraph from case *Alpine Investment:* C-384/93:

51 That point of view cannot be accepted. As the Advocate General correctly states in point 88 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 and hence incompatible with Community law.

Question: is the principle of priority for less restrictive measure just the other side of the same coin?

*** <u>No economic justification</u>** (Example: Case C-224/97, *Ciola*)

17 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.

*** <u>No administrative justification</u>** (Example: Joined cases C-369/96 and C-376/96, *Arblade*)

37 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).

Why do you think, economic reasons as well as administrative ones are not justifiable arguments to make freedom of services less attractive or even prohibited?

*** <u>No protection in the state of origin</u>** (Example: Case C-76/90, *Säger*)

15 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.

also (example: C-198/89, *Turist Guides Greece*):

19 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.

Which part of the above paragraphs would you underline as a rule applicable *erga omnes* in respect justification under Art. 56 TFEU (ex Art. 49 TEC)?

Is the above test indistinctly and uniformly applicable throughout the overall case law of the CJEU?

V.4. Cases

A) Austrian company Sporting Ges.m.g.H. is performing service in Slovenia. The service is a game, called Airsoft. The game is about shouting and hunting of humans. For these purposes the guns and pistols are necessary. Used are harmless weapons; however they are very similar – from the point of the look, shape, weight, colour, etc. The service is advertised by Sporting Ges.m.g.H. in the Slovene and Austrian media; mostly newspapers. After a year of being present at the Slovene market, a competent inspector issued a decision to Sporting Ges.m.g.H. (addressed to its Austrian headquarters) to prohibit the service itself and also related advertising.

Argumentation used in the case is, that such services constitute breach of dignity as defined in the Slovene Constitution. *Does Sporting, Ges.m.b.H. has any legal argument on disposal to defend it position and to continue with the service in Slovenia?*
See, in this respect, *case Omega, C-36/02.*

B) How to approach to legal argumentation in a case that relates to Art. 56 TFEU (ex Art. 49 TEC) (or also other freedoms)? Try to make order of precedence of steps to be taken (on the right)… eliminate steps that are not necessary at all. Imagine you are the judge in Vienna court trying to solve a case, where the plaintiff/service provider from Hungary asserts that the defendant (for instance one Austrian governmental authority) is not respecting Art. 56 TFEU (ex Art. 49 TEC) by imposing the knowledge of German language for the dog hair styling service providers and groomers in Austria.

Step number	Step/action…
	make a reference to the CJEU by way of preliminary ruling procedure;
	find out which national substantive law is applicable;
	applying the justification test;
	find out who is responsible for (who adopted) measure in question;
	ask the Government for the preliminary opinion;
	make a comparative survey if other MS also adopted such rule;
	ascertain whether there is a justification under Art. 52 TFEU (ex Art. 46 TEC);
	find out whether Art. 56 TFEU (ex. Art. 49 TEC) is applicable;
	ascertain whether there is a reason for justification due to the *"overriding reasons in public interest";*
	ascertain whether there is a direct or indirect discrimination or no discrimination at all;
	make a survey of national case law to find out whether national courts have already rules out in such cases;
	find out whether there is a breach of Art. 56 TFEU (ex Art. 49 TEC);
	find out which court has jurisdiction;

	find out if there is equally applicable measure in Hungary (and consequently apply reciprocity condition);
	ask the Constitutional Court whether such provision accords the *Österreichische Bundesverfassung*, like Art. 8 or any other article;
	to ascertain whether the plaintiff has to pay *cautio iudicatum solvi*
	to ascertain whether the ECHR is applicable;
	to check whether the action is a torpedo action or whether there is a forum shopping in question;

C) Is this a proper solution to respect judgement in Case C-388/01, *Com. v* Italy:

Add numbers of Articles:
By allowing advantageous rates for admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, granted by local or decentralised State authorities only in favour of nationals and persons resident within the territory of those authorities running the cultural sites in question who are aged over 60 or 65 years, and by excluding from such advantages tourists who are nationals of other Member States and non-residents who fulfil the same objective age requirements, a Member States fails to fulfil its obligations under Articles _____. Such rules are prohibited by the above provisions and cannot be justified either by economic considerations relating to the costs involved in running cultural sites or on grounds of cohesion of the tax system, since there is no direct link between any taxation and the application of preferential rates for admission to the sites concerned.

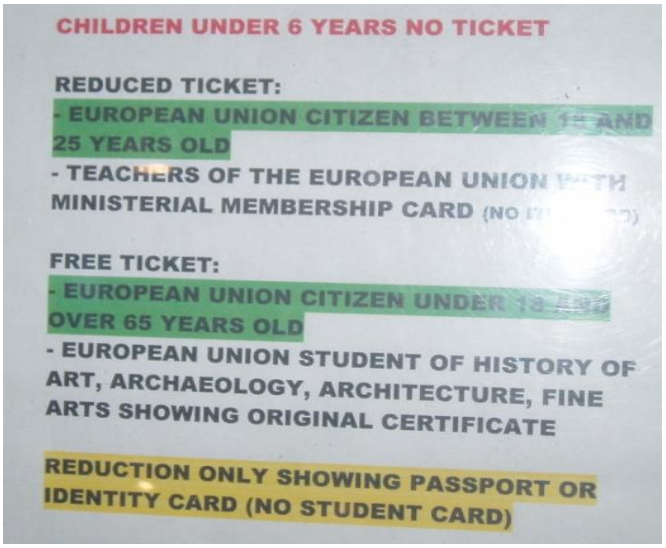


Photo: R. Knez (The entrance fee to Florence Accademia, Florence, Italy)

VI. Directive 2006/123 on services in the internal market

VI.1. Introduction

The objective of the Services Directive is to make progress towards a genuine Internal Market in Services so that, in the largest sector of the European economy, both businesses and consumers can take full advantage of the opportunities it presents. By supporting the development of a truly integrated Internal Market in Services, the Directive helps realise the considerable potential in terms of economic growth and job creation of the services sector in Europe. For this reason, the Services Directive is a central element of the renewed Lisbon Strategy for growth and jobs. Moreover, by providing for administrative simplification, it also supports the better regulation agenda.

The Services Directive is a big step forward in ensuring that both service providers and recipients benefit more easily from the fundamental freedoms guaranteed in TFEU – the freedom of establishment and the freedom to provide services across borders. In order to achieve this, the provisions of the Directive aim to simplify administrative procedures, remove obstacles for services activities as well as enhance both mutual trust between Member States and the confidence of providers and consumers in the Internal Market. The Directive applies to a wide range of service activities. Its provisions are, to a large extent, based upon the case law of the CJEU relating to the freedom of establishment and the free movement of services and it complements existing Community instruments, which remain fully applicable.

Besides requiring Member States to take concrete legislative measures, the Directive asks them to put in place a variety of practical measures such as points of single contact for service providers, electronic procedures and administrative cooperation. It also introduces innovative tools, such as the review of national legislation and the process of mutual evaluation. If implemented properly, these different instruments continue to further the development of the Internal Market for Services well beyond the Directive's implementation deadline. It is indeed clear that the Services Directive will not just require a one-off act of implementation but will also trigger a dynamic process, the benefits of which will unfold over the years. It is also important to highlight that the Directive will enhance the rights of recipients of services, in particular consumers, and provide for concrete measures to develop a policy on quality of services across Europe.

The directive entered into force on December 28th 2009.

- **The structure & scope of the directive**
    - Which areas / services are covered? (Art. 2, *ratione materiae*)

_____
_____
_____

    - Services of general economic interest are not part of the SD? Is there a connection with Art. 106 TFEU?

_____
_____
_____

- The directive as a codification act (substantive parts)

_____
_____

- The administrative simplification
  * What does it mean?
  * How to active the simplification?
  * Is it administrative law equally important as substantive law solutions?
  * Points of single contact

_____
_____
_____
_____

- The administrative cooperation among MS
  * What does it mean?
  * Is this something very new?
  * Why is it necessary?

_____
_____
_____
_____

VI.2. Substantive provisions & Restrictions on freedom to provide services that need to be removed

In order to establish a genuine internal market for services, it is necessary to abolish any restrictions on the freedom of establishment and the free movement of services which are still enshrined in the laws of certain Member States and which are incompatible with Articles 49 and 56 of the Treaty respective y. The restrictions to be prohibited particularly affect the internal market for services and should be systematically dismantled as soon as possible.

Freedom of establishment is predicated, in particular, upon the principle of equal treatment, which entails the prohibition not only of any discrimination on grounds of nationality but also of any indirect discrimination based on other grounds but capable of producing the same result. Thus, access to a service activity or the exercise thereof in a Member State, either as a principal or secondary activity, should not be made subject to criteria such as place of establishment, residence, domicile or principal provision of the service activity. However, these criteria should not include requirements according to which a provider or one of his employees or a representative must be present during the exercise of the activity when this is justified by an overriding reason relating to the public interest.

Furthermore, a Member State should not restrict the legal capacity or the right of companies, incorporated in accordance with the law of another Member State on whose territory they have their primary establishment, to bring legal proceedings. Moreover, a Member State should not be able to confer any advantages on providers having a particular national or local socio-economic link; nor should it be able to restrict, on grounds of place of establishment, the provider's freedom to acquire, exploit or dispose of rights and goods or to access different forms of credit or accommodation in so far as those choices are useful for access to his activity or for the effective exercise thereof.

Access to or the exercise of a service activity in the territory of a Member State should not be subject to an economic test. The prohibition of economic tests as a prerequisite for the grant of authorisation should cover economic tests as such, but not requirements which are objectively justified by overriding reasons relating to the public interest, such as the protection of the urban environment, social policy or public health. The prohibition should not affect the exercise of the powers of the authorities responsible for applying competition law.

Freedom of establishment for providers	**Freedom of services**
Art. 9: Authorisation schemes Art. 10: Condition for the granting of authorisation Art. 11: Duration of authorisation Art. 12: Selection among several candidates Art. 13: Authorisation procedures **Art. 14: Prohibited requirements (black list of prohibited requirements)** Q: are these requirements prohibited per se? **Art. 15: Requirements to be evaluated (grey list of prohibited requirements)… and justification reasons: Art. 15.3. in connection with Art. 4.8.:** o Restatements of the case law	Art. 16: **Freedom to provide services (no black lists, limited justification reasons: Art. 16.3)** Art. 17: Additional derogations Art. 18: Case-by-case derogations Art. 19: Rights of recipients of services

○ Black and grey list	

Question:
Why are these two freedoms (establishment and services) differently regulated; why are authorisation schemes part of the establishment, not services?

VI.3. The system of exemptions according to the directive

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.	3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions: (a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office; (b) necessity: requirements must be justified by an overriding reason relating to the public interest; (c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

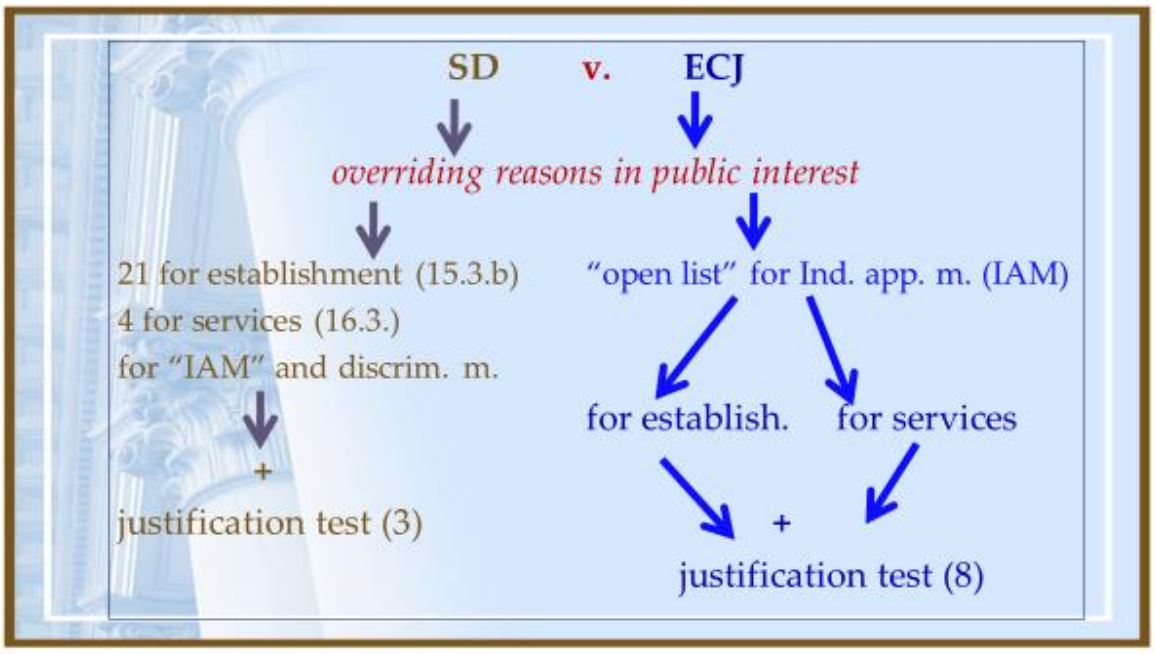
The system of exemptions (see above also part V of this handbook) is important, but as it looks like at the outset, rather differently regulated under the directive.
Questions:

- Compare Arts. 16.3. and 15.3 of the Directive!
- What can we find out?
- What are differences under the directive and jurisprudence discussed under part V?
- Has EU legislator departure from existing jurisprudence of the CJEU?

VI.4. Justifying restrictions (reasons of overriding public interest) and justification tests

According to the case law of the CJEU, public health, consumer protection, animal health and the protection of the urban environment constitute overriding reasons relating to the public interest. Such overriding reasons may justify the application of authorisation schemes and other restrictions. However, no such authorisation scheme or restriction should discriminate on grounds of nationality. Further, the principles of necessity and proportionality should always be respected.

However, the picture of the SD in this respect varies when one compare justifications regarding restrictions imposed for establishment of providers on the one hand, and on the other hand, service providers. This approach is different as the one by the CJEU (i.e. the EU legislator changed the approach). The following slide presents the difference:



VI.5. General on authorisations schemes (AS)

Authorisations schemes are, according to the SD:

6) 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;	

The term "authorisation scheme" encompasses any procedure under which a provider or a recipient is in effect required to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity, or the exercise thereof (Handbook, p. 24, also Art. 4 under definitions).

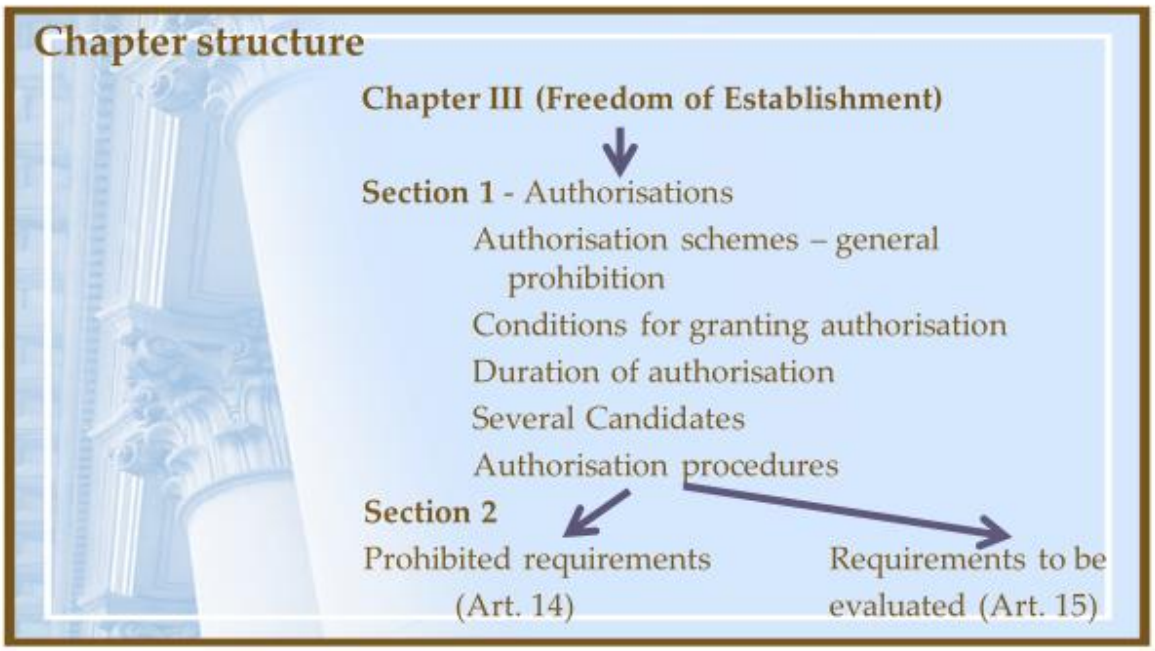
Authorisation schemes are one of the most common formalities applied to service providers in Member States and constitute a restriction to the freedom of establishment, as consistently recognised by the case law of the CJEU (judgment of 22 January 2002, *Canal Satélite*, Case C-390/99).

Important: Authorisation schemes apply to all cases where a business seeks to establish in a Member State, irrespective of whether a provider intends to start a new business or whether an existing business seeks to open a new establishment, for example a subsidiary or a branch. It covers both the situation where a service provider seeks to establish in another Member State and the situation where a provider seeks to establish in his own Member State.

Articles 9 to 13 establish a number of general principles for the review and adaptation of authorisation schemes. In order to avoid gaps in implementation and to ensure that these principles are complied with at all levels, MS should consider embodying these principles in their horizontal framework legislation implementing the Directive or, if existing, in general legislation dealing with authorisation schemes such as codes of administrative procedures. Rules under the SD are shaped by a help of CJEU judgements regarding the pursuit of an occupation in another MS and free movement of companies.

- The application of the AS:
  - Freedom of *establishment v*. free provision of *services*
  - scope of the application
  - are there problems
  - what does it mean from the perspective of the implementation of the SD
  - can the state use *gold-plating method*[1] of implementation?

[1] The term 'to gold-plate' is frequently used in regulatory contexts in the EU when national implementation of EU legislation exceeds what a legal act requires while staying within legality. There seems to be agreement that this practice can lead to increased costs, unnecessary regulatory burdens and competitive disadvantages for business, as well as a fractured single market. This in turn hampers growth and job creation. However, there are different understandings of what the concept gold-plating actually covers. Some people assign more to the concept, and others less.



Chapter structure is focusing to two main aspects of freedom of establishment of providers. Under section 1 are general rules relating to authorisation schemes, whereby Arts. 9, 10 and 13 are the most important. One could say that Art. 9 and 10 are dealing with the substantive point of view of authorisation procedure and Art. 13 on the other side, is dealing with the procedural issues of the granting of authorisations.
Under section 2 the word is not only about the authorisation schemes although **black and grey list** of prohibited requirements are closely connected to the authorisation schemes. Both lists are restatements from CJEU's case law.

Case 1
Detectives in one MS needs to be established in the legal form of a limited liability company… is this caught by the SD?

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Case 2:
Car driving school in one MS needs to have at least three employees… is this caught by the SD?

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Case 3:
Foreign architects needs to be enrolled into the domestic register… is this caught by the SD?

Case 4:
A foreign company cannot start performing services in one MS without first establish / register a branch office or subsidiary… is this caught by the SD?

Case 5:
Translators' prices are regulated by the State … is this caught by the SD?

Case 6:
Notary public can only be a domestic national … is this caught by the SD?

Case 7:
A judge would like to work at the CJEU as a translator (translator service). In his MS his function as a judge cease. On his return he claims, that his post shall wait for him and that his function as a judge shall not ceased… is this caught by the SD?

VI.6. Inactivity of the administrative authorities - lex silencio positive (no news is good news)

This mechanism of **tacit authorisation** (Art. 13.4) has already been adopted by many Member States in their efforts to achieve administrative simplification for the benefit of businesses and citizens. The mechanism of tacit authorisation leaves in any case sufficient time for competent authorities to examine the application since the time-period should be fixed in relation to the time necessary for examination of an application and the time period runs only from the time when all documentation has been submitted (Article 13(3)). MS can lay down that competent authorities may in exceptional cases, when this is justified by the complexity of the issue, extend the time-period once for a limited time. Such an extension and its duration need to be duly motivated and notified to the applicant before the initial period has expired.

There are specific cases where Member States may – if this is justified by overriding reasons relating to the public interest – decide to provide for different arrangements than a mechanism of tacit authorisation. This might be the case, for instance, for activities with a potentially lasting impact on the environment. At any event, even when Member States opt for these alternative arrangements, they must still guarantee fast procedures and have to ensure that the decisions are reasoned and open to challenge before the courts.

Faced with such a different approach to both freedoms that refer to service providers (freedom of establishment of providers on the one hand, and freedom to provide services on the other), it seems important to find reasons and possible substitutions that the SD could make them available in exchange for a very limited possibility for the MS to successfully enforce restrictions in the field of services. To deny the MS an opportunity to successfully enforce exceptions defined under case law prior to adopting the SD or prior to its implementation – does this mean a deviation from the TFEU rules? Such approach exhibits a major emphasis placed on the significance of the country of origin (*principle of origin*), which accompanies all the attempts (including the attempt with the Bolkenstein directive) of codification and regulation of the free service management. The restricted derogations of the SD are thus *a reflection of the enhanced confidence in the statutory regulation of certain services in individual Member States* wherefrom providers come to provide services in other MS.

VI.7. Administrative rules aiming to make interstates services easier

VI.7.1. Rules on advertising service providers

Article 24 **Commercial communications by the regulated professions** 1. Member States shall remove all total prohibitions on commercial communications by the regulated professions. 2. Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of each profession. Professional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.	

	_____ _____ _____

To some MS this is not an unimportant rule. For instance, in Slovenia, lawyers shall not be advertised. Does this mean that foreign lawyers can be advertised, but domestic lawyers not…?

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VI.7.2. Administrative simplification

In order to facilitate access to service activities and the exercise thereof in the internal market, it is necessary to establish an objective, common to all Member States, of administrative simplification and to lay down provisions concerning, inter alia, the right to information, procedures by electronic means and the establishment of a framework for authorisation schemes. Other measures adopted at national level to meet that objective could involve reduction of the number of procedures and formalities applicable to service activities and the restriction of such procedures and formalities to those which are essential in order to achieve a general interest objective and which do not duplicate each other in terms of content or purpose.

With the aim of administrative simplification, general formal requirements, such as presentation of original documents, certified copies or a certified translation, should not be imposed, except where objectively justified by an overriding reason relating to the public interest, such as the protection of workers, public health, the protection of the environment or the protection of consumers. It is also necessary to ensure that an authorisation as a general rule permits access to, or exercise of, a service activity throughout the national territory, unless a new authorisation for each establishment, for example for each new hypermarket, or an authorisation that is restricted to a specific part of the national territory is objectively justified by an overriding reason relating to the public interest.

Points of single contacts

The Points of Single Contact (PSCs) are e-government portals for entrepreneurs active in the service sector. It is a legal requirement to have a PSC in each EU country since December 2009 as set out in the EU Services Directive. EU countries are not legally obliged to make available tax and social security procedures through the PSCs. However, a large number of EU countries already provide for this possibility, and all others are encouraged to do so too.

Joint PoSC web page: http://ec.europa.eu/internal_market/eu-go/index_en.htm

In order to further simplify administrative procedures, it is appropriate to ensure that each provider has a single point through which he can complete all procedures and formalities (hereinafter referred to as 'points of single contact').

The number of points of single contact per Member State may vary according to regional or local competencies or according to the activities concerned. The creation of points of single contact should not interfere with the allocation of functions among competent authorities within each national system. Where several authorities at regional or local level are competent, one of them may assume the role of point of single contact and coordinator.

Points of single contact may be set up not only by administrative authorities but also by chambers of commerce or crafts, or by the professional organisations or private bodies to which a Member State decides to entrust that function. Points of single contact have an important role to play in providing assistance to providers either as the authority directly competent to issue the documents necessary to access a service activity or as an intermediary between the provider and the authorities which are directly competent.

VI. Comparison table – the inclusion of the case law in the DSIM (far from complete....)

The below table can serve you as a help discovering how articles in the DSIM can be compared with case law of the CJEU. This is the result of a codification process. Namely, the EU legislator followed the jurisprudence of the CJEU and especially chapters where the directive is dealing with free provision of services and establishment, the exemptions, overriding reasons in public interests, justification elements, ... in those parts the directive followed the jurisprudence rather strictly. This is not true for parts of the directive which regulates other questions, like a simplification of administrative procedures, contact points, cooperation among Member States, etc. These parts are administrative parts of the directive, meaning that they are addressed to the administrative authorities of the Member States and their objects are not provision of services or other freedoms as such. Therefore, the table can serve you, when dealing with the DSIM to find out background of directives rules in order to properly understand them.

General Provisions of the Directive		**Chapter I**
Activities excluded from the scope of the Directive because they fall under the scope of Art. 45 (official authority)	*Commission vs Belgium C-355/98, 2/74 Reyners (what is official authority)*	Article 2 i)
Notion of Serv-ices	*Band van Adverteerders C-352/85*	Article 4.1
Notion of establishment	*Factortame C-221/89*	Article 4.5
Notion of discrimination (in fiscal matters)	*Wielockx C-80/94* *Royal Bank of Scotland C-311/97*	General Concept
Prohibition of discrimination for public authorities and non State entities having regulatory powers	*Walrave C-36/74*	General Concept
Administrative simplification		**Chapter II**
Obligation for MS where the service is provided to take into account certificate, attestation or any other document proving that a requirement has been satisfied	*Commission vs Portugal C-171/01* *Architects C-298/99*	Article 5.3
Freedom of establishment		**Chapter III**
<u>Authorisation schemes:</u> - Necessity of the scheme - Conditions for granting - Selection among several candidates	 - *Canal Satellite C-390/99* - *Analir C-205/99* - *Teleaustria C—324/98*	 Article 9-b Article 10 Article 11
<u>Prohibited requirements:</u> - nationality requirements - obligation of residence - prohibition on having an establishment in more than one Member State - Restrictions on the freedom to choose between a principal or a secondary establishment - Conditions of reciprocity - Economic test - Involvement of competitors	 *- Halliburton C-1/93* *- Private security activities C-114/97, the same C-355/98 and C-145/99* *- Ramrath C-106/91, Klopp C-107/83* *- Centros C-212/97, and Tax advantages C-270/83* *- 325/85, Commission vs Germany* *- Patent agents C-131/01* *- Gloszcuck C-63/99* *- Fairs C-439/99*	 Article 14.1.a Article 14.1.b Article 14.2 Article 14.3 Article 14.4 Article 14.5 Article 14.6

- Obligation to provide or participate in a financial guarantee or to take out insurance from an operator established in the MS of establishment. - Obligation to have been pre-registered in the national registers	- *Ambry C-410/96, and C-279/00* - *C-58/98, Josef Corsten*	Article 14.7 Article 14.8
<u>Requirements to be evaluated</u> - Obligation to take a given legal form - Requirements relating to the shareholding of a company - Requirement on a minimum number of employees - Fixed tariffs	- *Fairs C-349/99* - *Commission vs. Italy (branch requirement) C-279/00* - *Commission vs. Italy (C-465/05, min. number of employees)* - *Arduino C-35/99, Cipolla and Others C-94/04 and C-202/04, Commission v Italy C-134/05*	Article 15.2.b Article 15.2.c Article 15.2.f Article 15.2.g
Free movement of Services		**Chapter IV**
<u>Freedom to provide Services:</u> Member State cannot restrict the free provision of Services for the following reasons: - obligation to have an establishment in the territory - Prior authorisation and/or prior registration - A ban on the provider setting up a certain form or type of infrastructure and/or obligation to have an address on the territory of the MS where the service is provided or a representative - Application of specific contractual arrangements - Obligation to possess an identity document - - Requirements affecting the use of equipment and material	- *Transporoute C-76/81, Security Services C-355/98* - *C-264/99, Patent agents C-131/01* - *Patent agents C-478/01, Gebhard C-55/94, Architects C-298/99* - *Tourist guides C-398/95* - *Security Services C-355/98* - *Canal Satélite Digital C-390/99 and C-203/98*	Article 16.2.a Article 16.2.b Article 16.2.c Article 16.2.d Article 16.2.e Article 16.2.f
<u>Additional derogations :</u> Exclusion of activity of judicial recovery of debts	*Reisebüro C-3/95*	Article 17.5
<u>Rights of recipients of Services:</u> - Obligation on MS not to restrict the rights of the recipients - Obligation to obtain an authorisation - Discriminatory limits on the grant of financial assistance - Discrimination - Justification of discrimination based on objective criteria	*Luisi and Carbone, C-286/82 and 26/83* *- By comparison see Article 16.2b* *Vestergaard C-55/98, Danner Fin C-136/00* *De Coster C-17/00 (discriminatory taxation regime)* *Italian Museums C-388/01*	Article 19 Article 19.a Article 19.b Article 20.1 Article 20.2
Quality of Services		**Chapter V**
<u>Multidisciplinary activities:</u> Justification to the maintaining of certain form of incompatibility	*Wouters C-309/99*	Article 25.1.a & b

VII. Specific profession / services

Art. 56 TFEU is a general, the most fundamental provision for freedom of services. It covers basically all areas of services, all modes of services, but all of them needs to have the interstate element present. Certain services do have particularities It would be wrong to say that for all different kind of services (and there are really many of them) the same rules on free provision of services are applicable, notwithstanding those particularities.

For instance, the health services are very expensive services and infrastructure needed for these services, is indeed very expensive. If we apply provision on services without any reservations and exemptions, it might be, that certain Member States invest a lot in this infrastructure, but there will be no patience, since all of them might live to receive services in other Member States. Reasons of sound administrative practice, or for the sake of planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources, certain restriction might be imposed, like that Member States cannot allow all future and possible patience to receive health of services abroad. This is one of the solution under the directive 2011/24/EC on crossboarder health services, but even before this directive was adopted, the CJEU jurisprudence was clear on that issue with the same solution.

Another example are the postal services as a public service. The price for postage-due stamp is the same, notwithstanding whether the letter has to be send to addressee only a couple kilometres away or hundreds of kilometres away or even if the addressee is not living in the town but somewhere outside the urban area. Although services in these listed cases are different (one is more expensive that the other) the price is the same. If one company would like to perform postal service, it will most likely strive to perform only services, which can be performed cheaper (like only in urban areas, only certain types of post's delivery, like only packages) and not all of them. Of course, this will be more profitable for them, while other services will remain a burden to public service. It is clear, that certain limitations can be imposed in this respect. This is why Art. 56 TFEU cannot be uniformly applied to all kind of services. Below, this services with particularities are listed and some cases are added in order for better understand this special area of services:

1. Tourism
2. Medicine/Health services (Dir. 2011/24)
3. Insurance
4. Law
5. Media
6. Employment Agencies
7. Lotteries
8. Sport
9. Postal services

Why are above listed services treated as specific services?

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Case 1:
Could we find answer in Case C-372/04, Watts:

Suffering from arthritis of the hips, Mrs Watts applied to the Bedford PCT (Bedford Primary Care Trust, the primary healthcare fund for Bedford) for authorisation to undergo surgery abroad under the E 112 scheme. In that context she was seen by a consultant in October 2002 who classified her case as 'routine', which meant a wait of one year for surgery. The Bedford PCT refused to issue Mrs Watts with an E 112 form on the ground that treatment could be provided to the patient 'within the Government's NHS Plan targets' and therefore 'without undue delay'. Mrs Watts lodged an application with the High Court of Justice for judicial review of the decision refusing authorisation.
Following deterioration in her state of health, she was re-examined in January 2003 and was listed for surgery within three or four months. Bedford PCT repeated its refusal but in March 2003 Mrs Watts underwent a hip replacement operation in France for which she paid £3,900.


UK citizen Yvonne Watts was not reimbursed for the cost of her hip replacement in France, but the ECJ ruling on her case established that waiting times do not breach 'acceptable' limts/EMP

She therefore continued with her application in the High Court of Justice, claiming in addition reimbursement of the medical fees incurred in France. The High Court dismissed the application on the ground that Mrs Watts had not had to face undue delay after the re-examination of her case in January 2003. Both Mrs Watts and the Secretary of State for Health appealed against that judgment. In those circumstances, the Court of Appeal referred to the Court of Justice of the European Communities questions on the scope of Regulation No 1408/71 and the Treaty provisions concerning the freedom to provide services.

The CJEU answer, in this breaking judgement, lots of questions. Let's discuss some of them and make remarks:

1. a situation such as that in issue 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 provisions on freedom to provide services** regardless of the way in which the national system with which that person is registered and from which reimbursement of those services is subsequently sought operates;

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2. the system of prior authorisation which governs the reimbursement by the NHS of the cost of hospital treatment provided in another Member State **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;

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3. under Regulation No 1408/71,[2] the competent institution issues prior authorisation for reimbursement of the cost of the treatment provided abroad only **if it cannot be provided within the time normally necessary for obtaining the treatment in question in the Member State of residence;**

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[2] *Article 22 of Regulation No 1408/71, entitled 'Stay outside the competent State – Return to or transfer of residence to another Member State during sickness or maternity – Need to go to another Member State in order to receive appropriate treatment', states:*

'1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

…

*(c) **who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition**,*

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay … in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

…

2. …

The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person resides and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of his disease.

…'

4. in order to be entitled to refuse to grant authorisation on the ground of waiting time, the competent institution **must establish that the waiting time**, arising from objectives relating to the planning and management of the supply of hospital care, **does not exceed the period which is acceptable in the light of an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and 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 authorisation is sought;**

5. the setting of waiting times should be done flexibly and dynamically, so that the period initially notified to the person concerned may be reconsidered in the light of any deterioration in his state of health occurring after the first request for authorisation;

6. **restrictions can be justified in the light of overriding reasons** - it finds that, from the perspective of ensuring that there is sufficient and permanent access to high-quality hospital treatment, controlling costs and preventing, as far as possible, any wastage of financial, technical and human resources, the requirement that the assumption of costs by the national system of hospital treatment provided in another Member State be subject to prior authorisation appears to be a measure which is both necessary and reasonable;

7. the conditions attached to the grant of such authorisation must be justified in the light of the overriding considerations and must satisfy the requirement of proportionality. **The GB regulations 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;**

8. where the delay arising from such waiting lists appears to exceed an acceptable period in the individual case concerned having regard to an objective medical assessment of all the circumstances of the situation and the patient's clinical needs, the competent **institution**

may not refuse authorisation: 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 Member State of residence;

9. **the patient who was granted authorisation to receive hospital treatment in another Member State (the State of treatment), or received a refusal to authorise which was unfounded, is entitled to reimbursement by the competent institution of the cost of the treatment in accordance with the provisions** of the legislation of the State of treatment, as if he were registered in that State;

10. Where there is no provision for reimbursement in full, in order to place the patient in the position he would have been in had the national health service with which he is registered been able to provide him free of charge, within a medically acceptable period, with treatment equivalent to that which he received in the host Member State, the competent institution must in addition reimburse him the difference between the cost of that equivalent treatment in the State of residence up to the total amount invoiced for the treatment received in the State of treatment and the amount reimbursed by the institution of that State pursuant to the legislation of that State, where the first amount is greater than the second. **Conversely, where the cost charged in the State of treatment is higher** than the cost of comparable treatment in the Member State of residence, the competent institution **is only required to cover the difference between the cost** of the hospital treatment in the two Member States up to the cost of the same treatment in the State of residence;

11. As regards the **travel and accommodation costs**, since the obligation on the competent institution exclusively concerns the expenditure connected with the healthcare received by the patient in the Member State of treatment, **they are reimbursed only** to the extent that the legislation of the Member State of residence imposes a corresponding duty on its national system where the treatment is provided in a local hospital covered by that system.

Case 2: Discuss reasons why should (if at all) a postal sector be treated differently from other services?

Sweden: setting the standard Belgium: fair play required
Letters liberalisation: what will it deliver?

Postal Services

ital services are seen as a vital part of the social fabric of some member states, writes **Lorraine Malli**

Case 3:

Bingo, d.o.o. is a Slovenian daughter company of Austrian mother company Gewinn, Ges.m.b.H. Bingo is selling lotteries coupons on behalf of Gewinn. Slovene Law on Lotteries includes the following measures:

Art. 6: Performing lotteries services on behalf of any foreign lotteries or by foreign companies is prohibited.

Art. 8: Activities of the lotteries are allowed only to legal persons in which the shares are owned by the citizens of Republic of Slovenia, or European citizens or legal persons having been established in the EU.

The service providers are not allowed to perform services through subsidiaries.

The competent inspection issued a decision against Bingo and Gewinn, forbidding any further performance of lotteries services and the competent prosecutor initiated criminal procedure against the general manager of Bingo.

What rights, if at all, are on disposal to companies and to the general manager?

Case 3:

A Greek citizen seeking the health treatment in Austria. She paid 32.000,00 Euros to private hospital. Returning home she claimed a reimbursement from the Greek competent authorities. The application was rejected with the reason that the costs of treatment in private hospitals abroad is not paid for, except where it relates to children under 14 years of age. Namely, the Greek legislation defines that if a patient insured in Greece with a social body receives treatment in a public establishment, or in a private establishment which is located in Greece and with which an agreement has been entered into, he does not have to pay out any sum. The situation is different where that patient is admitted to a private hospital in another Member State, since he must pay the costs of treatment and does not have the possibility of being reimbursed. The sole exception concerns children less than 14 years of age. Furthermore, while the existence of an emergency constitutes an exception to the rule of no reimbursement, where a patient is admitted to a private hospital in Greece with which no agreement has been entered into, it does not constitute an exception in any case upon admission to a private hospital in another Member State. The Greek Government is namely of the opinion that the balance of the national social security system could be upset if insured persons had the option of recourse to private hospitals in other Member States without an agreement having been entered into with those hospitals, given the high cost of hospital treatment of this type, which exceeds, in any event, considerably that of treatment in a public hospital in Greece.

Would you suggest her to fight for reimbursement?

VIII. Posting workers

Posting workers is, again, special area which falls within free provision of services rather free movement of persons (workers). This is so since workers being send abroad to perform services there for company, (which is basically foreign company, from the point of view that services are performed in another country), perform services and they are not employed in that country (host Member State).

They are employed in the state of origin. Since the employment rules on wages, number of dates of vacations, health services contributions, contributions for pension funds, etc. are different in host Member State that in state of origin, it might be, that services can be cheaper in the host State performed by posted workers in comparison to domestic workers. In such a case, it will be unlikely that domestic company, from the host Member State, will get the job. Instead of it the company from another Member State can get it and send workers abroad to perform the job, i.e. to perform services. It might be, that this is not an isolated case and that such cases are frequently appearing. Clearly, this can lead to the social dumping. Indeed, these cases happen, especially if posted workers are third country nationals (TCNs). Usually, TCNs are ready to work for minimum wages, and can be considered as a cheap working force. Cheap working force is, on the other side, the main element and condition precedent for social dumping case. Therefore, it is rather clear, that European Union needed a normative action, in order to harmonise main elements of social dumping: wages, minimum working hours, maximum working hours, minimum brakes and vacations, maternity leave, working conditions, etc. This is the object of posting workers directive, 96/71/EC.

Questions:

- What does mean being a posted worker?
- Why is this topic important? Why would one use posting workers?
- What is the definition?
- Directive 96/71/EC: it was adopted under the internal market jurisdiction concerning cross border services aiming to implement basic principles of Art. 56 TFEU (ex Art. 49 TEC) as they have been developed by the case law of the Court of EU in particular since Rush Portuguesa case. Namely, the provision of services may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract.

Why was the directive necessary? What can happen with posting of workers? Let's discuss case C-341/05, Laval:

The Swedish Law on the posting of workers sets out the terms and conditions of employment falling within the matters listed in Directive 96/71, save for minimum rates of pay. The Law is silent on remuneration, the determination of which in Sweden is traditionally entrusted to labor and management by way of collective negotiations. Under Swedish law, trade unions are entitled to have recourse to collective action, under certain conditions, which is aimed at forcing any employer both to enter into negotiations on pay and to sign a collective agreement.

In May 2004, *Laval un Partneri* Ltd, a Latvian company, posted workers from Latvia to work on building sites in Sweden. The work was carried out by a subsidiary, L&P Baltic Bygg AB, and included the renovation and extension of school premises in the town of Vaxholm.

In June 2004, Laval and Baltic Bygg, on the one hand, and the Swedish building and public works trade union, Svenska Byggnadsarbetareförbundet, on the other, began negotiations with a view to determining the rates of pay for the posted workers and to Laval's signing the collective agreement for the building sector. However, the parties were unable to reach an agreement. In September and October, Laval signed collective agreements with the Latvian building sector trade union, to which 65% of the posters workers were affiliated.

On 2 November 2004, Byggnadsarbetareförbundet began collective action in the form of a blockade ('blockad') of all Laval's sites in Sweden. The Swedish electricians' trade union joined in with a sympathy action, the effect of which was to prevent electricians from providing services to Laval. None of the members of those trade unions were employed by Laval. After work had stopped for a certain period, Baltic Bygg was declared bankrupt and the posted workers returned to Latvia.

The Arbetsdomstolen, before which Laval brought proceedings, inter alia, for a declaration as to the lawfulness of the collective action and for compensation for the damage suffered, asked the Court of Justice of the European Communities if Community law precludes trade unions from taking collective action in the circumstances described above.

IX. Professional qualifications & case work

The EU rules on professional qualifications and their recognitions make a distinction between "freedom to provide services" and "freedom of establishment" on the basis of criteria identified by the Court of Justice: duration, frequency, regularity and continuity of the provision of services.

FREEDOM TO PROVIDE SERVICES: Any EU national who is legally established in a Member State may provide services on a temporary and occasional basis in another Member State under his/her original professional title without having to apply for recognition of his/her qualifications. However, if the profession in question is not regulated in that Member State, the service provider must provide evidence of two years' professional experience.

The host Member State may require the service provider to make a declaration prior to providing any services on its territory (to be renewed annually), including details of insurance cover or other documents such as proof of nationality, legal establishment and professional qualifications.

If the host Member State requires pro forma registration with the competent professional association, this must be automatic. The competent authority must forward the applicant's file to the professional organisation or body on receipt of the prior declaration. For professions that have public health or safety implications and do not benefit from automatic recognition, the host Member State may carry out a prior check of the service provider's professional qualifications within the limits of the principle of proportionality.

In cases where the service is provided under the professional title of the Member State of establishment or under the formal qualifications of the service provider, the competent authorities of the host Member State may require the latter to furnish recipients of the service with certain information, in particular concerning insurance cover against financial risks arising from professional liability.

FREEDOM OF ESTABLISHMENT: "Freedom of establishment" applies when a professional enjoys the effective freedom to become established in another Member State in order to conduct a professional activity there on a stable basis.

General system for the recognition of qualifications

The general system applies to professions not covered by specific rules of recognition and to certain situations where the professional does not meet the conditions set out in other recognition schemes. This system is based on the principle of **mutual recognition**, without prejudice to the application of compensatory measures if there are substantial differences between the training acquired by the person concerned and the training required in the host Member State. The compensatory measure may take the form of an **adaptation period** or an **aptitude test**. The choice is left to the person concerned, unless specific derogations exist.

When access to or pursuit of a profession is regulated in the host Member State, i.e. it is subject to possession of specific professional qualifications, the competent authority in said Member State is to allow access to the profession in question and pursuit thereof under the same conditions as for its nationals. However, the applicant must hold a training qualification obtained in another Member State that attests to a level of training at least equivalent to the level immediately below that required in the host Member State.

On the other hand, when access to a profession is not subject to possession of specific professional qualifications in the applicant's Member State, access to that profession in a host Member State where it is regulated requires proof of two years' full-time professional experience over the preceding ten years in addition to the qualification.

The directive distinguishes five levels of professional qualifications:

- attestation of competence issued by a competent authority in the home Member State, attesting either that the holder has acquired general knowledge corresponding to **primary or secondary education**, or has undergone training not forming part of a **certificate or diploma**, or has taken a **specific examination without previous training** or **has three years' professional experience**;
- certificate corresponding to training at **secondary level** of a technical or professional nature or general in character, supplemented by a professional course;
- diploma certifying successful completion of training at **post-secondary level of a duration of at least one year or professional training** that is comparable in terms of responsibilities and functions;
- diploma certifying successful completion of training at **higher** or university level of a duration of at least three years and not exceeding four years;
- diploma certifying successful completion of training at **higher or university level of a duration of at least four years**.

The host Member State can make recognition of qualifications subject to the applicant completing a compensation measure (aptitude test or adaptation period of a maximum of three years) in the following three cases:

- the **training was at least one year shorter** than that required by the host Member State;
- the training covered **substantially different matters from those covered by the evidence of formal training required in the host Member State**;
- the profession as defined in the host Member State comprises one or more regulated professional activities that **do not exist in the corresponding profession in the applicant's home Member State** and requires specific training that covers substantially different matters from those covered by the applicant's training.

System of automatic recognition of qualifications attested by professional experience in certain industrial, craft and commercial activities

The industrial, craft and commercial activities listed in the directive (Chapter II) are subject, under the conditions stated, to the automatic recognition of qualifications attested by professional experience.

System of automatic recognition of qualifications for the professions of doctor, nurse, dentist, veterinary surgeon, midwife, pharmacist and architect.

For recognition purposes, the directive lays down minimum training conditions for each of these professions, including the minimum duration of studies. These qualifications enable holders to practise their profession in any Member State.

Procedure for the mutual recognition of professional qualifications

An individual application must be submitted to the competent authority in the host Member State, accompanied by certain documents and certificates. The competent authority has one month to acknowledge receipt of an application and to draw attention to any missing documents. In principle, a

decision has to be taken within three months of the date on which the application was received in full. However, this deadline may be extended by one month in cases falling under the general system for the recognition of qualifications. Reasons have to be given for any rejection. A rejection or a failure to take a decision by the deadline can be contested in national courts.

Member States may require applicants to have the language knowledge necessary for practising the profession. This provision must be applied proportionately, which rules out the systematic imposition of language tests before a professional activity can be practised.

Questions & Tasks & Cases:

1) Why there is a need to regulate (recognition of) professional qualifications (RPQ)?

2) What is (was) the approach of the EU? Vertical or horizontal?

3) Where we can find rules on RPQ?

4) What does it mean regulated profession?

5) What is to be recognised?

Case 1:

Macedonian rules foresees that tourist guides from abroad are not allowed to conduct tourist tours on historical sites, without possessing of a licence. Foreign licences proving the knowledge of Macedonian history and culture can be recognized. Is this in line with the EU law?

Case 2:

A doctor from Croatia would like to establish himself in Austria (either in form of self-employed or as an employee). In first case he would open a small clinic (i.e. health office) in second case he would seek a job in whatever hospital. Not being successful with job-seeking, he opens the clinic. However, the Austrian authorities prohibit, not the activities of the clinic, him to practice the doctor profession. They claim that he needs to obtain the recognition of professional qualifications. Now, he claims that he is not established in Austria, but merely performs services...
Is, in such case, he free and not being obliged to apply for recognition of the professional qualification? Nevertheless, if this is not the case, what is then at all the difference between being established and being the service provider? What should be the response from the state authorities?

Case 3:
A MS makes services of osteopathy subject to medicine (doctor) qualifications. One person (she) would like to practice osteopathy in this host MS. In her home MS there is no rules on professional qualification for osteopathy services. Is host MS entitled to restrict activity ancillary to medicine to persons holding qualification of doctor of medicine.