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From *Sacchi* to *Uber*: 60 years of Services Liberalization, Ten Years of the Services Directive in the EU

*Panagiotis Delimatsis**

Abstract: The only partial completion of the EU internal market for services has arguably been one of the important stumbling blocks in unleashing economic growth throughout the Union. While being regarded as an outlier for decades, the freedom to provide services came to the forefront after a series of studies underlining the economic benefits of further services liberalization within the EU. In this regard, the Services Directive has been the controversial reaction of the EU legislature to this quest for a new ‘integration boost’. An initially central piece of the Lisbon Strategy, the Directive aims at the elimination of the remaining legal barriers to the achievement of the internal market for services, while ensuring legal certainty for service suppliers and consumers. The Directive operationalizes Articles 49 and 56 TFEU and, in several respects, consolidates six decades of case law delivered by the Court of Justice of the European Union (CJEU). This article offers a succinct account of the services-related integration story within the EU. It reviews 60 years of services-related case law, including the first 10 years after the adoption of the Services Directive and its first enforcement period. In this respect, it will argue that the Directive constitutes, along with EU primary law, an additional legal instrument to be used by the CJEU judges with a view to further pursuing the objectives of the internal market even at the domestic level. The second important level that the Directive operates relates to the transparency-enhancing and mutual-trust-building benefits from the implementation of the Directive. On a pessimistic tone, then, the article submits that the Directive will not serve as a vector for completing the single market in services anytime soon. In the end, its effectiveness will depend on the Member States’ discretion and the capacity of national regulators to build trust for the benefit of intra-EU mobility of service suppliers despite regulatory competition within the EU.

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I. Introductory remarks

The European Union is a never-ending experiment whereby an ever-increasing number of European countries has decided to reach closer integration levels within a diverse set of legal traditions and values. Building on the ashes of a devastated and divided Europe after the Second World War, the early European Economic Community gradually evolved into an area where closer forms of integration were tested, with varying levels of success. The European recipe centred on market integration as a means of achieving broader economic, and ultimately political, goals.¹

It was peace and prosperity that would increase the popularity and legitimacy of the then Community. Increasing the interconnectedness of the European economies would create pressures for further integration from industries and interest groups. Thus, integration within Europe, in accordance with Jean Monnet's vision, had to be conceived as technocratic, elite-led gradualism, along with a corporatist-style engagement of affected interests, thereby creating pressures for 'more Europe' to increase prosperity internally² but also to become a convincing power at the international level.³

Indeed, in its first decades of existence, the EU story was focused on the market and the removal of discriminatory barriers.⁴ Such removal was, on many occasions, induced by far-reaching judgments from the European Court of Justice (ECJ); now the Court of Justice of the European Union—CJEU), which was advancing teleological interpretations (based on the doctrine of *effet utile* and the *finalité* of the Treaties) of the provisions enshrined in the Treaties. These interpretations were often habituated by an overarching vision of the Community (now Union) as a single market place⁵ and arguably amounted to a far-reaching market manifesto.⁶

Sometimes, these rulings seemed to constitute a means for the CJEU to indirectly express its discontent for what seemed to be, at times, the inertia of the supranational legislative institutions, leaving it for the Court to complete the

¹ See the speech of the former Belgian Prime Minister, Paul-Henri Spaak at the *Chambre des Représentants*, 14 June 1961. See also the Lisbon judgment by the German Constitutional Court: BVerfG, 2 BvE 2/08 of 30 June 2009, para. 7.

² This theory has been framed as the neofunctionalist theory of European integration. See Paul Craig, 'The Nature of the Community: Integration, Democracy, and Legitimacy' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), at 3–7.

³ Cf James Rogers, 'From "Civilian Power" to "Global Power": Explicating the European Union's "Grand Strategy" Through the Articulation of Discourse Theory' (2009) 47(4) *Journal of Common Market Studies*, 831.

⁴ F Jacobs, 'The Evolution of the European Legal Order' (2004) 41 *CML Rev*, 303, at 304.

⁵ Cf Case 8/74, *Procureur du Roi v Dassonville*, ECLI:EU:C:1974:82; also Case 24/68, *Commission v Italy*, ECLI:EU:C:1969:29.

⁶ G Davies, 'Trust and Mutual Recognition in the Services Directive', in I Lianos and O Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge: Cambridge University Press, 2011), 99, at 103.

largely unfinished contract enshrined in EU the internal market rules. Such developments compelled the EU legislative (that is, both the European Commission and the Council) to react and reflect on the necessary legislative responses to keep pace with the CJEU's judicial activism.⁷

This success story was built on the idea of an internal market⁸ whereby products and factors of production could move freely, while at the external level the EU would constitute a customs union. Initially perceived as economic, the four internal market freedoms (goods, services, persons, capital) have been gradually upgraded and recognized as fundamental, thereby attributing to them a status virtually equivalent to fundamental rights,⁹ against which fundamental freedoms should be weighed and balanced.¹⁰ This crested vital judicial support for the Commission's attempt to promote the mobility of the factors of production across the Community.

Against this background, this article focuses on the never-ending tale of convergence in the regulation of the service sector within the EU and assesses the impact of the adoption and subsequent implementation of the Services Directive¹¹ on this endeavour. Whereas the single market for services remains largely incomplete, exports of EU services thrive. However, any enthusiasm is immediately tempered by the fact that the statistics indicate efforts by individual EU Member States rather than reflecting a concerted effort of the EU as a whole to advance a global EU strategy in the trade of services.¹²

The present article advances three arguments. First, other than EU primary law, the Services Directive constitutes an additional legal instrument in the CJEU's arsenal to pursue the objectives enshrined in the Treaty on the Functioning of the European Union (TFEU) relating to the freedom of establishment and that of services. In interpreting this instrument, the Court has generally been faithful in implementing the aim of the Directive for the creation

⁷ E Stein, 'Lawyers, Judges, and the Making of Transnational Constitution' (1981) 75(1) *American Journal of International Law*, 1.

⁸ For the sake of simplicity, the terms 'single market', 'internal market' and 'common market' are used interchangeably here. For the nuances, see, generally, Catherine Barnard, *The Substantive Law of the EU—The Four Freedoms*, 5th edn (Oxford: Oxford University Press, 2016), 9.

⁹ The Court has invariably used terms such as 'fundamental freedom', 'one of the fundamental principles of the Treaty', a 'fundamental Community provision', or 'one of the foundations of the Community' to describe the significance of the four freedoms. See Peter Oliver and Wulf-Henning Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review*, 407.

¹⁰ See also C-438/05, *The International Transport Workers' Federation and the Finnish Seamen's Union* ("Viking Line") ECLI:EU:C:2007:772. For a critique, see V Trstenjak and E Beysen, 'The growing overlap of fundamental freedoms and fundamental rights in the case law of the CJEU' (2013) 38(3) *European Law Review*, 293.

¹¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market [2006] OJ L 376/36. For an early detailed account of the Directive, see C Barnard, 'Unravelling the Services Directive' (2008) 45 *Common Market Law Review*, 323; also M Klamert, *Services Liberalization in the EU and the WTO—Concepts, Standards and Regulatory Approaches* (Cambridge: Cambridge University Press, 2015), 174ff.

¹² See also P Delimatsis, 'The Evolution of the EU External Trade Policy in Services—CETA, TTIP and TiSA after Brexit' (2017) 20(3) *Journal of International Economic Law*, 583–625.

of a genuine internal market for services, but with some notable exceptions. Second, the implementation of the Services Directive has transparency-enhancing benefits which will have important trust-building effects. This will in turn allow for important compensatory measures of a formal and informal nature that will be likely to facilitate mobility in the medium run. Third, the Services Directive will not serve as an integration vector of the single market for services in the short run. Ultimately, its effectiveness will depend on the Member States' discretion and the capacity of public and private regulators to build trust among themselves for the benefit of service provider mobility amidst the remaining regulatory divergence at the EU level. In this regard, the Court's interpretation of the ambiguous provisions of the Directive will play a role in how effective the Directive will be in completing the internal market for services.

The article proceeds as follows: Section II includes a succinct analysis of the scope of the free movement of services, as clarified by the CJEU in over six decades of case law. A discussion of the scope of the Services Directive, the continuing efforts for further integration in the aftermath of its transposition and the recognition of professional qualifications is discussed in Section II, which, importantly, identifies a taxonomy relating to the first ten years of the Court's judicial interpretation of the Directive. Readers familiar with past case law on free movement of services are invited to read from Section III.F onwards where the most recent case law relating to the Services Directive is discussed. Section IV concludes.

II. The scope of the EU freedom to provide (and receive) services

A. Historical background and facts

The Single Market Programme (SMP) set out by the European Commission in its 1985 White Paper 'Completing the Internal Market',¹³ and the Single European Act (SEA) of 1986, formally completed in 1992, aimed for the removal of all barriers to trade and foreign direct investment (FDI) in the EU. While the SMP has unambiguously fostered greater competition, monetary integration, social protection, and common policies to external issues and challenges, several barriers to intra-EU trade in services remained in place.¹⁴

In its report on 'The State of the Internal Market for Services' in 2002,¹⁵ the Commission identified the many challenges of completing the internal market

¹³ See European Commission, *Completing the internal market*, White Paper, COM(85)310 final, June 1985.

¹⁴ The review of the mechanics of the fundamental freedom of free movement of workers is out of the scope of this article, as it focuses on persons (including self-employed ones) moving temporarily to provide a service. For the same reason, the freedom of establishment is outside the scope of this article as well.

¹⁵ European Commission, 'The State of the Internal Market for Services', COM(2002) 441 final, 30 July 2002.

for services. The EU Services Directive was the legislative reaction to what has been considered as a self-defeating impasse in regulating trade in services at the EU level. However, the adoption of the Directive was only the beginning. Indeed, in his report of 2010 commissioned by the European Commission, Mario Monti contended that, in the case of services, the EU was still in a phase of ‘market construction’ that requires the abolition of barriers to cross-border activity, the dismantling of national administrative and technical barriers and overcoming corporatist resistance.¹⁶ Complex regulatory barriers have replaced physical and technical barriers, thereby diminishing the possibilities for a genuine, integrated internal market for services.¹⁷ Furthermore, former monopolies in certain sectors such as postal services or energy utilities still create market frictions. In addition, Member States consistently fail to promptly transpose national law EU legislation, notably in areas such as transport, finance, and energy.

Despite the unfavourable regulatory framework and state of affairs, services continue to grow, accounting for two-thirds of total employment, while the growth-generating effects of services liberalization are well-documented.¹⁸ If one considers the beneficial effects of services in enabling trade in manufacturing (coined as the ‘servicification of manufacturing’), then more attention being given to services liberalization can have widespread positive affects on the competitiveness of firms.¹⁹ Such liberalization would most likely also further boost the within-firm shift toward services in manufacturing services.²⁰ Within the EU, the trade in services appears to occur despite limited traction to further liberalization. About 60 per cent of total trade in services takes place among EU Member States (ie intra-EU), which appears to be quite substantial but is significantly lower than intra-EU trade in goods (about 70 per cent), especially if one takes into account the importance of geographical proximity for certain services.

Sectoral diversity in services is an important reason why the single market for services has not become a reality to date. Several service sectors such as health or

¹⁶ M Monti, ‘A New Strategy for the Single Market at the Service of Europe’s Economy and Society’, Report to the President of the European Commission (Monti Report), 2010, 37.

¹⁷ This is a phenomenon observed in other developed countries as well. See S Miroudot, J Sauvage, and B Shepherd, ‘Measuring the Cost of International Trade in Services’ (2013) 12(4) *World Trade Review*, 719–35.

¹⁸ *Inter alia*, Aaditya Mattoo; Randeep Rathindran, and Arvind Subramanian, ‘Measuring Services Trade Liberalization and Its Impact on Economic Growth: An Illustration’ (2006) 21(1) *Journal of Economic Integration*, 64–98.

¹⁹ For a literature review, see M Lodefalk, ‘Servicification of Firms and Trade Policy Implications’, (2017) 16(1) *World Trade Review*, 59–83. Servicification may capture the use of services as inputs but also as activities within manufacturing firms (eg relating to after-sales and repair services) and as output sold bundled with goods.

²⁰ See M Crozet and E Millet, ‘The Servitization of French Manufacturing Firms’, in L Fontagné and A Harrison (eds), *The Factory-Free Economy—Outsourcing, Servitization, and the Future of Industry* (Oxford: Oxford University Press, 2017), 111–35.

education services are essentially regulated at the EU Member State level, while for a number of services such as tourism, distribution, construction, engineering and consultancy, certification and testing, no comprehensive internal market policy exists.

This contradicts the ever-increasing role that services play for the smooth functioning of markets. Services are a crucial component of the information society networks on which relations between producers and consumers depend. Instantaneous interactive communication permits transactions in an increasing number of services to occur at the same time but in different places. This allows overcoming the previously indispensable requirement of proximity between consumer and service supplier and thus increases the tradability of services across borders and jurisdictions, calling for more efficient regulatory-making terms on the part of the regulators at a cross-national level.

Furthermore, the growing interpenetration of services and goods in the supply and demand cycle means that any policy seeking the optimal allocation of productive resources must now take into consideration regulatory issues in both goods and services and their intermingling.²¹ As we will see later, the initially ambitious Services Directive attempted to resolve some of these deficiencies.

B. Primary law and relevant jurisprudence in the area of services

Very early on, the Court was asked to delineate the confines of the concept of 'service'. As services is a residual (but clearly not subsidiary, as we explain below) freedom when viewed against the other freedoms, cases whereby a potential application of more than one freedom quickly emerged. Thus, in *Sacchi*, the Court had to rule on whether the freedom to provide services or rather the free movement of goods would be relevant in a situation whereby an Italian citizen ran a private television-relay station without a licence. At the time, the Italian State had a monopoly right to operate cable television, including a monopoly on commercial advertising. The Court clarified that the transmission of television signals and commercial advertising can only fall under the freedom to provide services, but trade in tangible material which is used to transmit such signals such as sound recordings, films, or other equipment should be subject to the free movement of goods. Thus, the Court drew a dividing line between the two

²¹ P Delimatsis, *International Trade in Services and Domestic Regulations—Necessity, Transparency, and Regulatory Diversity* (Oxford: Oxford University Press, 2007), 62–3. For this intermingling, compare C-390/99, *Canal Satélite Digital*, ECLI:EU:C:2002:34, paras 31–33. In the WTO context, see Appellate Body Report, *China—Publications and Audiovisual Products*. See also A Antimiani and L Cernat, 'Liberalizing Global Trade in Mode 5 Services: How Much is it Worth?', July 2017, available at: <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155844.pdf> accessed 2 February 2018.

freedoms at issue based on the nature of the activities concerned, that is, whether it was material as opposed to intangible.²²

Almost twenty years after *Sacchi*, the Court revisited the question of how to classify services whereby the use of goods as a medium to supply or consume them is warranted. The most important judgments in this regard are *Schindler*,²³ the first gambling-related case decided by the Court, and, a decade later, *Omega*.²⁴ In both judgments, the Court confirmed the importance of service-related content in a given good (lottery tickets and recreational equipment, respectively) in triggering application of the freedom to provide services. In this way, the Court deviated from *Sacchi*, as it confirmed that the freedom to provide services can *alone* fully encompass an activity that has aspects that touch upon both the free movement of goods and the freedom to provide services.²⁵

In *Schindler*, despite the fact that the service (gambling) was incorporated in a good (a lottery ticket), the Court focused on the rationale of the activity at stake and noted that the importation, distribution, and sale of lottery tickets occurs in order to enable residents of another Member State (the UK) to participate in the lottery and thus consume a gambling service.²⁶

In *Omega*, on the other hand, the Court was by then well-versed in the period of application of the ‘centre of gravity’ test.²⁷ In this case, although the German authorities prohibited the use of specific equipment and thus infringed the rules on the free movement of goods, this was the inevitable result of the main objective of the measure at stake, which was to prohibit Omega from operating its ‘laserdrome’ under a cross-border franchising agreement where a ‘playing at killing people’ game was practised.²⁸ Indeed, the Court has clarified since that the object of the legislation or restrictive measure at issue may play a crucial role in distinguishing which freedom could be the most directly relevant.²⁹ It seems that economic as well as formalistic or textual elements will be taken into account when more than one freedom may be applicable.

The evolution of a fundamental freedom to include services *consumption* and a general trend towards an ever-increasing servicification of the economy has also had a similarly uplifting effect on the importance of the freedom to provide services. To be sure, the adoption of the Services Directive came to confirm this transition, as explained below. More recently, in *Premier League*, the Court resolutely underscored the value creating input that a service entails when bundled with a digital good. When having to decide whether, in a case of a

²² See V Hatzopoulos, *Regulating Services in the European Union* (Oxford: Oxford University Press, 2012), 24.

²³ C-275/92, *Schindler*, ECLI:EU:C:1994:119.

²⁴ C-36/02, *Omega*, ECLI:EU:C:2004:614.

²⁵ See also C-97/98, *Jägerskiöld v. Gustafsson*, ECLI:EU:C:1999:515, paras 35–36.

²⁶ C-275/92, *Schindler*, paras 22–24.

²⁷ See Section II.B.(i).

²⁸ C-36/02, *Omega*, paras 25–27.

²⁹ See, for instance, C-356/08, *Commission v Austria*, ECLI:EU:C:2009:401, para. 32.

cross-border provision of an encrypted broadcasting service which is possible via the use of decoding device, the free movement of goods or rather the freedom to provide services was relevant, the Court opted for the application of the latter alone in finding that the making available of this device only constituted one specific step in the organization or operation of a service by enabling such a service to be obtained. In other words, the decoders are the means by which subscribers make use of the service they paid for.³⁰ Thus, as of the early 1990s a gradual recognition has grown of the increasing importance of services as an independent economic activity, thereby challenging the view of services as an ancillary freedom. It is to the latter that we now turn.

(i) *Services as an ancillary freedom?*

For a long time, services were considered to be a subordinate category of economic activity. The wording of the Rome Treaty was also open to misinterpretation. According to Article 50 of the European Community Treaty (ECT), ‘services shall be considered to be “services” within the meaning of this Treaty where they are normally provided for remuneration, *insofar* as they are not governed by the provisions relating to freedom of movement of goods, capital and persons’ (emphasis added). Thus, services have been negatively defined in the alternative by reference to the other three fundamental freedoms.³¹ The drafters of the Lisbon Treaty did not feel that any changes to this provision were necessary and thus the new Article 57 TFEU reproduces the previous Article 50 ECT.

Such a definition of services could be regarded as a compromise solution in the absence of a satisfactory definition of what a service is.³² Nevertheless, this negatively formulated wording led to interpreting this provision as an ancillary one, when compared with the freedoms relating to goods, persons, or capital. The CJEU has also explicitly ruled as much in *Gebhard*, where it found that compatibility with the rules on establishment had to be assessed first before the rules on services were examined, thereby alluding to a relationship of subordination between the two freedoms.³³ As a corollary of this line of thinking, the

³⁰ See, for instance, joined cases C-403/08 and C-429/08, *Football Association Premier League*, ECLI:EU:C:2011:631, paras 77–83.

³¹ See C-D Ehlermann and G Campogrande, ‘Rules on services in the EEC: A model for negotiating world-wide rules’ in E-U Petersmann and M Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Alphen aan den Rijn: Kluwer Law International, 1988), 484; also J Snell, *Goods and Services in EC Law—A Study of the Relationship Between the Freedoms* (Oxford: Oxford University Press, 2002).

³² Recall that this is also the case in the General Agreement on Trade in Services (GATS) where services are defined by reference to the mode of supply through which they can be delivered.

³³ Case C-55/94, *Reinhard Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, para. 22. See also earlier, Case 60/84, *Cinéthèque*, ECLI:EU:C:1985:329, para. 10; and C-275/92, *Schindler*.

CJEU argued for the mutual exclusivity of the freedoms when it comes to their applicability to a given measure.³⁴

Perhaps driven by the fact that the economies of all Member States have become service economies—notably after several deregulation waves in key industries—the CJEU abandoned this incongruous case law in *Fidium Finanz*. At stake was whether a Swiss company could challenge German rules which made the grant of credit on a commercial basis subject to prior authorization, which in turn was contingent on the company having its central administration or branch in Germany (or within the European Economic Area—or EEA). The CJEU, in a Grand Chamber composition that underlined the gravity of the ruling, suggested that Article 50:1 ECT (now 57:1 TFEU) does not establish any order of priority between the freedom to provide services and the other fundamental freedoms.³⁵ Rather, the CJEU engaged in positive argumentation by stating that this provision covered services which are not governed by other freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms.

In addition, the Luxembourg Court eventually abandoned the unsustainable and rather artificial stance relating to an alleged mutual exclusivity among the freedoms previously supported in *Gebhard*. Instead, the CJEU confirmed that, in theory, a national provision may *simultaneously* hinder the exercise of *two* freedoms,³⁶ *in casu*, the freedom to provide services and the free movement of capital.

Having said this, courts are still obliged to examine whether, under the specific circumstances of a case, the national legislation should be examined under one freedom, whereas the other freedom is entirely secondary in relation to the first examined or should prevail over the first (the so-called ‘centre of gravity test’).³⁷ In the case of finding a violation of the main freedom at issue, the violation of the secondary freedom at stake should be regarded as the inevitable consequence of the violation of the former freedom.³⁸

(ii) *The constituent elements of this freedom*

According to Article 56, ‘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*’ (emphasis added). Thus, despite being a constituent element of the

³⁴ Case C-55/94, *Gebhard*, para. 20.

³⁵ C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht*, ECLI:EU:C:2006:631, para. 32. See also Christa Tobler, ‘Die Fidium Finanz-Entscheidung des EuGH: ein Vorbote der Luxemburger Rechtsprechung zum bilateralen Recht?’ (2006) 4 *SZIER*, 397.

³⁶ See by analogy (free movement of goods versus free movement of services), C-390/99 *Canal Satélite Digital*, paras 31 ff., and Case C-71/02 *Karner*, ECLI:EU:C:2004:181, paras 46–47.

³⁷ See, for instance, joined cases C-403/08 and C-429/08, *Football Association Premier League*, paras 78–83.

³⁸ C-196/04, *Cadbury Schweppes*, ECLI:EU:C:2006:544, para. 33.

freedom, the transfrontier character of a given situation has been applied flexibly by the CJEU—to the point that a distinction with its case law on purely internal situations is hard to make.

Cases such as *Carpenter*,³⁹ *Gourmet*,⁴⁰ or *Ciola*⁴¹ show that, under certain circumstances, service suppliers can have recourse to EU law even for situations which have only a remote bearing beyond the borders of the home state and use it against their government. Furthermore, as exemplified in *Alpine Investments* (cold calling)⁴² but also in *Bond van Adverteerders*,⁴³ the fact that only the service moves, while the supplier and the recipient of the service remain in their respective home states would be sufficient to trigger the application of Article 56.⁴⁴ In addition, the cross-border element would be satisfied in case the service supplier does not move but the service recipients from other Member States do.⁴⁵ Finally, it was made clear that Article 56 would be triggered even if the service provider does not provide his services in the Member State in which he is established.⁴⁶

In *Ullens de Schooten*,⁴⁷ the CJEU attempted to clarify the conditions under which a purely internal situation would still trigger the application of Article 56 TFEU. The Court underlined that if the facts at issue are confined within a single Member State, it is for the referring national court to show what is the connecting factor to EU law on fundamental freedoms even if a given dispute is confined in all respects within a single Member State. For instance, the reference could show that: (a) it is not inconceivable that nationals of other Member States are interested in making use of the freedom to provide services in that Member State and thus the national measure(s) at issue were capable of producing cross-border effects; (b) the decision of the national court would have effects on nationals of other Member States even if the facts are confined within a single Member State; (c) national law requires the referring court to grant the same rights to its nationals as those which nationals of other EU Member States if the same situation would derive from EU law; or (d) national law, when dealing with purely internal situations, generally follows the same approach as that provided by EU law. This much-needed clarification also underscores the obligations of the national courts when using the preliminary reference proceedings, which increasingly relate to the legal implications of the preliminary question.⁴⁸

³⁹ C-60/00, *Carpenter*, ECLI:EU:C:2002:434.

⁴⁰ C-405/98, *Gourmet*, ECLI:EU:C:2001:135.

⁴¹ C-224/97, *Ciola*, ECLI:EU:C:1999:212.

⁴² C-384/93, *Alpine Investments*, ECLI:EU:C:1995:126.

⁴³ C-352/85, *Bond van Adverteerders*, ECLI:EU:C:1988:196.

⁴⁴ See also C-342/14, *X-Steuerberatungsgesellschaft*, ECLI:EU:C:2015:827, paras 49–51.

⁴⁵ This is called the passive freedom to provide services. See Section II.B.(v).

⁴⁶ C-46/08, *Carmen Media Group*, EU:C:2010:505, para. 43.

⁴⁷ C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, paras 50–54.

⁴⁸ See S Iglesias Sanchez, 'Purely internal situations and the limits of EU law: a consolidated case law or a notion to be abandoned?' (2018) 14(1) *European Constitutional Law Review*, 7–36, at 20.

Recently, the CJEU also clarified that situations that arise in territories like Gibraltar in which EU law applies (because an EU Member State, *in casu*, the UK, is responsible for its external relations pursuant to Article 355:3 TFEU) should be regarded as purely internal situations unless a foreign element (or connecting factor) can be demonstrated. Thus, in this case, restrictions relating to the provision of gambling services from Gibraltar to the UK were regarded as falling outside the scope of Article 56 TFEU.⁴⁹

The second constituent element relates to the existence of *remuneration*. Remuneration lies in the fact that it constitutes consideration for the service at issue, and is normally agreed upon between the provider and the recipient of the service.⁵⁰ A series of education-related cases clarified that establishments of higher education come within this category when they are financed essentially out of *private* funds.⁵¹ Thus, the economic or commercial nature of the services supplied is also a decisive element to be considered. This may include services which are regarded as ‘sensitive’ from a domestic public opinion viewpoint such as medical,⁵² sports,⁵³ or gambling services.⁵⁴ However, the CJEU has also emphasized that, while the service at issue cannot be provided for nothing, there is no need to prove additionally that the service suppliers seeks to make a profit nor that the person who benefits from the service also pays for it.⁵⁵

The last constituent element of this freedom is the duration of the service supplied. In *Gebhard*, the CJEU found that the temporary nature of a given service is to be determined ‘in the light, not only of the duration of the provision of the service but also of its regularity, periodicity or continuity’.⁵⁶ In *Schnitzer*, the Court elaborated on the temporary nature of services and noted that the freedom to provide services would also cover cases where the service provider acquires some form of infrastructure in the host Member State, including an office, chambers, or consulting rooms, which is necessary in order to supply the service at issue.⁵⁷ In the Court’s view, services may vary widely in nature and include services which are provided to persons established in other Member States over several years, with a greater or lesser degree of frequency or regularity.⁵⁸ The CJEU concluded by ruling that there is actually no EU law provision to allow the determination, *in abstracto* and *ex ante*, of the duration or frequency

⁴⁹ C-591/15, *The Gibraltar Betting and Gaming Association*, ECLI:EU:C:2017:449.

⁵⁰ Case 263/86, *Humbel*, ECLI:EU:C:1988:451, paras 17–19.

⁵¹ C-109/92, *Wirth*, ECLI:EU:C:1993:916.

⁵² C-159/90, *Grogan*, ECLI:EU:C:1991:378, para. 21.

⁵³ Case 36/74, *Walrave and Koch*, ECLI:EU:C:1974:140, paras 3–8.

⁵⁴ See C-275/92, *Schindler*, paras 26ff; also C-67/98, *Zenatti*, ECLI:EU:C:1999:514, paras 14ff.

⁵⁵ C-179/14, *Commission v Hungary*, ECLI:EU:C:2016:108, paras 154–155.

⁵⁶ C-55/94, *Gebhard*, para. 27.

⁵⁷ More recently, the Court noted that the result would be no different even if the service supplier makes use of a computer support service provider or intermediaries established in the same Member State as the service recipients. The freedom to provide services rather than that of establishment would be applicable. See C-347/09, *Dickinger and Ömer*, ECLI:EU:C:2011:582, para. 38.

⁵⁸ C-215/01, *Schnitzer*, ECLI:EU:C:2003:662, para. 30.

beyond which the supply of a service or of a certain type of service in another Member State can no longer fall under the provision of services rules.⁵⁹ However, referring to *Schnitzer*, the CJEU found in *Trojani* that any activity with no foreseeable limit to its duration would not fall under Article 56 TFEU.⁶⁰

In the current state of EU law, it would be safe to argue that the Court essentially has a monopoly of deciding, on a case-by-case basis, whether a particular set of facts should trigger the application of the freedom to provide services. To soften this, in many recent cases relating to the freedom to provide services, some of which discussed the applicability of the Services Directive,⁶¹ the Court has refrained from giving definite answers to preliminary references but instead left this for the referring national courts, limiting itself to the identification of some pointers that could guide those courts. However, by blurring the distinction between services which are supplied on a long-term basis and establishment, the Court gradually expanded the scope of the former to the detriment of the latter, while reviewing under the freedom of establishment such cases where long-term establishment is required by the measure or the circumstances of the case.⁶²

(iii) From a 'discrimination' to a 'restriction' approach

As with other freedoms, the CJEU initially had to deal with and condemn discriminatory (*de jure* or *de facto*) measures that violated EU law on the basis of the origin of the service supplier.⁶³ With respect to the freedom to provide services in particular, the CJEU ruled in *Coenen*, that⁶⁴

[t]he restrictions to be abolished pursuant to Article [56 TFEU] include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the state where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the persons providing the service.

Hence, the Court found that requiring a service provider supplying insurance services to have both his business office and permanent private residence in the host Member State contravenes the freedom to provide services. As the Court confirmed in consistent subsequent case law, the requirement of a permanent

⁵⁹ For an attempt to add criteria allowing a distinction to be drawn between establishment and services, see Recital 37 of the Services Directive.

⁶⁰ C-456/02, *Trojani*, ECLI:EU:C:2004:488, para. 28. See also C-342/17, *Memoria and Dall'Antonia*, ECLI:EU:C:2018:906, para. 44.

⁶¹ See Section III.

⁶² For a depiction of this approach, see C-458/08, *Commission v Portugal*, ECLI:EU:C:2010:692.

⁶³ For the several attempts to identify distinct phases of the case law in the law of free movement of services, see Hatzopoulos (n 22), 101. However, we avoid the temptation to enter into a similar exercise here.

⁶⁴ Case 39/75, *Coenen*, ECLI:EU:C:1975:162.

establishment is the *very negation* of the freedom to provide services.⁶⁵ In addition, setting conditions to the provisions of services which are normally required for establishment would deprive the free movement provisions relating to services supply of their *effet utile*.⁶⁶ Thus, discrimination on the basis of nationality or place of establishment leads to a breach of the fundamental freedom relating to services.⁶⁷

In addition, service providers from other Member States should have access to essential facilities such as housing and thus cannot be discriminated against. For instance, in *Commission v Greece*, the Court found that restrictions on the right to purchase or use immovable property that are only imposed on the nationals of other Member States, but not on Greeks, breach the freedom to provide services, as one of the corollaries of the latter is access to ownership and the use of immovable property to allow for effective exercise of the freedom.⁶⁸

As domestic regulators became more creative in legislating services industries by using ostensibly origin-neutral measures to protect their domestic service suppliers, the Court adapted its case law as a response to this development. Thus, in *Säger*, the Court shied away from a 'discrimination approach' towards a more intrusive 'obstacle approach' when it found that the freedom to provide services requires the elimination not only of all discrimination but also all those *non-discriminatory* restrictions that are liable to impede the supply of services from one Member State to another.⁶⁹

Säger marks an era of enhanced judicial activism, which, is very much inspired by the *Cassis de Dijon* case law applicable to goods. In the post-*Säger* case law, the focus of the Court was concentrated on whether there is a restriction to the free movement of services that hampers market access, which is very similar to the test applied in the area of goods at the time.⁷⁰ Such an effect-based approach

⁶⁵ Case 205/84, *Commission v Germany*, ECLI:EU:C:1986:463, para. 52; and C-222/95, *Parodi*, ECLI:EU:C:1997:345, para. 31. This case law found expression in Art. 16 of the Services Directive.

⁶⁶ C-154/89, *Commission v France*, ECLI:EU:C:1991:76, para. 12 (outlawing restrictions applied to tourist guides accompanying groups of tourists from another Member State). See also the result in *Corsten*, where the Court considered a requirement for compulsory registration in the host State's trades register as a restriction not only for undertakings established in that State but also for undertakings wishing to supply services on an occasional basis or just once: C-58/98, *Corsten*, ECLI:EU:C:2000:527, para. 34. Importantly, the Court noted that, when an examination of the conditions governing access to the economic activity at stake had already been carried out in the home Member State, the host Member State should avoid the use of an authorization procedure that delays or complicates the exercise of the right of service providers from other Member States to offer their services in that State; the same would apply to any additional administrative expense or compulsory payment of subscriptions to the trades chamber. *Ibid* paras 47–48.

⁶⁷ C-288/89, *Gouda*, ECLI:EU:C:1991:323, para. 10.

⁶⁸ See Case 305/87, *Commission v Greece*, ECLI:EU:C:1989:218.

⁶⁹ Case 76/90, *Säger*, ECLI:EU:C:1991:331, para. 12; also C-346/06, *Rüffert*, ECLI:EU:C:2008:189, para. 37; and, more recently, C-475/11, *Konstantinides*, EU:C:2013:542, para. 44.

⁷⁰ See M. Maduro, 'Harmony and Dissonance in Free Movement' (2001) 4 *Cambridge Yearbook of European Legal Studies*, 315–41, at 332; and I Lianos and D Gerard, 'Shifting narratives in European economic integration: trade in services, pluralism and trust' in Lianos and Odudu (n 6), at 188.

quickly unfolded in the period that followed.⁷¹ For instance, the Court dismissed in *Alpine Investments* the possibility to extend the *Keck* proviso (that is, to exclude from the scope of Article 56 TFEU all selling arrangements that apply equally to all traders and affect in the same manner the marketing of domestic and foreign goods in law and in fact) in the field of services. The Court found that the ban on cold calling to sell investment products directly affected market access in the export markets of other Member States, thereby constituting an impediment capable of hindering intra-EU trade in services.⁷² Later on, in *Commission v Germany*, a case relating to the posting of workers, the Court regarded as restrictions certain obligations to translate the relevant documents into German because they involved additional expenses and an administrative and financial burden against foreign undertakings, thereby having a dissuasive effect against suppliers originating in other Member States.⁷³

The same happened with the *private security activities* case where the CJEU found, among other findings, that a requirement of an oath of allegiance to Italy and the Head of State; a requirement of prior authorization from each one of the provinces where it intends to offer private security services before being able to supply such services; or the requirement to have a place of business in each of the provinces where the service supplier is active all violate the free movement rules.⁷⁴

Taking its restriction-based case law to the extreme, the Court found in a series of financial services-related cases that, in order to achieve the objectives of the single market, the freedom to provide services precludes the imposition of national rules which effectively make the provision of services between Member States more difficult than the supply of services within one Member State.⁷⁵ Similar findings were delivered in recent cases relating to taxation with implications for the freedom to provide services.⁷⁶

Thus, the Court considers the commercial conditions in the home market as a benchmark and requires that the measure at issue be examined against it. Even so, regulatory diversity and variation in preferences is not ipso facto in jeopardy

⁷¹ See also A Biondi, 'Recurring Cycles in the Internal Market: Some Reflections on the Free Movement of Services', in A Arnall, P Eeckhout, and T Tridimas (eds), *Continuity and Change in EU Law—Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), 228, at 231.

⁷² In deciding so, the Court seems unwilling to draw a dividing line between the service and the way it is supplied. Cf Lianos and Gerard (n 70), at 189. *Alpine Investments* is also a very interesting case because the Court, within the market access fervour, recognizes the importance of domestic regulatory preferences and sufficient space to impose certain limitations in risky markets with significant information asymmetries (like, in this case, financial services).

⁷³ C-490/04, *Commission v Germany* [2007] ECR I-6095, para. 69. However, the Court found that these requirements were proportionate.

⁷⁴ Note that Italy has 103 provinces: C-465/05, *Commission v Italy*, ECLI:EU:C:2007:781.

⁷⁵ C-118/96, *Safir*, ECLI:EU:C:1998:170, para. 23; C-150/04, *Commission v Denmark*, ECLI:EU:C:2007:69, para. 38; and C-356/08, *Commission v Austria*, para. 35.

⁷⁶ C-155 and 157/08, *X and E.H.A. Passenheim-van Schoot v Staatssecretaris van Financiën*, ECLI:EU:C:2009:368, para. 32; and C-287/10, *Tankreederei I SA*, ECLI:EU:C:2010:827, para. 15.

in the absence of (full) harmonization. The Court has insisted that a restriction against the freedom to provide services is not to be found merely because other Member States apply less strict or economically more favourable rules in the supply of similar services.⁷⁷ Otherwise, deregulation and/or regulatory uniformity would be among the objectives of the Treaties. The sectoral diversity of trade in services but also variety in terms of competences seem to accentuate the Court's willingness to accommodate variety.⁷⁸ However, such a 'margin of diversity'⁷⁹ would find its place in the proportionality review of the measure rather than as the first step in examining whether a restriction exists.

Regardless of the level of harmonization chosen by the EU legislator (full or not), the application and scope of a primary free movement law is by now associated with the concept of market access.⁸⁰ Indeed, the Court recently also extended its 'market access' approach adopted in cases relating to the free movement of goods in the services realm.⁸¹ For instance, in *Commission v Italy*, the Court noted that non-discriminatory measures can still constitute restrictions if they affect access to the market for economic operators from other Member States.⁸² In the Court's view, market access deprivation should be assessed based on conditions of normal and effective competition.⁸³

In that respect, the Court clarified in *Volksbank Romania* that effective competition is preserved and thus market access is not hampered when the restrictions at issue do not result in additional burdens for service suppliers originating in other Member States, eg, obliging these institutions to change their commercial policy and strategies to gain access to a given market (in this case, the Romanian banking sector).⁸⁴ In contrast, measures unduly interfering with the exercise of an economic activity by obliging undertakings to re-think their business policy and strategy and thus causing additional costs in terms of organization and investment, reduce the ability of foreign undertakings to compete effectively with incumbents and thus contravene EU free movement law.⁸⁵

Such convergence between the judicial interpretation of the substantive scope of the two freedoms relating to goods and services may be welcome notably in view of the increasing embedding of high-value services in goods. It is also the inevitable result of the fundamental freedoms being regarded as essential

⁷⁷ C-565/08, *Commission v Italy*, ECLI:EU:C:2011:188, para. 74.

⁷⁸ For a similar argument expressed in constitutional terms, see F de Witte, 'The constitutional quality of the free movement provisions: looking for context in the case law on Article 56 TFEU' (2017) 42(3) *European Law Review*, 313.

⁷⁹ Lianos and Gerard (n 70), at 199.

⁸⁰ C-356/08, *Commission v Austria*, paras 39–41. See also J Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CML Rev*, 437–72; and Hatzopoulos (n 22), 113ff.

⁸¹ C-518/06, *Commission v Italy*, ECLI:EU:C:2009:270.

⁸² C-565/08, *Commission v Italy*, para. 46.

⁸³ *Ibid* para. 51. Also I Lianos, 'In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods' (2015) 40(2) *European Law Review*, 225–48.

⁸⁴ See C-602/10, *Volksbank Romania*, ECLI:EU:C:2012:443, para. 79.

⁸⁵ See C-518/06, *Commission v Italy*, paras 64–70.

economic rights of EU citizens.⁸⁶ Conceptually, however, they seem to solidify a judicial stance that looks to guarantee the equality of opportunities and level the playing field when faced with non-discriminatory measures with doubtful protectionist intent which nevertheless distort market circumstances, have a disparate impact, and a deterrent effect.⁸⁷ Finally, it appears that in certain cases the Court will apply an effects test without necessarily focusing on market access; rather, it would focus on the dissuasive effect by speculating on the potential behaviour of economic actors or entertaining a—sometimes untidy—counterfactual analysis. Thus, in *Konstantinides*, the Court found that all measures affecting the freedom to provide services in other Member States (rather than market access to others' services markets) constitute a restriction.⁸⁸

Overall, it has become clear on multiple occasions that the Court, when it determines whether a restriction exists, is not willing to offer any special treatment that caters for the specificities of a given sector. As noted by Weatherill, 'the internal market as a legal concept militates against a sensitivity to the particular context in the matter of finding a restriction on economic activity'.⁸⁹ Rather, such sensitivity (for example, in cases pertaining to health-related matters)⁹⁰ becomes apparent when the discussion of the Court turns to the potential justification of a given national measure. At the same time, such discussion will be quite strict *across* freedoms so that fundamental freedoms *qua* the economic rights of EU citizens are carefully balanced against non-economic values.

(iv) Applicability of the EU fundamental freedoms to private conduct

Services is one of the areas whereby the boundaries between state, legally binding action and private, essentially voluntary action are blurred.⁹¹ Often, private authority emerges as a law-maker with similar (and sometimes higher) effectiveness than public authority. This calls for a more careful analysis of the *ratione materiae* scope of EU fundamental freedoms.

The fragmentation of the internal market for services is partly due to divergent standards adopted by non-public bodies in Member States, such as professional associations, sports federations, social partners drawing up collective agreements, or interested parties or groups drawing up codes of conduct or

⁸⁶ See A Tryfonidou, 'Further Steps on the Road to Convergence Among the Market Freedoms' (2010) 35 *European Law Review*, 36.

⁸⁷ See also G Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement' (2010) 11(8) *German Law Journal*, 671; Hatzopoulos (n 22), 117–19; and I Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration' (2010) 21 *European Business Law Review*, 705, at 728–38. See also C-475/11, *Konstantinides*, para. 49.

⁸⁸ *Ibid* para. 45.

⁸⁹ See S Weatherill, *The Internal Market as a Legal Concept* (Oxford: Oxford University Press, 2017), 36.

⁹⁰ See C-531/06, *Commission v Italy*, EU:C:2009:315.

⁹¹ See also P Delimatsis, "'Thou shall not . . . (dis)trust": Codes of conduct and harmonization of professional standards in the EU' (2010) 47(4) *CML Rev*, 1049–87.

collective rules in the exercise of their legal autonomy.⁹² However, one early mainstream view suggested that extending the application of EU free movement law to private action would distort the philosophy of the Treaties, reserving this type of situation for scrutiny under the competition law rules enshrined in the TFEU.⁹³

This approach is parochial and in fact has been abandoned by now.⁹⁴ Rather, in relevant cases, the Court will examine a factual situation relating to private barriers to trade under both the fundamental freedoms and competition rules. For example, in *Premier League*, the Court, after finding a violation of Article 56 TFEU, went on to examine whether the clauses of an exclusive licence agreement concluded between an intellectual property right holder and a broadcaster and which prevents the latter from supplying decoders enabling access to protected content outside the territory covered by the licence agreement constitutes a restriction by object under Article 101 TFEU.⁹⁵ In other cases, the Court may simply assess a set of facts arising from private barriers to trade such as restrictions to economic activity imposed by self-regulated professional associations only by examining their compatibility with EU competition rules.⁹⁶

Recognizing that the activities of market participants can be equally restricted by private action,⁹⁷ the CJEU interpreted the fundamental freedoms in a broad manner with a view to enabling market participants to have adequate judicial protection and equal opportunities to gain access anywhere in the EU.⁹⁸ Hence, the traditional approach that horizontal effect was only applicable with regard to the rules of competition, whereas the rules on free movement only had vertical direct effect was abandoned at an early stage.⁹⁹

From that point onwards, the delimitation of the effect of the fundamental freedoms has been at issue in various cases before the CJEU. In *Walrave and Koch* and in *Bosman*, two of the leading cases dealing with sports, the Court found that the fundamental freedoms of services and workers, respectively, not only produce vertical direct effect, but also horizontal direct effect. In focusing on the *telos* of the Treaties, the Court proclaimed:¹⁰⁰

⁹² See, generally, M Mataija, *Private Regulation and the Internal Market—Sports, Legal Services and Standard-Setting in the EU Economic Law* (Oxford: Oxford University Press, 2016).

⁹³ M Quinn and N MacGowan, 'Could Article 30 Impose Obligations on Individuals' (1987) 12 *European Law Review*, 163.

⁹⁴ See V Brisimi, *The Interface between Competition and the Internal Market—Market Separation under Article 102 TFEU* (Oxford: Hart Publishing, 2016).

⁹⁵ Confirming that it was the case: see Joined cases C-403/08 and C-429/08, *Football Association Premier League*, paras 135–146.

⁹⁶ See, for instance, C-309/99, *Wouters*, ECLI:EU:C:2002:98.

⁹⁷ See D Chalmers, C Hadjiemmanuil, G Monti, and A Tomkins, *European Union Law* (Cambridge: Cambridge University Press, 2007), 749.

⁹⁸ See also D Edward and N Nic Shuibhne, 'Continuity and Change in the Law Relating to Services' in Arnall et al. (n 71), 243.

⁹⁹ See, for instance, 41/74, *Van Duyn*, ECLI:EU:C:1974:133, paras 4–8.

¹⁰⁰ Case 36/74, *Walrave and Koch*, paras 17–19.

Prohibition of such discrimination [on grounds of nationality] does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services. The abolition of obstacles to [free movement] would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law. Since, moreover, working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.

Thus, settled case law of the CJEU makes it clear that circumventing market integration through obstacles stemming from rules (or the application thereof) set out by associations or organizations not governed by public law that are entrusted with broad legal autonomy and regulatory power cannot be allowed.¹⁰¹ Indeed, rules of *any* nature set out by private bodies aimed at regulating gainful (self-) employment and the supply of services in a collective manner can impede the functioning of the internal market and thus come within the purview of the free movement provisions of the Treaty.¹⁰²

This case law found expression in the adopted Services Directive. Article 4:7 of the Directive provides that a ‘requirement’ within the meaning of the Directive means any obligation, prohibition, condition, or limit provided for in the laws, regulations, or administrative provisions of the Member States or administrative practice, but also the rules of professional bodies, or the collective rules of professional associations or other professional organizations, adopted in the exercise of their legal autonomy.

Furthermore, in *Angonese*, the Court broadened this case law by ruling that horizontal direct effect is also attributed in cases of actions of individuals who do not have the power to make rules regulating gainful employment (*in casu*, a single employer who refuses to employ a given individual because of its nationality).¹⁰³ In ruling so, the Court drew inspiration from its *Defrenne* case law, where the Court found that the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts *between individuals*.

In the infamous *Viking Line* case, the Court had to decide whether a private undertaking can confer rights from the free movement rules on which it can rely against a trade union or an association of trade unions. The Court had no difficulty in clarifying that the free movement rules extend also to rules of

¹⁰¹ See also 13/76, *Donà*, ECLI:EU:C:1976:115, paras 17, 18; C-415/93, *Bosman*, ECLI:EU:C:1995:463, paras 83–84; C-176/96, *Lehtonen*, ECLI:EU:C:2000:201, para 35; C-309/99, *Wouters*, para. 120.

¹⁰² C-519/04, *Meca-Medina v Commission*, ECLI:EU:C:2006:492, para. 24.

¹⁰³ C-281/98, *Angonese*, ECLI:EU:C:2000:296.

any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.¹⁰⁴

The same result was found in *Laval* with regard to the freedom to provide services.¹⁰⁵ In *Laval*, the Court had to decide on the compatibility with Article 56 TFEU of collective action by Swedish trade unions against a Latvian employer of posted construction workers, *Laval*, but also of the lack of recognition by Swedish trade unions that *Laval* was already subject to collective agreements concluded in Latvia. The Court followed the *Viking* line of case law to find that the right of trade unions to collective action violates Article 56 TFEU because it dissuades free movement by forcing foreign companies to sign collective agreements in the building sector.

With respect to the second question, the Court had to deal with a situation which raises a so-called ‘double burden’: the lack of recognition of conditions already fulfilled in the home Member State by the host state authorities or self-regulatory bodies obliges a given economic operator to go through the very same (or similar) process of compliance twice. The Court considered this to be a discriminatory treatment because foreign companies of this type are treated in the same way as host state companies which have *not* concluded a collective agreement at all.¹⁰⁶ This does not seem to be a sustainable approach:¹⁰⁷ one would rather expect the Court to consider such a discrepancy as a non-discriminatory measure that still amounts to a restriction against the freedom to provide services and then discuss whether it is justified and proportionate. The difference in treatment fails to take into account regulatory diversity and domestic preferences but also differences in administrative practice that perpetuate red tape. In practice, it also has systemic repercussions: if treated as a discriminatory measure, the regulating State can only have recourse to the express derogations but is in principle deprived from the possibility to raise an overriding requirement.

Be this as it may, confirming its stance in *Viking Line*, the CJEU again appeared to balance the conflicting rights (fundamental freedom against fundamental rights to protect workers against social dumping) in favour of free movement. In this case, however, it was more eloquent than in *Viking Line*. Whilst in the latter, the CJEU suggested that it is for the national court to undertake the proportionality test, in *Laval* the CJEU, in light of the severity of the means chosen by the domestic trade union (ie a blockade of sites), decided to undertake the proportionality test itself to conclude that it was not met, based on the safety net already provided by Directive 96/71 on the posting of workers and on the

¹⁰⁴ See C-438/05, *Viking Line*, para. 33. Thus, in all three freedoms (workers, establishment, and services) horizontal direct effect is by now a reality.

¹⁰⁵ C-341/05, *Laval*, ECLI:EU:C:2007:809.

¹⁰⁶ *Ibid* para. 116.

¹⁰⁷ See in a similar vein, Hatzopoulos (n 22), 111–13.

obscurity or absence of any provisions at all at a national level specifying the obligations of employers with respect to minimum pay.¹⁰⁸

However, it would be erroneous to consider that the CJEU adopted a human-rights- or labour-unfriendly stance. Arguably, the rulings of the CJEU are strictly fact-specific and should not be used to draw more general conclusions as to social protection within the Union.¹⁰⁹ On the other hand, it would be safe to say that the CJEU is not prepared to overrule light-heartedly a restriction on the fundamental freedoms, notably when their application may ensure an optimal allocation of resources throughout the enlarged Union.

It follows from the previous discussion that the CJEU, by focusing on the activity at stake, is determined to outlaw any provision of any nature capable of preventing or deterring an EU citizen from leaving its home country to exercise its right to freedom of movement. Any signal of disadvantaging nationals of another Member State in the territory of a given Member State, which subsequently impedes or renders less attractive the use of the Treaty constitutional rights, can be sufficient to trigger the application of the free movement provisions.¹¹⁰ In this regard, notably when it comes to the scope of the fundamental freedoms in particular, the Court has been consistent in maintaining a neo-liberal stance with a view to ensuring market access in fair terms and to limiting the unduly excessive part of Member States' regulatory space.¹¹¹

When the exercise of fundamental rights conflicts with the exercise of the freedom of movement, the Court will attempt to strike a balance based on the facts of the case and the interests at stake. Nonetheless, neither fundamental rights nor fundamental freedoms are absolute.¹¹² The Court is willing to take up this daunting task, absent any serious attempt by the State to resolve the matter in a satisfactory manner. The Court's case law hints at the need for a more pro-active and reflexive reaction from the State when such issues arise so that recourse to judicial means is precluded.

Indeed, Member States can and should interfere with private rules through appropriate legislation (including competition law enforcement) or court decisions at any time. Given the risk of bias that may characterize private rules, such state intervention may become essential in restoring the balance of rights and

¹⁰⁸ Directive 96/71 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

¹⁰⁹ See also more recent cases giving more leeway to the host State: for instance, C-115/14, *RegioPost*, EU:C:2015:760.

¹¹⁰ C-442/02, *CaixaBank France*, ECLI:EU:C:2004:586, para. 11.

¹¹¹ For an eloquent analysis, see G Davies, 'Internal Market Adjudication and the Quality of Life in Europe' (2015) 21 *Columbia Journal of European Law*, 289, at 308.

¹¹² To corroborate this view, see Art. 52:1 of the Charter of fundamental rights of the European Union, which provides that: '[a]ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be imposed only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others'. See also AG Maduro's opinion in *Viking Line*, point 23.

obligations or complying with the obligations enshrined in the Treaty. The same would apply to the European Commission, which, as the guardian of the treaties routinely uses the possibility of proposing legislation or launching infringement proceedings to also address private obstacles to EU trade.

This, however, may not be the end of the story for the purposes of examining the consistency with EU law of restrictions based on private conduct. Even if non-discriminatory, a restriction on free movement that impedes market access cannot be sustained unless it pursues an EU-consistent legitimate objective, is justified by overriding reasons of public interest and complies with the proportionality principle.

In *Gebhard*,¹¹³ and more recently in *Wouters*, the Court found or implied that national measures liable to hinder or make less attractive the exercise of the right to free movement can be justified because they structure the market thereby setting the 'rules of the game'. This is, for instance, the case with certain aspects that are inherent to a given profession or considerations such as professional ethics.¹¹⁴ If so, the measure should additionally comply with the principle of proportionality, that is, be suited to the attainment of the objective pursued and not go beyond what is necessary in order to attain it.¹¹⁵

Moreover, the Court has recognized the important role that self-regulatory bodies can play as gatekeepers ensuring the integrity, independence, and professionalism of a given profession, but has also been increasingly wary of market access foreclosure due to regulatory capture and special interests which benefit incumbents.¹¹⁶

¹¹³ C-55/94, *Gebhard*.

¹¹⁴ Or rules justified by the 'general good'. See also Cases 33/74, *Van Binsbergen*, ECLI:EU:C:1974:131, para. 12; and 71/76, *Thieffry*, ECLI:EU:C:1977:65, para. 12. See, by analogy, in regard to the reputation of a given services sector: C-384/93, *Alpine Investments*, paras 42–44. In *Deliège*, the Court had found that, although selection rules for sporting events restrict the freedom to provide services, the limitations that such rules imply are 'inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted'. See Joined Cases C-51/96 and 191/97, *Deliège*, ECLI:EU:C:2000:199, para. 64.

¹¹⁵ See, *inter alia*, C-415/93, *Bosman*, para. 104. This proportionality test will be much more flexible in cases where the professionals at issue are the agents protecting an important policy objective such as public health within the sphere of competences retained to the Member States. See Joined Cases C-171/07 and 172/07, *Apothekerkammer des Saarlandes*, ECLI:EU:C:2009:316. In this case, the Court suggested, *inter alia*, that the double nature of the pharmacists, ie the fact that they operate a pharmacy not only to make profit, but also as professionals bound by the rules of law and professional conduct, may justify a restriction allowing only pharmacists to own and operate pharmacies. According to the Court, moderating factors inherent in their function make them special when compared to non-pharmacists. Previously, the CJEU did not accept a similar exception for opticians. See C-140/03, *Commission v Greece*, ECLI:EU:C:2005:242. In *Apothekerkammer des Saarlandes* (para. 60), the CJEU explained: 'Unlike optical products, medicinal products prescribed or used for therapeutic reasons may nonetheless prove seriously harmful to health if they are consumed unnecessarily or incorrectly, without the consumer being in a position to realise that when they are administered. Furthermore, a medically unjustified sale of medicinal products leads to a waste of public financial resources which is not comparable to that resulting from unjustified sales of optical products'. See also C-531/06, *Commission v Italy*, paras 89–90.

¹¹⁶ Cf. AG Maduro's Opinion in C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, ECLI:EU:C:2009:587, paras 20–21.

To mitigate such problems, a consistency requirement was introduced more recently: the appropriateness of the measure at issue to genuinely pursue the chosen objective in a consistent and systematic manner is by now routinely part of the proportionality analysis.¹¹⁷ In this respect, the Court will be looking for inconsistencies or contradictions in the pursuit of the objective but also for any lack of coherence in addressing certain concerns.¹¹⁸ However, this investigation will not necessarily lead to inter-sectoral comparisons to identify discrepancies as to the reaction by regulatory authorities against similar risks. Thus, it is yet to develop into a fully-fledged EU standard for rational public administration.¹¹⁹

Protecting professional ethics in cross-border situations has continued to occupy the Court in recent times, although both case law and legislative instruments appear to be quite straightforward as to the obligations of professionals. Thus, in *Jakubowska*, the CJEU was called upon to decide whether a prohibition imposed by Italian legislation on lawyers registered in Italy being employed, even on a part-time basis, by a public enterprise was consistent with EU law. The Court first recalled that both primary and secondary EU law (in this case Directive 98/5/EC) do not preclude that a lawyer practising in the host Member State is subject to the rules of professional conduct in force in that Member State. Such rules are not harmonized and can therefore differ greatly among Member States. Failure to comply with such rules of conduct can lead to a lawyer being removed from the register in the Bar of the host Member State.

The Court went on to suggest that preventing conflicts of interest for lawyers is a legitimate objective, as lawyers should be in a situation of independence vis-à-vis the public authorities and other operators, by whom they should not be influenced. Such conflicts may indeed arise when a lawyer is registered with a Bar and simultaneously employed, even part-time, by another lawyer, an association, or firm of lawyers, or by a public or private enterprise. Nonetheless, the Court also voiced a reminder that such a requirement should be non-discriminatory and apply to all lawyers registered in the host Member State.¹²⁰

(v) *The ubiquitous nature of services*

Since the provision of services can be hindered through legislation adopted by both home and host state rules, Article 56 TFEU has been interpreted as covering both situations. For instance, the CJEU found that requiring a lawyer to be

¹¹⁷ See, among many, C-169/08, *Presidente del Consiglio de Ministri v Regione Sardegna*, ECLI:EU:C:2009:709, para. 42. See also J Langer and W Sauter, 'The Consistency Requirement in EU Law' (2017) 20(3) *Columbia Journal of European Law*, 39.

¹¹⁸ See G Mathisen, 'Consistency and coherence as conditions for justification of Member State measures restricting free movement' (2010) 47(4) *CML Rev*, 1021.

¹¹⁹ Cf. Langer and Sauter (n 117), at 73.

¹²⁰ C-225/09, *Jakubowska*, ECLI:EU:C:2010:729. Even if the case were concerned with the Directive 98/5 relating to the establishment of lawyers, it would be erroneous to believe that such a line of reasoning would not apply in the case of the cross-border supply of services on a temporary basis.

resident in a Member State before he is authorized to supply his services violates Article 56 (host state requirement).¹²¹ On the other hand, in cases such as *Carpenter* or *Alpine Investments*, the CJEU found that the domestic laws of the home state (alias, where the service provider is established) can discourage a service provider from supplying its services in another Member State (even if his clientele is only remote and unidentifiable).¹²²

Furthermore, the Court found that the freedom to provide services creates rights not only for the service *suppliers*, but also for the service *consumers*. Thus, the CJEU found that consumers in their capacity as tourists;¹²³ persons receiving medical treatment abroad;¹²⁴ or those travelling for the purpose of (private) education¹²⁵ are to be regarded as recipients of services who are entitled to make use of the freedom to provide services, as the freedom to *receive* services is the necessary corollary of that freedom. In *Cowan*, the CJEU found that France violated the freedom relating to services when refusing, based on the French criminal compensation scheme, to compensate a British tourist who had been attacked while in Paris.¹²⁶

More recently, in *Hengartner and Gasser*, the Court found that making available to some private parties, in return for payment and on certain conditions, of an area of land in order to hunt there, would come under the freedom to *receive* services provided that it is of a cross-border nature. The service in that case is the grant, in return for payment, of the exploitation of a right to hunt in an area of land for a limited time.¹²⁷

Finally, in *Vanderborght*, the Court had to decide on a claim relating to the personal scope of Article 56 in a case brought against Mr Vanderborght, a Belgian national, because he violated the ban against any advertising of dental services in Belgium. According to the referring court, the freedom to provide services was applicable because Mr Vanderborght posted ads on the internet

¹²¹ See Case 33/74, *van Binsbergen*, the first case where the Court recognized the direct effect of the freedom to provide services. 1974 was an important year for the CJEU case law, as the *Dassonville* judgment in the area of free movement of goods was delivered. In a similar, expansionist mode, the CJEU found in *van Binsbergen* that EU law and the freedom to provide services not only prohibited residency requirements imposed on a service supplier, but also 'all requirements which may prevent or otherwise obstruct his/her activities'. *Ibid* para. 10.

¹²² See also C-405/98, *Gourmet*, para. 35, where the Court found that a domestic law prohibiting domestic companies from selling advertising space in their publications to potential advertisers established in other Member States violated the freedom to provide services. The Court seemingly disagreed with a total ban because it effectively prevented the *development* of a (then non-existent) domestic market. See also Biondi (n 71), at 238.

¹²³ Joined Cases 286/82 and 26/83, *Luisi and Carbone*, ECLI:EU:C:1984:35, para. 16; also, more recently, C-98/14, *Berlington Hungary and Others*, C98/14, EU:C:2015:386 para. 25.

¹²⁴ C-372/04 *Watts*, ECLI:EU:C:2006:325.

¹²⁵ C-109/92, *Wirth*.

¹²⁶ C-186/87, *Cowan v le Trésor Public*, ECLI:EU:C:1989:47.

¹²⁷ C-70/09, *Hengartner and Gasser*, ECLI:EU:C:2010:430, paras 32–33. Based on this finding, the CJEU found that these two Swiss nationals could not draw any rights from the agreement between the EU and Switzerland, as the EU did not conclude with Switzerland an agreement relating to services but only to the free movement of natural persons.

which may reach clients from other Member States but also treated patients from other Member States. The Court agreed that the fact that a number of clients are EU citizens coming from other Member States would be sufficient to trigger the application of Article 56.¹²⁸ In earlier cases, the Court also clarified that such consumption of services in a cross-border manner is possible even if neither the supplier nor the recipient of the service at stake moves.¹²⁹

Thus, receiving certain services is regarded as the passive freedom to provide services, which entails a visit to another Member State with the intention or the likelihood to receive services. This includes tourists, persons receiving medical treatment, or persons travelling for educational or business purposes provided that they are EU citizens.¹³⁰ While it makes sense to impose restrictions on consumers rather than service suppliers in order to avoid circumvention of the Treaty freedoms, such an expansion of the reach of the personal scope of the freedom relating to services supply and consumption is not without practical repercussions. It aims to create a seamless experience when it comes to service supply and consumption within the territorial confines of the EU—and sometimes even outside the EU, as famously underscored by the Court in *Walrave and Koch*.¹³¹ More importantly, by blurring the boundaries between purely internal situations and cross-border situations while maximizing the scope of free movement law, the Court has gradually cemented the creation of an economic space for for-profit activities relating to services in defiance of distortions created by the market (via self-regulation) or the State (via legislation or other practice).

(vi) *The corollary rights to the freedom to provide services*

Other than the TFEU provisions relating to services, the rights of providers and recipients of services are further regulated by the Citizen Rights Directive (CRD).¹³² Importantly, in *Metock*, the CJEU confirmed the broad scope of the CRD not only for the individual service supplier but also for the members of its family, even if they are third-country nationals (TNCs). The Court explicitly associated the protection of the family life of EU nationals (even if this family life includes TNCs) with the proper exercise of the fundamental

¹²⁸ C-339/15, *Vanderborght*, ECLI:EU:C:2017:335, para. 56.

¹²⁹ See C243/01 *Gambelli and Others*, ECLI:EU:C:2003:597, paras 55, 57.

¹³⁰ But see C-221/11, *Demirkan*, ECLI:EU:C:2013:583, paras 35–36, where the Court dismissed an action calling for the application of the *Luisi and Carbone* case law in the case of Turkey. See also C-290/04, *FKP Scorpio*, ECLI:EU:C:2006:630, para. 68, where the Court denied an extension of the privileges relating to Article 56 TFEU to third-country nationals even if they are established within the EU.

¹³¹ See Case 36/74, *Walrave and Koch*, para. 28. In *Petersen*, the Court found that the activity could take place entirely outside the EU territory without undermining the links to EU law (in this case, *inter alia*, the employer was established in Denmark and the contract was concluded under Danish law). See C-544/11, *Petersen*, ECLI:EU:C:2013:124, paras 40–43.

¹³² Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

freedoms enshrined in the Treaties.¹³³ The Court found that the CRD aims to strengthen the right to free movement and thus it should be regarded as conferring more rights than any previous piece of secondary legislation.¹³⁴ The CJEU went on to confirm that the Directive cannot be interpreted restrictively, and must not be deprived of its *effet utile*.

Other than the right of entry, residence, and departure and the right related to access to a given market, there are also other rights that one should discuss such as social or tax advantages. The basic principle to keep in mind is the one of equality before the laws of any Member State. Thus, CJEU established case law guarantees the absence of any discrimination based on the place of residence.¹³⁵

With regard to tax treatment, the CJEU found in *De Coster* that a Belgian tax on satellite dishes led to preferential treatment of cable broadcasters *vis-à-vis* broadcasters supplying their services through satellite and thus violated Article 56.¹³⁶ More recently, in *Presidente del Consiglio de Ministri v Regione Sardegna*, the Court had to decide on the consistency with EU law of Sardinian tax legislation which imposes a regional tax in the event of stopovers for tourist purposes by aircraft used for the private transport of persons only on undertakings that have their tax domicile outside the territory of the region.¹³⁷ By referring to previous case law relating to the freedom to *receive* services and noting that the tax differential introduces an extra cost for undertakings established outside Sardinia, the Court had no difficulty in finding the measure at stake inconsistent with Article 56.

In contrast, in *Mobistar*¹³⁸ and *Viacom Outdoor*,¹³⁹ the Court found that municipal taxes (on transmission pylons, masts, and antennas for GSM, on one side, and on outdoor advertising on the other side) were fully compatible with Article 56 because the creation of additional costs similarly affected the provision of services *within* one Member State and the provision of services *between* Member States.¹⁴⁰ Although *Keck* goes unnoticed, its influence is quite unequivocal—just like the firm elements of some basic homogeneity when it comes to the interference of free movement law with national regulatory autonomy.¹⁴¹

¹³³ See also C-291/05, *Eind*, ECLI:EU:C:2007:771, para. 44.

¹³⁴ See C-127/08, *Metock and others*, ECLI:EU:C:2008:449, para. 59; also C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, para. 23.

¹³⁵ See, for instance, cases such as *Cowan* or *Bickel*. There is a series of cases in which the basic non-discrimination rule of Article 18 TFEU played a key role.

¹³⁶ C-17/00, *De Coster*, ECLI:EU:C:2001:651.

¹³⁷ C-169/08, *Presidente del Consiglio de Ministri v Regione Sardegna*.

¹³⁸ Joined Cases C-544/03 and 545/03, *Mobistar*, ECLI:EU:C:2005:518.

¹³⁹ C-134/03, *Viacom Outdoor*, ECLI:EU:C:2005:94.

¹⁴⁰ See also C-98/14, *Berlington Hungary and Others*, ECLI:EU:C:2015:386, para. 36; and V Hatzopoulos and T Do, 'The case law of the ECJ concerning the free provision of services: 2000–2005' (2006) 43 *CML Rev*, 923, at 960.

¹⁴¹ Cf. S Weatherhill, 'Several Internal Markets' (2017) 36 *Yearbook of European Law*, 125.

Generally, social advantages in the area of the free movement of workers have been given a broad meaning to extend almost any form of welfare benefit which is given to the host country's nationals. In the case of services, Article 56 was interpreted in a way that allows individuals to claim certain welfare entitlements and gain access to public services of other Member States such as healthcare or education.¹⁴²

III. Secondary law—the Services Directive

A. The rationale behind harmonization efforts

In the absence of tariffs charged at the border, services supply suffers from regulatory impediments that restrict their supply. Services are vulnerable to this type of impediment: they are intangible, have limited storability, and are above all heterogeneous with limited possibilities of mass production. In addition, considerations of quality and consumer protection, the 'holy grail' of every law and regulatory measures governing services, is closely intertwined with the characteristics, education, qualifications, or experience of individual service providers as well as the domestic preferences and traditions of each EU Member State.

These characteristics of services regulations increase transaction costs and can undermine any effort to achieve efficient outcomes when regulating this highly heterogeneous sector of the economy. Furthermore, numerous studies have identified the deadweight losses generated by existing barriers relating, for instance, to restrictive licensing conditions or to the lack of recognition of professional qualifications.¹⁴³ Additionally, self-regulated activities are routinely administered by the corresponding professional bodies which take decisions that can severely affect the supply of services in the 'shadow of the law'. Sometimes the rules that such bodies adopt can go against the spirit of state legislation or raise entry barriers aiming at the protection of incumbents whose income is maximized if access to a given activity is restricted.

Services drew the attention of EU legislators once the EU successfully tackled most of the protectionist measures at borders that affected the free movement of goods. It was not until the mid-1990s that non-tariff barriers and services took centre stage.¹⁴⁴ Given the existence of remaining barriers of this type which hamper the potential of the service sector to improve productivity and employment in the EU, the overarching objective of the European Commission at the

¹⁴² See Chalmers et al. (n 97), 760.

¹⁴³ See Centre for Strategy and Evaluation Services, 'Barriers to Trade in Business Services—Final Report', commissioned by the European Commission, January 2001.

¹⁴⁴ See also C Barnard, 'Brexit and the EU Internal Market', in F Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford: Oxford University Press, 2017), 204.

beginning of the new millennium was the achievement of a genuine internal market for services by the year 2010 (the so-called Lisbon Strategy). Ironically, this year coincided with the deepest sovereign debt crisis that the EU has ever been confronted with.

While the Lisbon Strategy failed, it would be reductive to say that no progress towards more integration in the area of services was achieved. The liberalization of various service sectors, such as finance or infrastructure services, did take place, albeit at varying speeds across Member States. Again, harmonization and mutual recognition efforts in the area of business services, and notably professional services, have met with overall limited success to date within the EU.¹⁴⁵

Furthermore, services are now central in the political and legislative agenda of the EU institutions, notably in the aftermath of the Monti Report in 2010 that recognized the important value-added role of further integration in services within the EU. In this regard, the implementation of the two Single Market Acts,¹⁴⁶ which call for achieving a single market notably in the areas of business and professional services, along with the full implementation of the Services Directive, shall significantly contribute to the pursuit of Europe's 2020 strategy objectives for smart, sustainable and inclusive growth in the medium run.¹⁴⁷

The core aim of the Services Directive has been to achieve more effective regulation and reap the economy-wide efficiency gains from more competitively supplied services within the Union. Earlier, the European Commission's Proposal for a Services Directive (hereinafter 'the Proposal')¹⁴⁸ recognized the importance of trust in the achievement and the smooth functioning of a genuine internal market for services. The lack of trust reveals the dominance of 'thinking national' mentality and is translated into protectionist interests that foreclose or impede foreign competition; negate the possibility of comparison; and thus dampen the incentive for domestic service suppliers to improve their services.¹⁴⁹ In turn, such lack of trust evidently affects consumer welfare within the EU.

More fundamentally, the Directive exemplifies the plurality of tools, objectives, and interests in the area of services that challenge any call for regulatory

¹⁴⁵ However, as we discuss below, the consolidation of various directives relating to professional qualifications through Directive 2005/36 had a beneficial impact on the EU market for professional services and paved the way for further integration in recent times.

¹⁴⁶ See European Commission Communication, 'Single Market Act', COM(2011) 206 final, 13 April 2011, 11, and European Commission Communication, 'Single Market Act II', COM(2012) 573 final, 13. Both Acts are so much focused on services that one could describe them as 'Single Market for Services Acts'. See V Hatzopoulos, 'The Court's Approach to Services (2006–2012): From Case Law to Case Load?' (2013) 50 *CML Rev.* 459, at 501.

¹⁴⁷ See European Commission Communication, 'Europe 2020—A strategy for smart, sustainable and inclusive growth', COM(2010) 2020 final, 3 March 2010, 20–1.

¹⁴⁸ European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market', COM(2004) 2, 13 January 2004.

¹⁴⁹ For the positive effects of mutual trust more generally, see the seminal work by Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995).

convergence and the conventional wisdom of the common triptych of market access, mutual recognition/equivalence, and harmonization. The latter fails to fully capture the much more complex landscape of services regulation, whereby managed market access, managed mutual recognition, managed harmonization, soft coordination mechanisms, and delegated governance to private parties co-exist and shape the European services market. In principle, all these tools and mechanisms in their managed form condone diversity and pluralism¹⁵⁰ and nurture the process of serving regulatory peace.¹⁵¹

In this new environment, diversity and pluralism are as managed as equivalence, harmonization, and convergence, depending on the service sector at stake and the dynamics of the tools and actors involved. If viewed through this lens, the Directive will increase the levels and tools for decentralized knowledge sharing and mutual learning among regulators thereby minimizing the scope for suspicion and conservatism, which have undermined any previous attempt to complete the single market for services, in the medium run.¹⁵²

B. A series of unfortunate events

The tale of the EU Services Directive reveals how even within highly integrated areas such as the EU, services remain hostage to regulations impeding their supply. The timing of the Services Directive was also somewhat unfortunate, as it was associated with fears expressed in several Member States of uncontrolled flows of (especially lower-skilled) worker-migrants from the new Eastern European Member States to the old EU15 Member States. Such fears also had a negative impact on the fate of the Constitutional Treaty for which so much ink was spilt.

Soon the Services Directive became the 'legislative hot potato of the early twenty-first century'.¹⁵³ Significant political resistance mounted quickly¹⁵⁴ and attempts to narrow down its scope started. It is for this reason that one of the major tools to achieve full market integration in the area of services, ie the country of origin principle, did not ultimately find its way into the final text of the Directive despite compelling economic studies praising the potential economic gains from the introduction of the highly contested principle to the Directive.¹⁵⁵ Political contestation and polarization on the occasion of the

¹⁵⁰ Lianos and Gerard (n 70), at 241ff.

¹⁵¹ K Nicolaïdis, 'Trusting the Poles? Mark 2: towards a regulatory peace theory in a world of mutual recognition', in Lianos and Odudu (n 6), at 290.

¹⁵² Cf. Davies (n 6), at 101–2.

¹⁵³ Cf. Barnard (n 11), at 323.

¹⁵⁴ The lack of early involvement of critical stakeholders may have been one of the reasons for such resistance: see J Loder, 'The Lisbon Strategy and the politicization of EU policy-making: The case of the Services Directive' (2011) 18 *Journal of European Public Policy*, 566.

¹⁵⁵ See Copenhagen Economics, 'The Economic Importance of the Country of Origin Principle in the Proposed Services Directive' (Copenhagen Economics document, 2005), 9. In other studies, the negative effects of the non-incorporation of the country of origin principle appear to be even greater.

Services Directive was also accentuated by the fact that the two opposing camps (those that saw the country of origin as the culmination of 50 years of European integration in services, on one side, and those who saw it as the culmination of a neo-liberal attack advocating social dumping and unfair regulatory competition against social preferences and longstanding values notably in the West, on the other) failed to accurately present the proposed Directive as the next step of a previously consistent application of home-country control in services that has been conditioned, partial, and monitored in the form of managed mutual recognition.¹⁵⁶

Notwithstanding the exclusion of the country of origin principle, several recitals of the Services Directive reveal its ambition to complete the internal market for services through a mix of various measures designed to ensure a high degree of legal integration by means of, *inter alia*, harmonization regarding certain aspects of services-specific regulation.¹⁵⁷ The Services Directive takes a horizontal approach based on the understanding that, while ubiquitous and diverse, several service sectors call for regulatory intervention to pursue a set of legitimate public policy objectives which are common across sectors, such as consumer protection, the integrity of the profession, or ensuring the quality of the service.

The Directive has a broad scope in that it aims to outlaw any requirement which may negatively affect access to or the exercise of a service activity.¹⁵⁸ The objective of the Directive is to enable both service suppliers and consumers *qua* service recipients to benefit from the fundamental freedoms guaranteed in Articles 49 and 56 TFEU, that is, the freedom of establishment and the freedom to provide services.¹⁵⁹ In this respect, the Directive consolidates previous CJEU case law on related issues.

C. The scope of the Directive

Admittedly, the substantive scope of the Directive has been significantly curtailed in that numerous sectors are excluded from its scope such as gambling,

See R de Bruyn, H Kox, and A Lejour, 'The trade-induced effects of the Services Directive and the country of origin principle' (CPB document no. 108, February 2006), 42.

¹⁵⁶ See K Nicolaïdis and S Schmidt, 'Mutual recognition "on trial": the long road to services liberalization' (2007) 14(5) *Journal of European Public Policy*, 717, at 718.

¹⁵⁷ Cf Joined Cases C-360/15 and C-31/16, *X and Visser*, ECLI:EU:C:2018:44, para. 106. See also Hatzopoulos (n 22), 257ff.

¹⁵⁸ M Klamert, 'Way to go?—More on the Services Directive and the Fundamental Freedoms' (2009) 64 *Zeitschrift für öffentliches Recht*, 335.

¹⁵⁹ The Directive provides that suppliers already established in another Member State cannot be prevented from providing their services in a given Member State on the basis that they do not have an establishment in that Member State (Art. 16:2(a)). For the sake of comparison, Art. 56 on the freedom to provide services is the equivalent of Mode 1, Mode 2, and Mode 4 under the GATS, since it covers the supply of services on a *cross-border* basis, the movement of the *consumer* to the location of the supplier to *receive* the service and the *temporary* movement of the supplier in order for him to be able to supply the service in question in the host country.

notary, healthcare, audiovisual, telecommunication services, or financial services. While some of these sectors are regulated through sector-specific instruments at the EU level, the exclusion of additional sectors which are not subject to EU regulation yet has been the result of political negotiations and pressure. This has led commentators to lament the unnecessary fragmentation.¹⁶⁰ However, this does not mean that EU primary law ceases to apply in these sectors. On the contrary, the EU *acquis* relating to the freedom of establishment and the freedom to provide services remains relevant and applies in the relevant cases.¹⁶¹

Still, the Directive applies to business services and covers, *inter alia*, most of the regulated professions as well as services of general economic interest (SGEIs) within the EU, with the exclusion of non-economic services of general interest.¹⁶² Importantly, as noted earlier, *ratione materiae*, the Directive adopts a sweeping definition of the term ‘requirements’ to cover obligations, prohibitions, conditions, or limits imposed by law, administrative practice, judicial decisions, or rules of professional bodies of a self-regulatory nature.¹⁶³ Thus, the Directive confirms the horizontal direct effect of EU law in this field, that is, that private action by professional associations when they self-regulate their activities is subject to the obligations laid down in the Directive.

Other than codifying existing case law, the Directive validates the difficulty that Member States will have to justify any discriminatory measures and adduce evidence that proves that they comply with the principles of necessity and proportionality in the case of non-discriminatory measures. In addition, the Directive confirms the view that in the case of services the home state is the primary regulator and thus, contrary to what happens under the freedom of establishment, the right to intervene in the case of the freedom to provide services is narrower.

Thus, despite the absence of a full-fledged country of origin principle, Article 16 of the Services Directive, the most controversial provision of the Directive,¹⁶⁴ encompasses, for all practical purposes, the spirit of that principle by greatly curtailing the possibility for the host Member State to impose their rules on foreign service suppliers.¹⁶⁵ Article 16 requires that host Member States ensure free access and free exercise of a service activity within their territory and restrict

¹⁶⁰ See Barnard (n 11), at 344.

¹⁶¹ See, for instance, with respect to notaries: C-392/15, *Commission v Hungary*, ECLI:EU:C:2017:73.

¹⁶² The Court confirmed that the Directive does not deal with the liberalization of SGEIs, reserved to public or private entities, nor with the privatization of public entities providing services. Further, it does not deal with the abolition of monopolies providing services nor with State aid, which is covered by EU competition rules. In essence, the Court grandfathers those SGEIs or monopolies which existed at the date into force of the Directive. See C-171/17, *Commission v Hungary*, ECLI:EU:C:2018:881, paras 41–43.

¹⁶³ Art. 4:7 of the Directive. See also European Commission (DG Internal Market and Services), ‘Handbook on Implementation of the Services Directive’, 2007, 16.

¹⁶⁴ Cf. Barnard (n 11), at 360.

¹⁶⁵ See also Davies (n 6), at 111.

such access and exercise only through requirements that respect the principles of non-discrimination, necessity, and proportionality.

Furthermore, Article 16 includes, by way of illustration, an indicative ‘black list’ of per se prohibitions which codify existing case law in the field. A question yet to be answered is whether, by the introduction of Article 16:3, host Member States can no longer justify restrictions on the freedom to provide services based on overriding requirements. A formalistic reading would suggest that, by virtue of this paragraph, Member States can now only use reasons of public policy, public security, and public health (the typical ‘express derogations’) or the protection of the environment to justify restrictions to the freedom to supply and receive services.

Barnard suggested that there are arguments that would call for both a formalistic reading and a more expansive reading, although she seems to prefer the formalistic and thus narrow one which would also be in line with the long-established idea that, under establishment, the host Member State has more room for intervention in the market (and, thus, the need to allow overriding requirements) than in the case of services.¹⁶⁶ Hatzopoulos, on the other hand, appears to take the opposite view, suggesting that the overriding requirements will have a role to play in the interpretation of the scope of Article 16.¹⁶⁷

The jury is not out yet, as the Court left the question open in *Commission v Hungary*.¹⁶⁸ However, I would argue that the harmonizing secondary instrument should prevail in this case (as the Court noted when interpreting other provisions of the Services Directive)¹⁶⁹ and thus no other justification can be invoked when Article 16 is applicable,¹⁷⁰ with the exception of safety which can be added to the list by virtue of Article 18:1 of the Directive. This would mean that consumer safety would in all likelihood allow deviation by the host Member State from the obligation of Article 16, but the same cannot be said for any measure aiming at the protection of consumers’ economic interests, thereby limiting Member States’ regulatory competence when designing their domestic consumer laws.¹⁷¹

¹⁶⁶ See Barnard (n 11), at 364ff. Lianos and Gerard agree but also note that this should not necessarily be taken to mean that the type of managed regulatory mutual recognition that the Directive introduces jeopardizes regulatory diversity. This is essentially because of its narrow scope of application, as there are manifold sectors and types of services that are exempted from the scope, in part or in full, of the Directive: Lianos and Gerard (n 70), 245.

¹⁶⁷ Cf. Hatzopoulos (n 146), at 462.

¹⁶⁸ See C-179/14, *Commission v Hungary*, para. 116.

¹⁶⁹ See Section III.F.

¹⁷⁰ Similarly, AG Bor’s conclusions in C-179/14, *Commission v Hungary*, ECLI:EU:C:2015:619, para. 156. See also J Van den Gronden and H De Waele, ‘All’s well that bends well? The constitutional dimension to the Services Directive’ (2010) 6(3) *European Constitutional Law Review*, 397, at 407.

¹⁷¹ See Weatherhill (n 90), 7–8. At the same time, the Court has traditionally been quite strict in upholding the legality of restrictive measures allegedly taken to protect consumers: Davies (n 6), at 112.

Moreover, a textual interpretation of Article 16:1(b) (particularly when compared to Article 15:3(b)), 16:3 and recital 78 of the Directive leads to the same conclusion. In addition, a careful look at the case law relating to the Services Directive corroborates this view. It appears that the Court shares the view that Article 16 (just like Article 14, which was discussed in *Rina Services* as explained below) aims at full harmonization, which would mean that recourse to primary law (and the ensuing judge-made justifications relating to overriding requirements) is no longer possible.¹⁷²

D. Issues relating to the implementation and enforcement of the Directive

The Directive has led to a regulatory deluge in the wake of its adoption but also after the end of the transposition period.¹⁷³ It incorporates obligations for Member States to conduct a screening and self-evaluate their regulations relating to services against EU law,¹⁷⁴ whereas administrative simplification is encouraged or, under certain circumstances, required. According to the Directive, all EU Member States have to assess the impact of their legislation at all levels and reconsider domestic rules and measures that are out of proportion to their stated objectives and have negative effects on the trade in services.

Furthermore, the Directive calls for the creation of single contact points for service providers, the establishment or maintenance of electronic procedures, the promotion of the quality of the services supplied, and the establishment of effective administrative cooperation among the Member States so that infra-structural heterogeneity is sufficiently tackled. The Directive also includes a convergence programme, which *inter alia* promotes the idea of creating pan-European codes of conduct in professional services.¹⁷⁵

The Services Directive is widely acknowledged as a major step towards liberalization and market integration but also the top-down creation of a culture of administrative cooperation. In the medium-term, this should be expected to lead to better regulation and the abolition of remaining barriers,¹⁷⁶ the

¹⁷² See AG Bot's Opinion in Case C-179/14, *Commission v Hungary*, paras 69–73.

¹⁷³ Cf. Hatzopoulos (n 146), at 463. See also M Klamert, 'Of Empty Glasses and Double Burdens: Approaches to Regulating the Services Market à propos the Implementation of the Services Directive' (2010) 37(2) *Legal Issues of Economic Integration*, 111, at 114.

¹⁷⁴ For the key findings of the mutual evaluation process that took place in 2010, see European Commission Communication, 'Towards a better functioning Single Market for services—building on the results of the mutual evaluation process of the Services Directive', COM(2011) 20 final, 27 January 2011.

¹⁷⁵ See, in more detail, P Delimatsis, 'The EU Services Directive and the Mandate for the Creation of Professional Codes of Conduct' in Lianos and Odudu (n 6).

¹⁷⁶ Once again, such liberalization happens at a varying pace. For instance, a recent EU Commission's study showed that some of the most sweeping measures to reform domestic services markets were taken in EU Member States which have been subject to economic adjustment programmes since the financial crisis, that is, Greece, Portugal, and Spain. For Greece in particular, the reforms in the period 2012–14 were estimated to increase Greek GDP by 1.1% in a period of 5–10 years. See European Commission,

modernization of bureaucratic practices and the streamlining of administrative procedures that should also prove beneficial to service suppliers originating in EU Member States but also third-country service suppliers. Significant economic benefits across services sectors but also for the EU's GDP generally are being reaped as the Directive is implemented voluntarily or through infringement proceedings initiated by the European Commission.¹⁷⁷

The Juncker Commission has further prioritized services liberalization by launching and implementing its Single Market Strategy in 2015.¹⁷⁸ The new administration emphasized the importance of introducing a 'services passport for growth-generating sectors such as construction or business'. In January 2017, the Commission presented three legislative proposals ('the Services package'): one relating to a European services e-card (formerly known as a 'services passport'), which would be a voluntary electronic document issued by the home Member State of the service suppliers (*in casu*, construction and business service providers) to show compliance with applicable national rules when expanding their operations to other Member States.¹⁷⁹ A second proposal concerns a comprehensive and transparent proportionality test to be undertaken prior to adopting or amending national rules on professional services.¹⁸⁰ The third proposal is on improved notification of draft national laws on services allowing for the early filing of concerns regarding incompatibilities between national and EU law.¹⁸¹ Finally, the Commission published a guidance document on reforming

'Assessment of the economic impact of the Services Directive: Update of the 2012 study', at 3, available at: <<https://ec.europa.eu/docsroom/documents/13327/attachments/1/translations/en/trenditions/native>> accessed 20 March 2018.

¹⁷⁷ Ibid. See also J Monteagudo, A Rutkowski, and D Lorenzani, 'The economic impact of the Services Directive: A first assessment following implementation', *Economic Papers* 456, June 2012.

¹⁷⁸ See European Commission Communication, 'Upgrading the Single Market: More opportunities for people and business', COM(2015)550 final, 28 October 2015. The European Council called for the full implementation of all aspect of the Single Market Strategy by 2018: European Council Conclusions, 28 June 2016, EUCO 26/16.

¹⁷⁹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council introducing a European services e-card and related administrative facilities', COM(2016)824 final, 10 January 2017; and 'Proposal for Directive of the European Parliament and of the Council on the legal and operational framework of the European services e-card introduced by [the proposed services e-card] Regulation', COM(2016)/ 823 final, 10 January 2017. The Internal Market Information System (IMI) would be used to ensure the smooth functioning of the European services e-card, according to the Commission's proposal.

¹⁸⁰ European Commission, 'Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions', COM(2016) 822 final, 10 January 2017.

¹⁸¹ The proposed Directive would spell out the notification requirements under the Services Directive (see, for instance, Article 15:7 SD): European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorization schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (IMI)', COM(2016)821 final, 10 January 2017.

professional services at the domestic level, in particular engineering, legal, accounting, patent agent, real estate agent, and tourist guide services.¹⁸²

Along with these instruments, the implementation of the Digital Single Market Strategy will also shape the provision of services within the EU regardless of place of residence and thus deserves particular mention. Technological advances enable and empower the increasing servicification of the European (and global) economy but can also hamper its growth and potential if used in a manner that allows companies to partition national markets and raise artificial barriers to seamless access to services. Techniques that allow companies to manage free commercial flows relate in particular to geo-blocking and geo-filtering.¹⁸³ In this increasingly transformed landscape, whereby private restrictions to trade call for vigilance on the side of regulators and competition authorities, a potential review of the fundamentals of the EU internal market idea may be needed—one that takes into account new technologies, economic transformations, and global dynamics and in which a combination of competition law tools and traditional regulatory instruments may be warranted.¹⁸⁴

The flagship initiative confirms a shift of the internal market strategy towards a more consumer-oriented focus and it aims to ensure seamless access and exercise of online activities under conditions of fair competition regardless of nationality and place of residence. In this respect, it is connected to the implementation of Article 20 of the Services Directive relating to the obligation of Member States to combat discriminatory requirements based on the place of residence and to the corresponding rights of service recipients regarding non-discriminatory treatment relating to access to a given service. With respect to geo-blocking in particular, the adoption of the new Geo-blocking Regulation¹⁸⁵ became necessary, in part because EU Member States failed to fully enforce this provision or to flesh out objective criteria under which such practices may be justified.¹⁸⁶ The Regulation fills this gap by also offering clarifications on situations where different treatment cannot be justified under Article 20:2 of the

¹⁸² See European Commission Communication, 'Reform recommendations for regulation in professional services', COM(2016) 820 final, 10 January 2017.

¹⁸³ Such practices are used for commercial reasons by online sellers and result in the denial of access to websites based in other Member States or in different results depending on the place of residence (eg different prices for the same car rental in the destination on the basis of the geographic location of the buyer). See European Commission Communication, 'A Digital Single Market Strategy for Europe', COM(2015)192 final, under 2.3.

¹⁸⁴ See also I Lianos, 'Updating the EU Internal Market Concept', UCL Centre for Law, Economics and Society Research Paper Series 1/2018.

¹⁸⁵ See Regulation 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market [2018] OJ L 60 I/1, Recital 4 and Article 1. Importantly, like the Services Directive, the Regulation does not apply to audiovisual services but it does cover non-audiovisual electronically supplied services which relate to the provision of access to and use of copyright-protected works.

¹⁸⁶ See European Commission Guidance on the application of Article 20:2 of the Services Directive, SWD(2012) 146 final, 8 June 2012.

Services Directive. In this respect, the Regulation is *lex specialis* and thus prevails over the Directive in case of conflict.

The implementation of the so-called ‘Services package’ is currently in full swing. Other than its substantive scope and breadth, it also shows the dialectical relationship between the EU Services Directive and the EU legal framework relating to the recognition of professional qualifications with respect to the national regulation of professions. Naturally some requirements continue to fall under both the professional qualifications directive and the Services Directive (eg requirements relating to legal form or shareholding). If so, the proposed Directive on proportionality would be decisive for the notification to be made by national authorities according to the Services Directive (which, in turn, would be determined by the new Directive on notification procedures included in the Services package). It is to the recognition of professional qualifications for service providers that we now turn.

E. Recognition of professional qualifications of service providers

The EU gradually replaced its strategy of adopting harmonization legislation enshrined in vertical directives during the 1970s and mid-1980s with horizontal directives, applying *across* service sectors.¹⁸⁷ Such horizontal directives came in the aftermath of important decisions delivered by the Court relating to the principle of mutual recognition.¹⁸⁸ However, the general system of directives fell short of ensuring recognition. Rather, these directives obliged Member States to take into account qualifications and, if needed, impose additional requirements to achieve equivalence with nationals holding national titles.

The Professional Qualifications Directive (PQD), replacing all previous ones, introduced a more flexible and automatic procedure.¹⁸⁹ As a result of the Directive, reforms in all EU Member States regarding professional services were discussed or implemented with a view to fostering greater competition.¹⁹⁰

The Directive has replaced three general and twelve sectoral directives on the recognition of professional qualifications. It applies to regulated professions¹⁹¹ and covers both employed and self-employed activities within the EU. By recognizing the professional qualifications of a given individual, the host

¹⁸⁷ Directives 89/48 [1989] OJ L 19/16 and 92/51 [1992] OJ L 209/25.

¹⁸⁸ Most notably, Case 120/78, *Rewe-Zentral* (Cassis de Dijon), ECLI:EU:C:1979:42; and C-340/89, *Vlassopoulou*, ECLI:EU:C:1991:193.

¹⁸⁹ Directive 2005/36/EC on the recognition of professional qualifications [2005] OJ L 255/22.

¹⁹⁰ Several of these proposed reforms have been discussed in the European Commission, ‘Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services’, Commission Staff Working Document, COM(2005)405 final, 5 September 2005.

¹⁹¹ According to the Directive, ‘regulated profession’ is a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications’. The CJEU has held that the definition of ‘regulated profession’ is a matter of EU law: C-298/14, *Brouillard*, ECLI:EU:C:2015:652, para. 36.

Member State allows it to gain access in that Member State to the profession for which she is qualified in the home Member State and to pursue it under the same conditions as host country nationals. The profession can be considered as being the same if the activities are ‘comparable’.¹⁹² The Directive also suggested that a European professional card be developed by professional associations.¹⁹³ However, this idea was not taken up by the associations with sufficient zeal and this eventually led to an amendment of the regulatory framework in line with the Single Market Act observations in 2011.

One of the novelties of the Directive vis-à-vis the previous ones is the partial liberalization of the provision of services.¹⁹⁴ When the freedom to provide services is exercised, the Directive provides that access to the market of the host Member State cannot be made conditional on the recognition of qualifications by that Member State if the service supplier is legally established in a given Member State and pursues there the same profession. If the profession is not regulated in the home Member State, then the service supplier can legitimately be requested to provide evidence of two years of professional experience gained over the previous ten-year period. The Services Directive leaves no doubt as to the full application of the chapter of the PQD relating to the freedom to provide services (Title II). Thus, the freedom to provide services within the meaning of Article 16 of the Services Directive will apply, for regulated professions, only to those issues which are not associated with professional qualifications such as commercial communications, multidisciplinary practices, tariffs, or fees and so on.

The PQD creates a presumption that the qualifications of an applicant entitled to pursue a regulated profession in one Member State are sufficient for the pursuit of that profession in another Member States.¹⁹⁵ Nevertheless, the service supplier can be subject to professional rules of a professional, statutory, or administrative nature which are directly linked to professional qualifications such as the definition of the profession, the use of titles and codes of conduct aimed at consumer protection and safety which are applicable in the host Member States to professionals supplying the same services.¹⁹⁶ In *Konstantinides*, the CJEU clarified that professional rules for calculating fees

¹⁹² See Art. 4 of the Directive.

¹⁹³ See recital 32 of the Directive 2005/36.

¹⁹⁴ For more practical information, see European Commission, ‘User Guide—Directive 2005/36/EC’, available at: <<https://ec.europa.eu/docsroom/documents/15032/attachments/1/translations/en/renditions/native>> accessed 20 November 2018.

¹⁹⁵ Cf. C-274/05, *Commission v Greece*, ECLI:EU:C:2008:585, para. 30.

¹⁹⁶ Cf. Art. 4:1 of the Directive 77/249/EEC [1977] OJ L 78/17. See also Arts 6 and 7 of Directive 98/5 of the European Parliament and the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained [1998] OJ L 77/36. Directive 2005/36 provides that the Lawyers’ Cross-Border Services Directive remains applicable, although the PQD regulates the recognition of professional qualifications for lawyers for the purpose of immediate establishment under the professional title of the host Member State. See Recital 42 of the Directive.

or rules prohibiting unprofessional advertising by doctors cannot be regarded as professional rules directly and specifically linked to professional qualifications relating to access to the regulated profession of the doctor.¹⁹⁷

In addition, the previous derogation that the Services Directive incorporates with respect to the applicability of the PQD functions as a conflict rule in that it gives priority to the latter regarding certain obligations that the host Member State can impose on service suppliers such as the obligation of a prior declaration on an annual basis. The host Member State may require that the first declaration be accompanied by certain documents such as proof of the nationality of the service supplier; an attestation that she legally exercises professional activities in the home Member State; evidence of professional qualifications; evidence of no criminal convictions if employed in the security sector.¹⁹⁸ The service supplier may also be required to submit certain information to the service recipient related to its home-country professional qualifications; liability cover; membership of professional associations; or its VAT identification number.¹⁹⁹

However, in *Commission v Italy*, the CJEU found that Italy breached its obligations under the fundamental freedom to provide services (and the freedom of establishment) by requiring that (i) the application for diploma recognition be accompanied by the original diploma and a certified copy; and (b) a certificate of nationality, and (c) all the documents be translated in Italian. According to the CJEU, such requirements create additional obstacles for all applicants seeking recognition of their diplomas and delays. In addition, there are additional costs for the certification of copies.²⁰⁰

Whereas prior controls and authorizations are in principle prohibited under EU law and settled CJEU case law,²⁰¹ in the case of regulated professions that may have a negative impact on public health or safety (and which do not come under the automatic recognition regime that we discuss below), the authorities of the home Member States are allowed to perform an *a priori* evaluation of the professional qualifications of the service supplier to avoid serious damage to the health or safety of the service recipient due to a lack of professional qualification of that provider. Such an evaluation can take place only prior to the *first* provision of services and has to be proportionate to the objective pursued. This

¹⁹⁷ See C-475/11, *Konstantinides*, para. 40.

¹⁹⁸ *Ibid.*, Art. 7. See, in this respect, C-458/08, *Commission v Portugal*, para. 92.

¹⁹⁹ A Code of Conduct was adopted to assist competent authorities in the implementation of the Directive. See 'Code of Conduct approved by the Group of Coordinators for the Directive 2005/36/EC on the recognition of professional qualifications—National Administrative Practices falling under Directive 2005/36/EC', 2010, available at: <<https://ec.europa.eu/docsroom/documents/14981/attachments/1/translations/en/renditions/native>> accessed 20 November 2018. The Code is not legally binding.

²⁰⁰ C-298/99, *Commission v Italy*, ECLI:EU:C:2002:194. The case was concerned about free movement of architects under the sectoral Directive 85/384 that was in force at the time.

²⁰¹ Cf C-189/03, *Commission v Netherlands* ECLI:EU:C:2002:194, paras 17–18.

means that service suppliers providing their services periodically for several years cannot be subject to such a requirement more than once.

If there are substantial differences between the professional qualifications of the service supplier and the training warranted in the host Member State which may be harmful to public health or safety, the host Member State shall offer to the supplier the opportunity to demonstrate that it does actually have the necessary competences. For this purpose, the Member States are encouraged to use an aptitude test.²⁰² Under such exceptional circumstances, Article 7:4 of the PQD recalls that strict time limits for a final decision (one month) should be respected. The same applies to the principle of proportionality. Absent any decision by the competent authority of the home Member State within the given timeline, the service supplier is allowed to deliver its services. In this case, the supplier is required to use its home-country professional title.²⁰³

More generally, the PQD provides that the service supplier wishing to deliver services on an occasional and temporary basis can only use the professional title of the home Member State. Only in cases of automatic recognition can the service supplier use the professional title of the *host* Member State. Few professions, which have been harmonized initially through sectoral directives, benefit from automatic recognition. These include: doctors, nurses in charge of general care, dentists, veterinary surgeons, midwives, pharmacists, and architects. For such recognition to occur, the Directive sets minimum training requirements and notably the minimum duration of studies for every profession coming under the above categories. Any service supplier meeting these requirements can automatically practice in any Member State.²⁰⁴

Finally, if a profession is regulated by a professional association in the host Member State, the service supplier should be able to become a member of that organization. However, according to Article 6, in the case of a service provider supplying services on a temporary basis within the meaning of Article 56 TFEU, the host Member State cannot require that the provider be registered or become member of the corresponding host-state professional association before

²⁰² In *Commission v Italy*, the Court found that, while an aptitude test must be determined on a case-by-case basis following a point-by-point comparison between qualifications and experience acquired and warranted, this does not relieve the host Member State of the obligation to specify and publish the subjects regarded as indispensable for practising the profession concerned and the rules regulating the conduct of the aptitude test for the sake of legal certainty. Potential applicants can thus be acquainted with the nature and context of the test they must take. See C-145/99, *Commission v Italy*, ECLI:EU:C:2002:142, paras 52–53. See also Art. 3(h) of the Directive 2005/36, codifying this line of case law.

²⁰³ In *Hartlauer*, the Court emphasized that a prior administrative authorization scheme can only be justified if it is based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion: C-169/07, *Hartlauer*, ECLI:EU:C:2009:141, para. 64.

²⁰⁴ See C-365/13, *Ordre des architectes*, ECLI:EU:C:2014:280.

authorizing it to supply services.²⁰⁵ However, Member States are allowed to provide for automatic temporary registration with *pro forma* membership of such a professional association, provided that such registration does not have negative effects on the provision of services nor creates additional costs for the service provider.

For instance, in *Schnitzer*, the Court found that the requirement for a Portuguese company supplying plastering-related services in Germany to register on the skilled trades' register was in breach of the freedom to provide services. If such registration is deemed necessary, it must in no way delay or complicate the exercise of the right of service suppliers of other Member States to provide services in another Member State nor entail any additional costs for the service provider.²⁰⁶

Recent case law suggests that the Court explicitly underlined the limits of derogations once secondary law was in place. For instance, in *Commission v Portugal*, Portugal attempted to justify certain restrictions in the construction sector based on consumer protection considerations, safety, and protection of the environment. The Court noted that these objectives were taken into account in the introductory text of the PQD and thus were reflected in the provisions of the Directive.²⁰⁷ Therefore, when harmonization measures are adopted, the possibility for successfully derogating is restrained.

In the above case, what was more specifically at issue was whether Portuguese law violated EU law by imposing in the building sector the same requirements on both suppliers wishing to supply their services temporarily and those wishing to establish themselves permanently. The Court seized the opportunity to confirm the 'bite' of Article 56 by underlining the importance of mechanisms in place in the host Member State that duly take into account equivalent obligations and verifications already carried out in the home Member State.²⁰⁸ Furthermore, the Court found that the complexity of cooperation with the administrative authorities of other Member States, including the Member State of establishment, cannot be accepted as a justification for making the issue of authorization for a service supplier already established in another Member State subject to requirements which duplicate the equivalent evidence and safeguards required in the Member State of establishment.²⁰⁹

In cases falling outside the scope of the horizontal Directive 2005/36, the principles outlined by the CJEU in *Gebhard*, *Heylens*, *Vlassopoulou*, *Aranitis*, and *Bobadilla* still apply. This means that EU primary law continues to give

²⁰⁵ Note that Art. 16:2(b) of the Services Directive also provides that Member States cannot restrict the freedom to provide services by imposing an obligation on the provider to obtain an authorization from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in the Directive or other instrument of EU law.

²⁰⁶ See C-215/01, *Schnitzer*, paras 36–38. See also C-298/99, *Commission v Italy*, paras 58–64.

²⁰⁷ See C-458/08, *Commission v Portugal*, paras 89–90.

²⁰⁸ *Ibid* para. 100.

²⁰⁹ *Ibid* para. 105.

guidance as to the proper *modus operandi*.²¹⁰ Indeed, as underlined in *Dreessen*, the object of the horizontal directives on the recognition of qualifications should not be 'to make recognition of diplomas, certificates and other evidence of formal qualifications more difficult in situations falling outside their scope, nor may they have such an effect'.²¹¹ More specifically, settled case law suggests that national competent authorities duly take into consideration the knowledge, diplomas, certificates, qualifications, and experience already recognized or acquired in another Member State (notably when imposing supplementary requirements), and give adequate reasons in case of non-recognition and allow for access to an effective judicial remedy.²¹²

More recently, the Court clarified that all practical experience in the pursuit of related activities, even if it is acquired in the host Member State, can increase the applicant's knowledge and therefore should be taken into account. The CJEU found that it is for the competent national authorities to decide what value to attach to such experience 'in the light of the specific functions carried out, knowledge acquired and applied in pursuit of those functions, responsibilities assumed and the level of independence accorded to the person concerned'.²¹³ The Court went on to emphasize that the obligation to take into account all relevant experience exists independently of the adoption of directives on the mutual recognition of diplomas.²¹⁴ Such analysis should also be in place to examine whether, objectively, partial recognition is possible.²¹⁵ In addition, where an unregulated service provider offers a service from an EU Member State to another where similar services are regulated, the latter is obliged to put in place legislation that allows the pertinent qualifications obtained by that service provider in another Member State to be accorded its proper value and to be duly taken into account. Having said this, the home Member State can require a simple prior declaration of the intention to offer services in the market where the activity is regulated. More generally, the principle of legal certainty would require that Member States adopt clear, precise, and predictable rules to that effect.²¹⁶

A similar type of comparison may also be warranted in the case of EU nationals who have acquired formal qualifications and practical experience in a third country.²¹⁷ In practice, the Court will undertake a very broad interpretation of the fundamental freedoms enshrined in Articles 49 and 56 TFEU to outlaw any requirement which is liable to hinder or make less attractive the

²¹⁰ See, for instance, C-531/06, *Commission v. Italy*, paras 35, 37.

²¹¹ C-31/00, *Dreessen*, ECLI:EU:C:2002:35, para. 26.

²¹² See also C-345/08, *Pešla*, ECLI:EU:C:2009:771.

²¹³ Joined cases C-422, 425&426/09, *Vandorou and others*, ECLI:EU:C:2010:54, paras 68–70.

²¹⁴ *Ibid* para. 71; also C-313/01, *Morgenbesser*, ECLI:EU:C:2003:612, para. 58.

²¹⁵ See C-575/11, *Nasiopoulos*, ECLI:EU:C:2013:430, paras 32–35.

²¹⁶ See C-342/14, *X-Steuerberatungsgesellschaft*, ECLI:EU:C:2015:827, paras 54–59.

²¹⁷ See, *inter alia*, C-238/98, *Hocsman*, ECLI:EU:C:2000:440, para. 35.

exercise of the fundamental freedoms unless it is justified based on legitimate policy grounds and is proportionate to the objective pursued.²¹⁸

In 2010, the European Commission launched consultations with a view to revising and simplifying the framework relating to the recognition of professional qualifications. An evaluation report on the PQD followed a year later, identifying existing obstacles such as those relating to the declaration system and automatic recognition, but also the limited administrative cooperation and the lack of availability to use electronic means to file recognition requests.²¹⁹ This led to a recent amendment of the PQD,²²⁰ which clarified the conditions for the launch and functioning of a European Professional Card (EPC) supported by the Internal Market Information (IMI) system²²¹ and introduced an alert mechanism that informs other Member States of professionals in the fields of health and safety whose activities are restricted or prohibited, even temporarily by national authorities or courts.

The new PQD of 2013 gives flesh to the concept of EPC, an electronic certificate that proves that the conditions to provide services in a host Member State on a temporary and occasional basis or that professional qualifications for establishment in a host Member State are met. As implementing measures were necessary for the EPC system, and also for the alert mechanism mentioned above, to function, the Commission adopted Implementing Regulation 2015/983,²²² which identifies the professions that can make use of the EPC but also clarifies technical matters such as format, documentation requirements, payment modalities, handling of applications, or remedies.

The EPC is now available for five professions (general care nurses, physiotherapists, pharmacists, real estate agents, and mountain guides), thereby creating the first EU-wide fully online procedure for the recognition of qualifications in these professions.²²³ It bears mention that the EPC system is complementary and in no way affects the system of automatic or other recognition foreseen in the amended PQD other than considerably diminishing the transaction costs for certain professions. Discussions for extending the EPC to additional professions are ongoing.

²¹⁸ See C-108/96, *Mac Quen*, ECLI:EU:C:2001:67, paras 24–26; and C-370/05, *Festersen*, ECLI:EU:C:2007:59, para. 26.

²¹⁹ See European Commission, ‘Evaluation of the Professional Qualifications Directive’, 5 July 2011.

²²⁰ See Directive 2013/55/EU [2013] OJ L 354/132.

²²¹ The IMI was established by EU Regulation 1024/2012 [2012] OJ L 316/1.

²²² EU Implementing Regulation 2015/983 [2015] OJ L 159/27.

²²³ For a first assessment of the system, see European Commission Staff Working Document, ‘Assessment of stakeholders’ experience with the European Professional Card and the Alert Mechanism procedures’, SWD(2018) 90 final, 9 April 2018.

F. Ten years of case law under the Services Directive

In the early years after the transposition of the Services Directive, a period of judicial unease can be observed. Divergences between the Opinions of the Advocates-General and the Court (typically, in a Grand Chamber format to underline the importance and novelty of the questions raised) were the rule rather than the exception. During this period, a judicial interpretation faithful to the high level of ambition expressed in the introductory recitals of the Services Directive appears to surface and solidify relatively quickly.

The connecting factor and underlying rationale in the Court's case law appears to be quite straightforward: a broad interpretation of concepts enshrined in the Services Directive would be in line with its objective to remove restrictions to establishment and supply of services thereby contributing to the completion of a free and competitive internal market.²²⁴ Such consolidation occurs whereas, at the same time, the implementation of the Directive and ensuing actions are in full swing, ranging from benchmarking and mutual evaluation to peer reviews and targeted interventions by the European Commission—more recently, via the services package discussed earlier. In what follows, we review trends, jurisprudential patterns, and an early consolidation of the meaning and scope of certain concepts and provisions of the Services Directive.

(i) Testing restrictions on advertising

The Court remains quite adamant as to the restrictive nature of absolute prohibitions of any advertising in professional services even when it examines their compatibility with Article 56 TFEU or other secondary law instruments such as the E-commerce Directive.²²⁵ The first case in which the CJEU was called upon to interpret the Services Directive related to a prohibition of canvassing by qualified accountants enshrined in the French Code of professional conduct and the ethics of qualified accountants.²²⁶ More specifically, under Article 12 of the Code, unsolicited contact by qualified accountants with third parties with a view to offering them their services was prohibited. The National Association of Qualified Accountants requested the annulment of the French Decree encompassing such a restriction. The Association based its request before the French *Conseil d'Etat* on the Services Directive and, in particular, its provisions relating to the removal of prohibitions relating to advertising.

The issue is not as easy as one may think at first blush—and this, together with the importance of getting right the first question arising in the context of the Services Directive, led the Court to convene in the Grand Chamber formation. Indeed, whereas Article 24 of the Directive appears to call for the removal of all *total* prohibitions on advertising by regulated professions, it remains silent

²²⁴ See, among many, C-179/14, *Commission v Hungary*, para. 63.

²²⁵ Recall our discussion earlier of C-339/15, *Vandenberght*.

²²⁶ See C-119/09, *Société fiduciaire nationale d'expertise comptable*, ECLI:EU:C:2011:208.

in the case of prohibitions of a given *form* of advertising (such as, in this case, canvassing).

First, the CJEU found that, being a form of direct marketing, canvassing comes under the Directive's definition of commercial communication. The more crucial question, however, was whether the ban on canvassing could be regarded as a total prohibition of commercial communication pursuant to Article 24. After noting that the French law prohibits any canvassing, whatever its form, content, or means employed, the CJEU noted that the Directive should be interpreted as also covering those cases of a total prohibition of *a given form* of commercial communication. The CJEU found support in Recital 100 of the Directive which refers to the intent of the Directive to remove prohibitions on one or more forms of commercial communication such as a ban on all advertising in one or more given media.²²⁷ The Court also underscored the importance of canvassing for professionals from other Member States who could use it to penetrate the French market.

Earlier, the CJEU had clarified that Article 24:2 of the Directive still preserves Members' rights to lay down prohibitions relating to the content or methods of commercial communications, provided those rules are justified and proportionate for the purposes of ensuring, inter alia, the professional independence, dignity, integrity, or secrecy. Nevertheless, being a total prohibition and not a prohibition relating to the content or methods of advertising, the restriction at issue fell under Article 24:1 and thus no leeway was available for the French government to defend the proportionality of the challenged measure.

In this respect, the Court disagreed with the AG Mazak who advanced the argument that canvassing is not a sufficiently separate form of commercial communication that can be distinguished from advertising but simply a method of advertising that would be subject to Article 24:2 of the Directive.²²⁸ In condemning the French measure, the Court also took issue with the AG's ultimate conclusion that the measure not only falls under Article 24:2 but it is also proportionate to the public interest objectives it pursued.

A plain reading of Article 24 of the Directive seems to lead to the opposite result from the one the Court reached. This is because the provision appears to aim at the most blatant advertising bans while leaving less strict advertising prohibitions relating to just one means of advertisement—like the one at stake in this case—*outside* the scope of the Directive. These could potentially be examined under primary law and the freedom to provide services, in the same way as any other advertising restriction was examined before the advent of the Services Directive.

²²⁷ Ibid para. 29.

²²⁸ AG Mazak's Opinion, Case C-119/09, ECLI:EU:C:2010:276, para. 50.

There are also contextual elements that challenge the approach taken by the Court in this case. First, recital 100 talks about a ban on all advertising in one or more given media. One could hardly consider canvassing as a sort of media; rather it is a form of advertisement, while other forms of advertisements appear to be allowed. Furthermore, the Court appears to misunderstand the purpose of Article 24, which becomes clear in particular when one reads paragraph 2. The Court notes that, when looking into Article 24 and Chapter V of the Directive, entitled 'Quality of Services', it becomes evident that safeguarding the interests of *consumers* is the most important aim of this set of provisions.²²⁹ However, this does not seem to be in line with Article 24:2; that provision instead aims at *disciplining service providers* by requiring that Member States ensure that advertising is in line with professional ethics. Thus, it appears that, contrary to the Court's view, the provision seems to imply a certain leeway when it comes to regulating advertising provided that no total ban is involved. In addition, the Court also makes a distinction between total prohibitions and restrictions relating to the content and methods of advertising, claiming only that regulation of the latter would be covered by Article 24:2 of the Directive. However, the issue of content and methods in recital 100 is associated with the creation of pan-European codes of conduct, as revealed by a joint reading of recital 114 and Article 26.

From the above, one should infer that canvassing, entailing an unsolicited contact with a client or else direct marketing, does not entail a total ban of advertising in a given medium. This is also corroborated by the content of the Handbook on the implementation of the Directive, which appears to call for a level of balancing in line with Article 24:2 when it comes to advertising restrictions of the type raised in this case.²³⁰ Interestingly, while the Court used the Handbook in other cases as a supplementary means of interpretation, it explicitly omits such reference in this case.

In my view, the Court clearly wanted to take a hard stance against restrictions on direct marketing and unsolicited contact with consumers. However, the analysis does not appear to fully take into account consumer interests nor safeguard professional integrity. A more balanced and—lengthier—analysis, which would include a full discussion of justifications and proportionality would be more apposite—regardless of whether it would lead to the same result of condemning the French measure. Nevertheless, by adopting a broad reading of Article 24, the Court signals its intentions when it comes to filling gaps and addressing ambiguities left unsettled by the EU legislature during the drafting of the Directive, thereby leaving the door for similar liberalization-friendly interpretations in the future wide open.

²²⁹ C-119/09, *Société fiduciaire nationale d'expertise comptable*, para. 28.

²³⁰ See Handbook (n 163), p. 49.

(ii) *Clarifying the scope of the governmental authority exception of Article 51 TFEU and the dichotomy between establishment and services enshrined in the Services Directive*

In the early years since the transposition of the Services Directive, the Court had the opportunity to clarify under which conditions certain restrictions on the freedom to provide services could be justified based on the Services Directive rather than the primary law exception of services in governmental authority (Article 51 TFEU).

The first such case arose from three disputes before the Italian *Consiglio di Stato* between Italian public authorities and an Italian company, Rina SpA, in connection with the State-imposed obligation for certification bodies to have their registered office in Italy.²³¹ The CJEU was requested to rule on, first, whether certification bodies (SOAs) fall outside the scope of the Directive because they exercise official authority pursuant to Article 2:2(i) of the Directive in conjunction with Article 51 TFEU; and, second, whether any of the liberalizing provisions of the Directive, including Articles 14–16 would outlaw the requirement for a registered office imposed by Italian law. The Court quickly dealt with the first question by noting that it answered the question in the negative in a previous case²³² where it affirmed that SOAs have no decision-making autonomy; rather, they operate under strict State supervision and on conditions of competition, as companies seeking to participate in public works contracts can use the services of an SOA of their choice.²³³

In dealing with the second question, which was novel in view of the content of the Services Directive, the Grand Chamber had to answer a fundamental question of systemic importance: how to classify a requirement to have a registered office in a Member State? This is vague, partly because of the birth defects of the Services Directive after the abolition of the country of origin principle. It appears that such a requirement could be viewed as coming under Article 14:1, which deals with prohibited requirements, or Article 16 relating to the freedom to provide services.

While inconsequential at first blush, the distinction has repercussions for the standard of review by the Court: if the requirement falls under Article 14 of the Directive, this means that it is per se prohibited and no possibility for justification is offered under the Directive. If, on the other hand, Article 16 is applicable, then a Member State can justify such a restriction on public policy, public security, public health, or environmental grounds provided that the

²³¹ See C-593/13, *Rina Services and Others*, ECLI:EU:C:2015:399.

²³² See C-327/12, *SOA Nazionale Costruttori*, ECLI:EU:C:2013:827, paras 28–35.

²³³ More recently, the Court found that the activities of vehicle roadworthiness testing centres are not connected with the exercise of official authority, despite the fact that the operators of these centers have the power to take cars off the road in cases of safety defects. See C-168/14, *Grupo Itevelesa SL*, ECLI:EU:C:2015:685, para. 61.

principles of non-discrimination, necessity, and proportionality are respected. Importantly, Article 14 is located within the Directive's provisions relating to establishment whereas Article 16 is the introductory provision relating to the provision of services.

In *Rina Services*, the Court had to decide whether Article 14 or rather Article 16 should be the leading authority in legally classifying the measure at issue. AG Villalón took the latter view: whereas he admitted that the national measure at issue related to establishment, he also noted that, if properly viewed, the national measure also precluded any certification company established in another Member State from providing certification services in Italy. Thus, in the AG's view, both provisions could be relevant. However, the AG decided to examine the measure only under Article 16:2(a) of the Directive because the national measure constituted an absolute negation of the freedom to provide services.

The Court disagreed once again with the AG's interpretation of the Services Directive *tout court*, taking a stance in favour of the liberalizing force of Article 14. Disregarding the AG's argument about the negation effect against the freedom to provide services, the Court noted that the requirement at issue relates to the location of the provider's registered office as laid down in Article 14:1 and in conjunction with Article 14:2, as the measure at stake indirectly prevents multiple establishments.

This excessive textualism is anything but satisfactory when taking into account the wording of Article 14; indeed the requirement at stake was not technically based on the location of the registered office but actually *required* establishment. In addition, the Court does not seem to consider to a fuller extent what problems a simultaneous application of both Articles 14 and 16 of the Directive (in the same way as the simultaneous application of Articles 49 and 56 TFEU) would create. After all, the Court has previously accepted that both freedoms may sometimes be relevant for a particular set of facts. Nonetheless, what seems to have played the most important role in the Court's decision was the dichotomy that the Services Directive aims to draw between restrictions relating to the establishment of service providers and those regarding the provision of services in a cross-border manner.²³⁴ However, this very situation shows the failure of the EU legislative in properly clarifying the landscape even for one of the most common restrictions against the provision of services within the EU.

The Court's case law in this regard is not a model of clarity either. Recently, in *Commission v Hungary*,²³⁵ it seems that the Court took a different stance in the dichotomy between establishment and services or else between Articles 14 and 16 of the Directive. Interestingly, the Court, again in a Grand Chamber format, dismissed the Hungarian claim that a national measure requiring establishment

²³⁴ Cf. C-593/13, *Rina Services and Others*, para. 31.

²³⁵ See C-179/14, *Commission v Hungary*, paras. 108ff.

cannot fall under both Articles 14 and 16. If this reading is correct, then one wonders why in *Rina Services* the Court did not examine the measure at issue under both Articles 14 and 16. In a proper interpretation of the Directive, it appears that, in cases where domestic measures require establishment, the Court should examine the measure under the obligations laid down in the Directive relating to both establishment and services. It appears that the latter would not be applicable only if the respondent can show that it would, in practice, be impossible for, and of no interest to, a service supplier established in another Member State to provide the relevant service in another Member State without any stable infrastructure there. In this respect, the Court appears to seek more tangible evidence of the violation of the freedom of establishment than mere speculation, which seemed to be sufficient in previous cases discussing Article 56 TFEU.

As noted earlier, the Court also had to discuss in *Rina Services* the possibility of invoking justifications in the case of a violation of Article 14. The Court emphasized that no justification can be submitted by the regulating Member State once a violation of Article 14 of the Services Directive is confirmed. Any possibility of resorting to primary law, or more specifically Article 52 TFEU, would undermine the ad hoc harmonization intended by the Services Directive. In the Court's view, the per se prohibition of Article 14 was intentionally chosen by the EU legislature to ensure the systematic and swift removal of certain restrictions on the freedom of establishment which were considered to negatively affect the smooth functioning of the internal market.²³⁶ In other words, the Directive has intentionally provided for exhaustive harmonization regarding those services that fall within its scope.²³⁷ Therefore, the Court correctly concluded that any recourse to primary law despite the *lex specialis* that the Directive created would deprive the latter of its *effet utile*.²³⁸

The Court was given the opportunity to discuss again the concept of the governmental exception under the Directive few years later. In *Hiebler*, what was at stake was whether the trade of a chimney sweep as exercised in the Land of Corinthia could be regarded as an activity in the exercise of official authority.²³⁹ In its preliminary request, the Austrian Supreme Court appeared to suggest that this was the case because of certain tasks of public interest assigned to the chimney sweeps relating to fire safety regulations.

The Court disagreed in that it found that the activity at stake was auxiliary to the exercise of official authority because the mayor delegates such tasks to chimney sweeps and is in charge of directly supervising their work. The chimney sweeps have no personal power of enforcement, constraint, or coercion against

²³⁶ C-593/13, *Rina Services and Others*, para. 46.

²³⁷ Notably when it comes to Arts 9–14. See Joined Cases C-458/14 and C-67/15, *Promoimpresa srl*, ECLI:EU:C:2016:558, paras 59, 61.

²³⁸ Cf. Joined Cases C-360/15 and C-31/16, *X and Visser*, para. 93.

²³⁹ See C-293/14, *Hiebler*, ECLI:EU:C:2015:843.

their clients. The fact that they act in the public interest as part of their everyday activity is not sufficient for that activity to be regarded as directly and specifically connected to official authority. As the Court has underlined previously in a series of cases relating to the inconsistency with EU law of a nationality requirement for notaries, it is not uncommon in various EU legal systems at the national level that certain regulated professions have an obligation to act in pursuit of an objective in the public interest.²⁴⁰ This trait of their activity alone does not, however, render it as the exercise of official authority. The functional approach that the Court consistently applied when interpreting this derogation in a narrow manner is reasonable and protects the spirit of the scope of the fundamental freedoms.²⁴¹

(iii) Clarifying basic concepts of the Directive

'Service': In the first ten years since the adoption of the Services Directive, the Court has clarified the meaning of various key concepts enshrined in the Directive. For instance, in *X and Visser*, the Court discussed the confines of the basic concept of 'service'. Recall that Article 4(1) of the Directive provides that service is any self-employed economic activity, normally provided for remuneration, along the lines of Article 57 TFEU.

In *X and Visser*, the question at issue was whether the activity of retail trade in goods (the sale, that is) such as shoes and clothing comes under the above definition of 'service'.²⁴² The question arose when Visser BV, a Dutch company owning commercial surfaces at the Woonplein, an outlet shopping area in Northern Netherlands, decided to rent shop premises to Bristol BV, a company wishing to open a discount retail outlet for shoes and clothing. However, this was against the zoning plan adopted by the local municipal council which reserved the area exclusively for retail trade in bulky goods.

At the outset, although one would not argue against retail being a self-employed activity provided for remuneration, the Court faced here the fundamental question whether the free movement of goods could be of relevance. However, the Directive could not be clearer in this regard: distributive trades fall under the scope of the Directive and the same goes for all requirements applicable to access to service activities or to the exercise thereof, to the exclusion of requirements applicable to goods as such. As the zoning plan at issue related to the conditions of access governing Woonplein where activities relating to the sale of specific goods can be established, the concept of 'service' must also include the retail trade in goods such as clothing and shoes.²⁴³

²⁴⁰ See, among many, C-61/08, *Commission v Greece*, ECLI:EU:C:2011:340, para. 88.

²⁴¹ See also D Damjanovic, 'Territorial Restrictions in the chimney sweep business under the Services Directive: *Hiebler*' (2017) 54 *CML Rev*, 1535, at 1545.

²⁴² See Joined Cases C-360/15 and C-31/16, *X and Visser*, paras 84ff.

²⁴³ In a similar vein, the Court previously found that the marketing of non-alcoholic beverages and food in coffee shops is a catering activity characterized by an array of features and acts in which

Similarly, EU primary law on the freedom of establishment could not be applicable without depriving the Directive's establishment-related provisions for service providers of their *effet utile*. Following the AG's advice, the Court underscored the ever-changing nature of retail trade in goods, which nowadays extends to a considerable gamut of pre- and post-sale services.²⁴⁴

'Requirement': Another basic concept discussed in *X and Visser* was that of 'requirement', which, according to the Directive, covers any obligation, prohibition, condition, or limit provided for in national law.²⁴⁵ At issue was whether the zoning plan can fall under the concept of 'requirement' as set out in the Directive. The 9th recital of the Directive excludes from its scope requirements such as road traffic rules, rules on the use of land and planning, buildings standards, as well as administrative penalties relating to such rules, as they do not specifically regulate the service activity but have to be respected by suppliers when carrying out their economic activity and individuals acting in their private capacity in the same manner.

The wording seems to go very close to the *Keck* line of case law but this is not sufficient to create a clear dividing line. Imagine, for instance, outdoor advertising restrictions in legislation related to town planning: would it fall outside the scope of the Directive? Arguably not, as such restrictions apply equally to economic operators and individuals in their private capacity but have a much more appreciable impact on the former than the latter.²⁴⁶ In addition, the Directive does not seem to exclude zoning plans altogether from its scope, as Article 15:2 (territorial restrictions) or recital 47 (authorizations for hypermarkets) clearly suggest.²⁴⁷

In *X and Visser*, the Court indeed focused on the effect of the legislation at issue. First, it acknowledged that requirements of the type identified in the second sentence of recital 9 cannot be regarded as restrictions on the free movement of services or the freedom of establishment because they have a universal impact on both economic operators and individuals acting in their private capacity. Then, the Court also underlined that clearly the subject matter of the zoning plan was to determine the geographical zones where certain retail trade activities can be established. Thus, the addressees of such a plan were not individuals in their private capacity but rather persons interested in the development of those activities in the geographical zones at stake.²⁴⁸ For this reason,

services (rather than the supply of the product itself) dominate: see C-137/09, *Josemans*, ECLI:EU:C:2010:774, para. 49.

²⁴⁴ Joined Cases C-360/15 and C-31/16, *X and Visser*, para. 95. Also AG Szpunar's Opinion in *X and Visser*, ECLI:EU:C:2017:397, paras 102–103.

²⁴⁵ Article 4:7 of the Directive.

²⁴⁶ See also Barnard (n 11), at 337–9.

²⁴⁷ Cf. AG Szpunar's Opinion in *X and Visser*, para. 137.

²⁴⁸ The Court juxtaposed the measure at issue with the one in *Libert*, whereby the Court found that the measure satisfied the conditions of the second sentence of recital 9, as the objective of the Flemish

the legislation at stake would seem to fall under the first paragraph of recital 9 of the Directive.

As the measure at issue limited the establishment of retail traders outside the city centre, its compatibility with Articles 14 and 15 had to be examined. Whereas no clear violation of Article 14 was invoked, Article 15:2(a)—which obliges Member States to evaluate whether national measures impose territorial restrictions, and if so, to ensure that such measures are non-discriminatory, necessary, and proportionate—was of relevance. By precluding access to a service activity in a given geographical area, the measure at issue came under Article 15:2(a) and therefore had to comply with the principles of necessity, proportionality, and non-discrimination.

While the Court found that it is for the domestic court to determine the compliance of the measure with these basic EU principles, it noted that protecting the urban environment²⁴⁹ by maintaining the viability of the city centre of the municipality is in the interests of good town and country planning and could be an overriding reason relating to the public interest that may justify territorial restrictions of this type. In this case, AG Szpunar went a step further in affirming the proportionality of the measure and contending that no indication existed that the zoning plan at issue indirectly limited (or aimed at limiting) the overall number of retailers in the municipality.²⁵⁰

The contours of what type of requirements are covered by the Services Directive were further discussed in *Commission v Hungary*. At stake was the legality of a nationwide mobile payment system governed by a State-controlled company. The use of this system was mandatory, *inter alia*, for the mobile payment of public parking charges, tolls for use of the road network, public transport fares as well as fees connected with other services offered by the State. Hungary argued that a SGEI was at stake which should result to the exclusion of the application of the Directive. While the Court admitted that the European Commission did not plausibly prove that the mobile payment service at stake is not a SGEI, it still held that the Directive applies to SGEIs on condition that it does not obstruct the performance, in law and in fact, of the particular task assigned to such service providers.²⁵¹

Thus, the Court went on to examine the application of Article 15 of the Directive. Confirming the broad reach of the concept of ‘requirement’, the Court found that the national mobile payment system at stake is a requirement that falls under Article 15:2(d). This provision requires that Member States

government measure in *Libert* was to guarantee affordable housing. See C-197/11 and C-203/11, *Libert*, ECLI:EU:C:2013:288, para. 106.

²⁴⁹ Cf. C-17/00, *De Coster*, para. 38.

²⁵⁰ AG Szpunar’s Opinion in *X and Visser*, paras 148–150.

²⁵¹ Art. 15:4 of the Directive echoes Art. 106:2 TFEU. According to established case-law, it is for the Member State invoking the exception of Art. 106:2 to prove that its requirements are met. See C-160/08, *Commission v Germany*, EU:C:2010:230, para. 126.

evaluate and ensure the compatibility with the principles of non-discrimination, necessity and proportionality of any condition that reserves access to a given service activity to particular providers by virtue of the specific nature of the activity concerned. Indeed, Article 15:2(d) appears to cover any newly established monopoly (of public or private nature) in a given service sector.

In examining the necessity of the system at stake, the Court found that Hungary itself accepted that a less restrictive measure was available, that is, a system of concessions based on a competitive process. In the Court's view, Hungary failed to prove that the system at stake was necessary to the performance, in a cost-effective manner, of the particular public service task at issue. For this reason, it found that it did not meet the necessity requirement of Article 15:3 nor has Hungary proven the cost-effectiveness of the regulatory choice made pursuant to Article 15:4 of the Directive.

Authorization requirements and procedures: Another important concept that the Court was called upon to delineate relates to authorization requirements and procedures. According to the Directive, an authorization scheme involves any procedure under which a service provider or recipient is in effect required to take steps with a view to obtaining from a competent authority a formal decision, or an implied decision regarding access to a given service activity or the exercise thereof (Article 4:6). Thus, the definition appears to be sufficiently broad to cover both explicit and implicit decisions as well as administrative procedures of a public or private nature that are a prerequisite in order for a service supplier to commence her activity.

Nonetheless, the case law appears to suggest that a scheme of general application such as a zoning plan would not come under that concept because it does not require an administrative decision or act following a mandatory application by a service provider seeking to pursue an economic activity.²⁵² In *X and Visser*, AG Szpunar correctly identified three conditions for a particular situation to fall under an authorization scheme: (a) the service provider has to request a decision from an authority;²⁵³ (b) the provider received a decision addressed to him specifically; and (c) that decision and the compliance therewith was a prerequisite for the service provider to start his activity.²⁵⁴ One should add here that the decision does not need to be formal but can also be implicit. This is a necessary clarification, as any lack of reaction by the competent domestic authorities should not be used as a fact that prevents the application of the relevant provisions allowing an authorization scheme or the manner in which it is applied to be challenged.

²⁵² See Joined Cases C-360/15 and C-31/16, *X and Visser*, para. 115.

²⁵³ The authority in this case can also be a non-State body in case of self-regulation. See Recital 39 of the Directive.

²⁵⁴ AG Szpunar's Opinion in *X and Visser*, para. 126.

Articles 9–13 of the Directive spell out the conditions under which authorization schemes can be compatible with EU law. In *Van Gennip*,²⁵⁵ the Court was requested to assess whether the requirement for a dual authorization (a federal one relating to explosives and a regional environmental permit) in order to store pyrotechnic articles was consistent with Article 10 of the Directive, which establishes certain criteria for authorization schemes relating to non-discrimination, transparency, proportionality, objectivity, and clarity. Interestingly, the Court referred to the obligation for judicial deference when it comes to assessing the allocation of competences of the Member States' authorities granting authorizations, but it proceeded to examine the precise nature of the domestic dual authorization scheme nonetheless. While the Court found that it did not have sufficient information to examine the authorization schemes at issue against all criteria, it noted, crucially, that the two schemes pursue different objectives, are subject to precise but different criteria and are transparent and accessible, as they are published in accordance with federal and regional legislation. Unfortunately, for our purposes, but wisely, for an instance of supranational judicial, the Court decided to leave to the Belgian Court the assessment of proportionality of the measure establishing a ceiling, to protect public safety, at 50 kg of pyrotechnic composition at the federal level.

In *Hemming*, the compatibility with the Directive of a payment of a fee for the grant (or renewal) or a sex establishment licence in Westminster (London) was discussed. This fee consisted of two parts: one related to the administration of the application, which is non-refundable when the application is refused; and the other (much higher fee) related to the management of and enforcement of the licensing regime, which was refundable in case of refusal.

The plaintiff argued that this second part of the fee was inconsistent with Article 13:2 of the Directive. This provision requires that authorization procedures and formalities not be dissuasive and unduly complicated nor delay the service supply. Crucially, it requires that charges incurred by the applicants are *reasonable* and *proportionate* to the cost of the authorization procedures in question and do not exceed the cost of the procedures. As the national scheme resembled the fee structure of several professional associations, the case could have systemic repercussions for various categories of service providers.²⁵⁶

Referring to previous case law suggesting that general supervisory activities cannot be financed in granting individual licences in telecommunications services under Directive 97/13, as it does not constitute the administrative costs strictly generated by the work involved in implementing licences,²⁵⁷ the Court found that Article 13:2 should be interpreted in a similar manner so that the fees charged by the city of Westminster exceed the cost of the authorization

²⁵⁵ C-137/17, *Van Gennip*, ECLI:EU:C:2018:771, paras 78ff.

²⁵⁶ Thus, the English professional associations or lawyers and architects were among the interveners in the proceedings.

²⁵⁷ See Joined Cases C-392/04 and C-422/04, *i-21*, C- ECLI:EU:C:2006:586, paras 34–35.

procedure. The fact that such fees could be later reimbursed would not change the Court's conclusion.

Importantly, the Court noted that a different interpretation, which would essentially allow the pre-financing of management costs, would contradict the aim of facilitating market access as incorporated in the Directive. In doing so, the Court followed a more liberalization-friendly approach than the AG's. AG Wathelet adopted a more fact-specific and evidence-based stance in that he considered the second part of the fee to be unreasonable because the City Council could not give additional explanations and evidence about the composition of that part of the fee.

In *Trijber*,²⁵⁸ the Court was requested to address the issue of the duration of authorizations. Article 11:1 of the Directive provides that authorizations cannot be for a limited period except in cases where the number of available authorizations is limited; for instance, on public interest grounds. In that case, the Court agreed that protection of the environment and public safety can be objectives that justify limiting, in both time and number, the authorizations granted by the competent authorities.

The Court also had to decide on the scope of Article 12 of the Directive, which relates to the specific case whereby the number of authorizations available for a given activity is limited due to the scarcity of natural resources or technical capacity. In such cases, the provision requires that Member States introduce a selection procedure and exclude automatic renewal. In *Promoimpresa and Others*, the issue at stake was whether the automatic extension of the period of validity of concessions of State-owned maritime and lakeside property contravened Article 12.²⁵⁹ First, the Court found that the concessions at stake constituted formal decisions which a service provider must obtain from the national authorities in order to be able to commence his economic activity and thus they can be regarded as authorizations pursuant to the Directive. The Court went on to find that the State land at issue is located in place which can be defined as natural resources but refrained from expressing a view as to whether such resources were scarce.

Going back to the scope of Article 12, the Court contended that the automatic renewal foreseen by the domestic legislation disregarded the obligation for a selection procedure. Even if the Italian State had particular public interest grounds in mind, they could be taken into account in establishing the rules governing the selection procedure. However, Article 12 does not allow any justification of an automatic renewal on public interest grounds when no selection procedure is organized. Thus, the Italian measure was incompatible the Directive.

²⁵⁸ See Joined Cases 340/14 and C-341/14, *Trijber*, ECLI:EU:C:2015:641, paras 61ff.

²⁵⁹ See See Joined Cases C-458/14 and C-67/15, *Promoimpresa srl*, paras 49ff.

'Cross-border' vs 'purely internal': As noted earlier, a key objective feature of a State measure in order for it to fall under the freedom to provide services is some cross-border element. Whereas we noted previously that this requirement has been interpreted narrowly and in a manner that often looks only marginally into evidence of cross-border activity,²⁶⁰ the Services Directive appears to require no such activity in the case of the provisions relating to the freedom of establishment. First, in *Rina Services*, the Court abstained from discussing the significance of the fact that the situation at issue was confined to one Member State only. Then, in *Trijber* the Court appeared to consider it necessary to identify cross-border elements before discussing the application of Chapter III of the Directive relating to establishment.²⁶¹ In doing so, it disregarded the advice of AG Szpunar to the Court to rule that the provisions of the Directive relating to establishment of service providers also apply to purely internal situations.²⁶²

More recently, in *Hiebler*, the Court did not seem to mind that the territorial restrictions allowing chimney sweeps to offer their services only in the sweeping area where they are resident were confined to an Austrian region, Corinthia, and applied the relevant provision of the Directive. The same approach can be observed in *Promoimpresa*, where the Court interpreted Chapter III provisions that prohibited the automatic extension of concessions of State-owned maritime and lakeside property without considering that the fact that the situation was purely internal had a bearing on the applicability of the Directive. The same stance was then reiterated in *Hemming*, whereby all facts of the case related to London.

However, despite this case law, one could still argue—admittedly, more in certain cases more than in others—that the dissuasive effect to service providers from other Member States potentially interested in establishing themselves in those Member States was still present. This uncertainty was removed in *X and Visser*. The Court confirmed that the absence of a requirement for a cross-border element in the Directive as far as establishment is concerned shall have a meaning.

In this regard, the Court drew a comparison with the provisions of the Directive relating to services provision—notably Article 16—where the legislature clearly incorporated a cross-border element. In addition, the Court underscored that the conclusion could be no different if one takes the objective of the Directive to complete the internal market for services. This requires the elimination of obstacles encountered by those providers establishing in another

²⁶⁰ See the discussion in Section II.B.(ii).

²⁶¹ See Joined Cases 340/14 and C-341/14, *Trijber*, para. 41. On the other hand, when the Court discussed the second part of the case relating to a language requirement for window prostitution businesses as a condition for granting authorizations of that activity, it did not look for cross-border evidence: *Ibid*, paras. 67ff.

²⁶² See AG Szpunar's Opinion in *Trijber*, ECLI:EU:C:2015:505, paras 52–57 (referring to textual and contextual elements). The AG also found support in the Handbook on Implementation of the Services Directive (n 163), 24.

Member State and also by those establishing in their own Member State, as such obstacles can adversely affect the supply of services throughout the Union.²⁶³

X and Visser amply shows the liberalizing effect of the Directive and its highly penetrating effect in domestic markets within the EU. The outcome is not unexpected; in the Handbook discussed earlier, the Commission already made it clear that establishment in one's own Member State falls within the scope of Articles 9–15 of the Directive.²⁶⁴ Other than the provisions included in the main text of the Directive, the preamble of the Directive is also instructive in this respect. Recital 36 seems to draw a distinction between services provision and establishment appearing to require no cross-border element in the case of a provider being established.

'Commercial communications/advertising':²⁶⁵ Finally, a concept that will most likely keep the Court and the Commission occupied in the short and medium run relates to commercial communications and the regulated professions. Recall that, in *Société fiduciaire nationale d'expertise comptable*, the Court confirmed that the concept of commercial communication includes any form of communication that promotes the product or service of an undertaking or a person engaged in an economic activity, including a regulated profession.²⁶⁶ In this case, it found that canvassing is a commercial communication as it constitutes a form of communication of information via personal contact between the service provider and potential clients with a view to acquiring new clients. Such communications are akin to direct marketing, according to the Court.

To be sure, whereas some coherence would be desirable and indeed necessary in view of the increasingly globalized nature of certain professions, the fact that various professions are excluded from the scope of the Directive or are regulated by other legislative instruments clearly affects such national measures being dealt with by a system based on a single set of rules. In view of this fact, it should be expected that the Court will try to ensure some coherence informally between interpretations under Article 24 of the Services Directive and other secondary law instruments or, indeed, Article 49 and 56 TFEU. This is all the more so because the Court has, over time, recognized the sensitivities of various professions when it comes to restrictions that ensure their integrity, professionalism, or dignity.²⁶⁷

This is no easy task for the Court. Case law has revealed the Court's difficulty in clearly delineating *ex ante* under which conditions certain restrictions on advertising cannot be compatible with EU law. In *Vanderborght*, the struggle

²⁶³ See Joined Cases C-360/15 and C-31/16, *X and Visser*, para. 105.

²⁶⁴ Handbook (n 163), 24.

²⁶⁵ Grappling with advertising restrictions in professional services is not an EU peculiarity. For an analysis of similar issues in the USA, see P Delimatsis, 'The Future of Transnational Self-Regulation—Enforcement and Compliance in Professional Services' (2017) 40(1) *Hastings International and Comparative Law Review*, 1, at 53.

²⁶⁶ See Art. 4(12) of the Services Directive.

²⁶⁷ C-339/15, *Vanderborght*, para. 68.

on the part of the Court to explain in what sense the restrictions in that case were more burdensome than in *Konstantinides* (where the advertising restrictions were regarded as compatible with EU law) is quite telling. In a single sentence, the Court merely notes that in *Vanderborght*, the legislation at issue ‘has a much broader scope’ than in *Konstantinides*.²⁶⁸ Whether this statement indirectly introduces a *de minimis* test is unclear. For all practical purposes, more analytical guidance would be apposite and necessary in the future. A parallel development that may affect the interpretation of such restrictions would be the creation of codes of conduct for professions at the EU level as well as standardization-related initiatives within the European standard-setting bodies.

(iv) Shedding light on the tension between the Services Directive and transport services

Article 58:1 TFEU excludes from the scope of the freedom to provide services those activities provided in the field of transport.²⁶⁹ By the same token, services in the field of transport, including port services, are excluded from the scope of the Directive pursuant to Article 2:2(d) of the Directive. In addition, recital 21 of the Directive provides that not only port services but also urban transport, taxis, and ambulances should equally be excluded.

More generally, this would appear to be in line with Article 100:1 TFEU, which provides that the transport-related provisions under the TFEU apply to transport by rail, road, and inland waterways, but potentially also to sea and air transport. In view of the open wording adopted in the Directive (‘including’), it appears that an *a priori* broad interpretation of this exclusion is apposite. This is all the more so not only because it would be too narrow an approach to restrict the exclusion to means of transport in themselves,²⁷⁰ but also because the chapter on transport is an expression of the freedom to provide services which should lead to a common transport policy to be materialized by the EU legislature.²⁷¹

In *Trijber*, the Court had the opportunity to demarcate the contours of this exception for the first time. At issue was whether a service of carrying passengers on a boat for a waterway tour of a city for event-related purposes against remuneration is a service in the field of transport. The Court started by noting that a review of the wording, purpose, and general structure of the exception was necessary. After referring to the wording of primary law but also recital 21, the Court contended that no provision explicitly provides that any service consisting in waterway transport is *ipso facto* classified as ‘transport’

²⁶⁸ Ibid para. 74.

²⁶⁹ Crucially, however, the rules relating to the freedom of establishment apply in the case of transport: See C-338/09, *Yellow Cab Verkehrsbetrieb*, EU:C:2010:814, para. 33.

²⁷⁰ See C-168/14, *Grupo Itevelesa SL*, para. 45.

²⁷¹ See also AG Szpunar’s Opinion in *Trijber*, ECLI:EU:C:2015:505, para. 28.

under the directive. Rather, a review of the purpose of the service at issue was necessary.

In the Court's view, the Directive has to cater for a delicate balance between the elimination of obstacles to establishment and services supply and the need to safeguard the traits of certain sensitive activities, notably those relating to consumer protection. In this respect, the Court noted that services in the field of tourism, including tour guides, are consumer services falling within the ambit of the Directive. The Court went on to note that in the present case the consumers of the services were not interested in point-to-point transport in Amsterdam but rather in the consumption of a service associated with tours and rentals for festive occasions. Thus, the Court concluded, subject to verification by the referring court, the purpose of the service at issue was not a service in the field of transport pursuant to Article 2:2(d) of the Directive.

In *Grupo Itevelesa*,²⁷² another related *ratione materiae* question was raised: are vehicle roadworthiness-testing activities covered by the Directive? The Court had recourse to contextual and teleological techniques to answer the question. Generally, the Court appeared to follow no narrow view of the transport exception included in Article 2:2(d) of the Directive. First, it noted that the exclusion of this provision not only covers any point-to-point physical act of moving persons or goods by means of a vehicle, aircraft, or waterborne vessel, but also any service inherently linked to such an activity. Viewed through this lens, tests relating to roadworthiness for motor vehicles are ancillary to and indispensable for the transport service. In the mind of the Court, it seems that the existence of secondary law on the issue which used the relevant TFEU provisions on transport as a legal basis weighed significantly in favour of including the testing activities at issue as services in the field of transport.

The most recent cases discussing the scope of the provision excluding certain services from the scope of the Services Directive in the field of transport relate to Uber.²⁷³ The subject matter of the cases before the CJEU could be regarded as quite narrow when compared to the breadth and complexity of litigation activity against Uber in several EU Member States.²⁷⁴ In *Elite Taxi*, at issue was whether the service that Uber offers is an information society service, a service coming under the Directive, or a service in the field of transport.

Crucially, the answer to this question would determine the applicability and 'bite' of EU law: under EU secondary law, an information society service is a service provided for remuneration, at a distance, by electronic means at the

²⁷² This decision was made public 15 days after *Trijber*.

²⁷³ See C-434/15, *Asociación Profesional Elite Taxi*, EU:C:2017:981, para. 35 ; and C-320/16, *Uber France SAS*, ECLI:EU:C:2018 :221.

²⁷⁴ For an overview, see V Hatzopoulos and S Roma, 'Caring for Sharing? The Collaborative Economy under EU Law' (2017) 54 *CML Rev*, 81–128, at 90.

request of the recipient.²⁷⁵ The E-commerce Directive²⁷⁶ requires that Member States not restrict the supply of such services but also that they notify the Commission of measures to be taken against providers of such services. If, on the other hand, the Services Directive is deemed applicable, Article 9 on the conditions that authorizations schemes shall meet (in case of establishment) and Article 16 (in the case of services) call for an assessment against the principle of non-discrimination, necessity, and proportionality. Finally, if the service at issue is regarded as falling under the exception of Article 2:2(d) of the Directive relating to services in the field of transport, then the regulation of the activity is essentially a matter reserved to the EU Member States (with Article 49 TFEU nevertheless remaining directly relevant, as noted earlier).

Depending on the solution chosen for this legal conundrum, negative effects on innovation could be expected. While controversial from a competition or labour law perspective, online platforms have exerted a leadership role in disrupting various industries, ranging from hotels to tourism to transport.²⁷⁷ Indeed, while the regulation of services is very much associated with the principle of technological neutrality to avoid discriminatory treatment among modes of service supply (for instance, establishment versus supply through electronic means), things would arguably be different in a situation like Uber whereby the technology alters and fundamentally changes the nature of the service. One should also reflect on the characteristics of the market about to be disrupted. Regulatory capture at the domestic level could lead to unduly protecting incumbents and preventing the modernization of performance in taxi services. More competition would instead increase the overall quality of the service in terms of choice, timing, and performance.

AG Szpunar suggested that Uber is more than a mere intermediary between non-professional drivers willing to offer transport services occasionally and passengers looking for such services. In the AG's view, it is a genuine organizer and operator of urban transport services. Even if innovative and composite, as it combines an information society service with a transport service, the final service offered should be regarded as being offered in the field of urban transport.²⁷⁸

For all practical purposes, the Court agreed with AG Szpunar. Initially, the Court appeared to favourably view the possibility of Uber being classified as an information society service due to the fact that it enables the transfer, by means

²⁷⁵ See Directive 98/34 laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 204/37, as amended by Directive 98/48 [1998] OJ L 217/18, Article 1:2. The same definition is to be found in the Directive that replaced Directive 98/34: See Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services [2015] OJ L 241/1, Art. 1:1(b).

²⁷⁶ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1.

²⁷⁷ See also European Commission Communication, 'Online Platforms and the Digital Single Market—Opportunities and Challenges for Europe', COM(2016) 288 final, 25 May 2016.

²⁷⁸ See AG Szpunar's Opinion in *Asociación Profesional Elite Taxi*, ECLI:EU:C:2017:364, para. 61

of a smartphone application, of information regarding the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his own vehicle. The Court, however, subsequently noted that the service offered by Uber also had a component relating to non-public urban transport services, which in fact was the predominant component of the service offered. In view of the logic that underlined its decision in *Trijber*, the Court found that the intermediation service had to be regarded as being an integral part of an overall service which was transport centred.

Such a conclusion was corroborated by two facts. First, Uber provided an application without which the non-professional drivers would not have decided to provide transport services, and the clients who wished to make an urban journey would not have used the services provided by those drivers. Second, Uber exercised a decisive influence over how those services were provided, notably by determining the maximum fare; by collecting that fare from the service recipients before paying part of it to the non-professional driver of the vehicle; and by exercising a certain control over the quality of the vehicles, the drivers, and their conduct.²⁷⁹ The Court concluded by noting that, in the current state of EU law, it is for the EU Member States to promulgate the conditions under which such services can be offered, keeping in mind the general TFEU rules.²⁸⁰

More recently, in *Uber France*, the Court build on the previous reasoning to exclude from the scope of EU law a French law that foresees criminal penalties for the services that Uber offered without authorization. In that case, Uber claimed that such penalties were imposed unlawfully because the relevant legislation was not notified to the European Commission as required by Directive 98/34. However, as the Court had previously found in *Elite Taxi* that the service offered by Uber was not an information society service pursuant to that Directive, no notification was required.²⁸¹

This line of case law seems to represent a missed opportunity for the Court to embrace innovation in the way services are provided within the EU and put pressure on EU Member States and the Commission to kickstart a sincere and comprehensive discussion relating to consumer protection or labour-related issues arising from disruptive models in supplying services. However, the Court took a quite reluctant view, which is self-defeating from an economic point of view but also inconsistent with EU primary law (indeed, it is quite bizarre why the Court has not taken the time to discuss the applicability of Article 49) and the E-commerce Directive.²⁸²

²⁷⁹ See C-434/15, *Asociación Profesional Elite Taxi*, paras 38–39.

²⁸⁰ Similar considerations relating to online, collaborative platforms were identified by the Commission in a recent Communication: See European Commission Communication, 'A European agenda for the collaborative economy', COM(2016) 356 final, 2 June 2016, 6.

²⁸¹ See C-320/16, *Uber France SAS*, para. 26.

²⁸² For a critique along these lines, see D Adamski, 'Lost in the Digital Platform: Europe's Legal Travails With the Digital Single Market' (2018) 55 *CML Rev.* 719, at 738ff.

(v) Health-related services through the lens of the Services Directive

Free movement law has expanded its interference with the domestic regulation of healthcare services in recent years.²⁸³ However, the Services Directive excludes from its scope healthcare services, provided via healthcare facilities or not and regardless of the way they are organized and financed. Recital 22 equally excludes pharmaceutical services provided by health professionals to patients to assess, maintain, or restore their state of health where such activities are reserved to a regulated health profession in the host Member State. From its wording, the EU legislator appears to have intentionally broadened the scope of the healthcare exception. At the same time, the Handbook on the implementation of the Services Directive provides that the exception covers activities directly and strictly linked to the state of human health and therefore does not concern services which are designed to enhance well-being or provide relaxation such as sports or fitness clubs.²⁸⁴

In view of the broad scope of the exception and absent relevant, health services-specific secondary law, primary law remains the guiding legal basis for assessing compatibility with EU law when it comes to health-related professions. For instance, in *Ottica*, the Court found that the activities of opticians in Italy, where it is a regulated profession, ensure the protection of public health by, *inter alia*, conducting eye tests, measuring visual acuity, detecting eye problems, and using corrective optical devices and are therefore excluded from the scope of the Directive.²⁸⁵

Similarly, in *Femarbel*,²⁸⁶ the Court confirmed the broad scope of the healthcare exception enshrined in the Directive and referred to the essential features of the activity: as long as the service is intended to assess, maintain, or restore the state of health of patients and the activity is carried out by healthcare professionals recognized as such by the home Member State, the healthcare exception of the Directive should be triggered. In this respect, the Court upheld the distinction expressly enshrined in the Directive between its substantive scope and what would fall under the Patient Mobility Directive.²⁸⁷ The Court left it for the referring court to decide whether care activities in day-care centres and night-care centres shall be deemed as falling under the healthcare exception. Notably, the referring court has to assess whether the activity is genuinely intended to maintain or restore the state of health of elderly persons; is provided

²⁸³ See W Gekiere; R Baeten, and W Palm, 'Free movement of services in the EU and healthcare' in E Mosialos, G Permanand, R Baeten, and T Hervey (eds), *Health Systems Governance in Europe—The Role of European Union Law and Policy* (Cambridge: Cambridge University Press, 2010), 461.

²⁸⁴ See Handbook (n 163), 12.

²⁸⁵ See C-539/11, *Ottica New Line di Accardi Vincenzo*, ECLI:EU:C:2013:591, paras 19–20.

²⁸⁶ See C-57/12, *Fédération des maisons de repos privées de Belgique (Femarbel) ASBL*, ECLI:EU:C:2013:517.

²⁸⁷ Directive 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45.

by a health professional; and constitutes a principal part of the services provided in these care centres.²⁸⁸ In acting in such a deferential manner, the Court failed to engage more actively with the AG's Opinion in this case, which sought to better delineate between services with a social dimension and those with a more economic dimension and thus offer some more legal certainty when it comes to borderline cases in the healthcare sector.²⁸⁹

More recently, in *CMVRO*,²⁹⁰ the Court confirmed that activities relating to the retail supply and use of organic products, special purpose anti-parasitic products, and veterinary medicinal products do not constitute healthcare services for human beings and thus are subject to the requirements laid down in the Services Directive.²⁹¹ The Romanian law at stake limited to veterinary practitioners the retail and use of organic products, special purpose anti-parasitic products, and veterinary medicinal products. It also required that the share capital of veterinary pharmacies and relevant outlets is owned only by registered veterinary practitioners.

Inspired by its case law relating to human health,²⁹² the Court found that the exclusive retail right, while falling under Article 15 of the Directive, was necessary and proportionate because of the importance of ensuring and protecting public health and the fact that the Romanian law did not appear to unduly use the discretion at its disposal. Regarding the shareholder requirement, the Court drew on previous case law²⁹³ to find that good policy considerations may support the necessity of such a measure. However, the Court ultimately ruled that Member States' discretion in the field of animal health is not so important as to allow a total exclusion of non-veterinary professionals from establishments selling such products. By ruling so, the Court denied the extension to animal health-related cases of its previous case law that accepted the compatibility of EU law with similar restrictions relating to shareholding acquisition in Italian pharmacies.²⁹⁴

IV. Conclusion

This article has offered a concise account of the evolution of services trade regulation and integration within the EU. It also constitutes the first, comprehensive assessment of the first ten years of implementation of the Services

²⁸⁸ Ibid para. 41.

²⁸⁹ See also R Zahn, 'The regulation of healthcare in the European Union: Member States' discretion or a widening of EU law: *Femarbel and Ottica New Line*' (2014) 51 *CML Rev*, 1521, at 1533.

²⁹⁰ See C-297/16, *Colegiul Medicilor Veterinari din România (CMVRO)*, ECLI:EU:C:2018:141.

²⁹¹ See also Handbook (n 163), 12, which provides that the healthcare exclusion concerns services relating to human health. Thus, services provided by veterinaries should be covered by the Directive.

²⁹² See, for instance, C531/06, *Commission v Italy*.

²⁹³ See Joined Cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes*, para. 40.

²⁹⁴ See Case C-531/06, *Commission v Italy*.

Directive, an EU secondary law instrument that created high expectations but also faced significant criticism. Despite previous instances of political turmoil, a broader consensus seems to be emerging as to the economic benefits of integration in the field of services.

In addition, one should expect that the CJEU ruling in the *Singapore Opinion*²⁹⁵ confirming that the EU has exclusive competence in trade in services, including transport services, will most likely have a significant impact on regulatory initiatives in this field both internally and externally in the short and medium run. In combination with the unsustainable approach in the *Uber* judgments, one should hope for a fresh and critical study on the continuous need for a separate chapter on transport services, essentially creating a silo from the otherwise wide scope of the freedom to provide and receive services and thus contradicting the spirit and *effet utile* of economic integration within the EU but also putting in place barriers to the effectiveness of EU's external transport policy.

The present article has focused on a review of 60 years of case law and regulatory activity in the area of services and offered a critical assessment of advances and pitfalls during this extraordinary journey. With respect to the Services Directive, it argued that it constitutes an additional legal instrument to be used by the CJEU with a view to further pursuing the objectives of the fundamental freedoms of services and establishment. Early case law suggests that the Court may take a bold, expansive view in interpreting the provisions of the Directive while maintaining a quite conservative view when it comes to exceptions such as those relating to social or healthcare services. In the case of the latter, the Court may even exercise unexpected deference which gives lip service to the protection of public interest, as it perpetuates legal uncertainty with respect to borderline cases.

Other than that, though, the first period of implementation and judicial interpretation of the Directive confirms that there are sufficient 'teeth' in the provisions of the Directive, definitely enough to keep lawyers happy for quite a while.²⁹⁶ With some notable exceptions discussed in this article, the Court will generally try to faithfully serve the overall rationale of the Directive to create a genuine internal market for services, thereby calling for the alleviation of any remaining barriers in cross-border activity and also in domestic activity.

Additionally, the effects of the Directive on enhancing transparency and communication among regulatory authorities, and the Commission and thus on further strengthening trust are already visible, notably at the informal level. Any increase in mobility should follow suit once the market conditions stabilize and economic operators are encouraged to use their free movement rights. Again,

²⁹⁵ See Opinion 2/15, *Singapore-EU FTA*, ECLI:EU:C:2017:376.

²⁹⁶ Cf. G Davies, 'The Services Directive: extending the country of origin principle, and reforming public administration' (2007) 32(2) *European Law Review*, 232, at 233.

this does not mean that the Directive will complete the EU services internal market anytime soon. This is also due to the weakened ‘bite’ of the services-related provisions of the Directive (as opposed to the establishment-related ones, notably Article 14 thereof). To be sure, the impact of the Directive will depend on the level of discretion that the Court will recognize as falling to EU Member States when interpreting the remaining ambiguous provisions of the Directive. However, due to the broad exemptions from its substantive scope, there is so much the Directive can do in dismantling the barriers in key bottleneck industries and in the digital market. The creation of a genuine internal market for services will also depend to a significant extent on how bold the EU legislature will be in implementing the digital market strategy and in revising key secondary instruments in the medium run.