Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice

UtrechtLawReview

ARTICLE

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ABSTRACT

The main objective of the Services Directive was to remove barriers to trade in services within the Single Market of the European Union. The achievement of this objective still remains an unfulfilled promise according to the Commission, the Member States, and other stakeholders. As was previously raised in the literature, this may be derived mainly from the legislative shortcomings of the Services Directive. In this paper, the author assesses how the Court of Justice of the European Union has contributed to the fulfilment of this aim, during the 14 years since its adoption, in a practical way – through responding to preliminary questions and issuing rulings on the ground of the Commission's enforcement activity. The analysis covers the delimitation between the regimes for the protection of the freedom of establishment and the freedom to provide services, the forms of restrictions and the potential justification grounds, as interpreted by the Court in its judicial practice.

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KEYWORDS:

barriers; the Services Directive; Single Market; freedom of establishment; freedom to provide services; overriding reasons related to public interest

TO CITE THIS ARTICLE:

Wojciech Lewandowski, 'Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice' (2022) 18(1) Utrecht Law Review 57–75. DOI: *https://doi.org/10.36633/ulr.718*

DOI: 10.36633/ulr.718

1. INTRODUCTION

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (hereinafter: the 'Services Directive')[1] was one of the landmark legislation initiatives of the European Commission under the presidency of Romano Prodi. The Directive was proposed in 2004, was adopted after turbulent negotiations and a considerable number of amendments made throughout the legislative process in 2006, and was finally implemented by the Member States after a long transposition period by the end of 2009.[2] It was originally meant to be a broad-reaching and horizontally encompassing legal act that would regulate the variety of fields and sectors of services.[3] However, it received acclamation neither from representatives of Member States[4] nor from academia[5] at the moment of its adoption. The 'legal design' and main legislation techniques of the Services Directive have been subjected to criticism since 2006[6] –the perplexing system of derogations and exclusions provided by the provisions of the Services Directive, the large number and illogicality of those derogations and exclusions were the most criticized features of this legal act,[7] leading some scholars to label the Services Directive 'anti-legislation'.[8]

The main objective of the Services Directive was expressed in its Preamble and Article 1 – the completion of the Single Market for services in the EU.[9] In a wider context, removing barriers to trade within the Single Market of the European Union has been one of the foundations of the common borderless area for trade in goods and services among the Member States of the European Union since the establishing of the Single Market in 1992. Nevertheless, almost three decades later, in 2020, the European Commission still regarded this objective as one of the most pressing issues under economic policy. Two out of five parts of the Commission's so-called 'March Package', aimed at stimulating a long-term economic growth in the European Union, were devoted to the barriers in the Single Market and the improvement of enforcement of their eradication.[10] Removing the barriers in the Single Market also seems to be an on-going concept for the recovery of the economy of the EU after the crisis caused by

1 OJ L376/36.

2 Deadline for transposition to national legal orders expired on 28 December 2009.

3 See more: Peter Timmerman, *Legislating amidst public controversy: the services directive* (Gent 2009).

4 Vassilis Hatzopoulos, 'Assessing the Services Directive (2006/123/EC)' in *Cambridge Yearbook of European Legal Studies* (2007/1) vol 10, p. 236.

5 See for criticsm Catherine Barnard, 'Unravelling the Services Directive' [2008] 45 CMLR 323–394; Gareth Davies, 'The Services Directive: extending the country of origin principle, and reforming public administration' [2007] 32(2) ELR 232–245; Hatzopoulos (n 4) 236–261. See further: Maria Wiberg, *The EU Services Directive: Law or Simply Policy?* (The Hague 2012); Fritz Breuss, Gerhard Fink, Stefan Griller (eds) *Services Liberalisation in the Internal Market* (Vienna/NewYork 2008).

6 The most criticized element was scrapping the Services Directive from the country of origin and replacing it with less efficient mutual recognition instruments and a wide range of exclusions from the scope of its application, resulting in ambiguity and unfulfilled potential. See more on the topic of mutual recognition and a country of origin principle: Hatzopoulos(n 4) 236–261; Vassilis Hatzopoulos, *Regulating Services in the European Union* (Oxford 2012) 274–287; Karsten Engsig Sørensen 'The Country-of-Origin Principle and Balancing Jurisdiction between Home Member States and Host Member States' [2019] 30(1) EBLR 37–76.

7 See for criticism Hatzopolous, *Regulating* (n 6) 351–352; Hatzopoulos, *Assessing* (n 4) 244 and 261; Barnard (n 5) 340–350; Davies (n 5) 233–234.

8 Hatzopoulos, Assessing (n 4) 243–244.

9 See recital 1 of the Preamble which frames the Single Market for services as 'an area without internal frontiers in which the free movement of services is ensured' and the main objective of the Services Directive as 'essential in order to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress (...)'. There is further detail on the barriers in recitals 2, 3, 4, 5, 6, 7, and following 37–116 of the Preamble. Pursuant to Article 1 '[the Services] Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services'.

10 These being Commission, 'Long-term action plan for better implementation and enforcement of single market rules' COM(2020) 94 final <*https://ec.europa.eu/info/sites/info/files/communication-enforcement-implementation-single-market-rules_en_0.pdf*> accessed 10 April 2022 and Commission, 'Identifying and addressing barriers to the Single Market' COM(2020) 93 final <*https://ec.europa.eu/info/sites/info/files/communication-eu-single-market-barriers-march-2020_en.pdf*> accessed 10 April 2022 with accompanying Staff Working Document, 'Business Journey on the Single Market: Practical Obstacles and Barriers' SWD(2020) 54 final <*https://ec.europa.eu/info/sites/info/files/eu-single-market-barriers-staff-working-document_en.pdf*> accessed 10 April 2022. The Commission established a new body to target the remaining barriers called the Single Market Enforcement Taskforce (SMET) as part of that package, the first meeting of which was convened in a particularly difficult moment of the re-emerging of national borders within the EU as a result of national measures introduced unilaterally, EU-wide, by virtually all Member States and, ultimately, also the whole EU to prevent the spread of the Coronavirus pandemic.

the Coronavirus pandemic – both in the plans of the Commission[11] and in views expressed by the Member States.[12]

The Services Directive has been also the subject of interpretation by the Court of Justice of the European Union (the CJEU) – the total number of cases related to the Services Directive issued since the lapse of the transposition period (28 December 2009) amounts to 50[13] – 43 in response to the preliminary questions of the national courts and 7 as a result of the Commission's complaints. Nevertheless, an encompassing assessment of the CJEU's case law on the Services Directive is absent in the literature. Therefore, my ambition is to fill this vacuum and present a coherent analysis of the judicial reception of the Services Directive in the context of the main objective of this legal act – removing barriers for cross-border trade in services in the EU. This paper has been divided into five sections: Section 2 briefly presents the liberalization model implemented by the Services Directive, its reception in the literature and a quantitative assessment of the effectiveness of the Services Directive in reaching its objectives. As the Services Directive, in order to establish a Single Market for services, covers the freedom of establishment and the freedom of services, Section 3 is devoted to the delimitation between them conducted by the CJEU. Section 4 comments on the approach of the CJEU towards the various models of liberalization provided by the Services Directive. The next two sections set out the approach of the CJEU to the restrictions introduced by Member States (Section 5) and the justification grounds acknowledged by the CJEU under the framework of the Services Directive (Section 6). The conculsions are presented in Section 7.

2. PRELIMINARY OBSERVATIONS – THE ADDED VALUE OF SERVICES DIRECTIVE FOR REMOVING BARRIERS IN TRADE WITH SERVICES WITHIN THE EU?

The objectives of the Services Directive are complementary to the wider policy and political objectives of the EU enshrined in the Treaties. This should lead to mutual reinforcement and legislation that *truly* aims at removing internal barriers to establishing a Single Market for services. However, due to the numerous compromises in the legislative process of drafting, preceding the adoption in 2006, the width and depth of the legislative impact on the current landscape of barriers have been also compromised – this conclusion can be drawn from the list of 2019 and 2020 initiatives presented in the Section 1[14] and also from the critical assessment of the Services Directive presented in the literature.[15] It is frequently raised that the provisions of the Services Directive codify the case law of the CJEU in matters related to the freedom of establishment and the freedom of services issued on the grounds of the Treaty provisions – Articles 49–55 and Articles 56–62 of the Treaty on the Functioning of the European Union (the TFEU).[16]

11 As presented by the Commission in 'Recovery Plan' – see Commission, '*Europe's moment: Repair and Prepare for the Next Generation*' COM(2020) 456 final,<*https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0456&from=EN*> accessed 10 April 2022, pp. 11–12.

12 Removing the barriers in the Single Market which in 'Brussels-Englis' translate as the 'deepening of the Single Market' is one of the main political messages of the 'Joint Declaration of the Ministers responsible for the internal market and industry on the Recovery Plan for Europe' issued after a videoconference on12 June 2020 <*https://eu2020.hr/Home/OneNews?id=345*> accessed 10 April 2022. This has been strengthened in the 'Conclusions on a deepened Single Market for a strong recovery and a competitive, sustainable Europe' and 'endorsed' by the European Council in conclusions of 2 October 2020, EUCO 13/20, <*https://data.consilium.europa.eu/doc/document/ST-13-2020-INIT/en/pdf*> accessed 10 April 2022 – 'The European Council (...) will draw the lessons from the COVID-19 crisis, address remaining fragmentation, barriers and weaknesses, and increase [its] ambition'.

13 As of 27 February 2022.

14 Even strengthened by the emphasis laid on the services in COMPET 437, doc. 9743/19 (n 13) point 15 of which declares that the Council 'ACKNOWLEDGES that barriers remain in the services market, CALLS on the Commission and Member States to work together in partnership on removing barriers, based on specific challenges encountered by businesses; CALLS on the Commission to provide further guidance to improve the implementation of existing rules and instruments in services, and to facilitate mutual learning through the detection and sharing of experiences and best practices between Member States'. This approach was repeated in COMPET 397, doc. 10698/20 (n 13) point 20 of which states that the Council 'HIGHLIGHTS the opportunities that optimal functioning of the Single Market for services would offer and STRESSES the need to deepen cross-border integration of the services markets'.

15 See for criticism Barnard (n 5); Davies (n 5); Hatzopoulos, Assessing (n 4) 236–261.

16 See more on the role of the Court in regulating services in the Single Market: Hatzopoulos, *Regulating* (n 6) 179–221; Vassilis Hatzopoulos, 'The Court's Approach To Services (2006–2012): From Case Law to Case Load' [2013] 50 CMLR 459–502.

For these reasons, it could have been assumed that, once put into hard legislation and implemented in the Member States' legal orders, the long-established principles governing the exercise of freedom of services in the EU would be granted a stable and foreseeable framework. In this way the level of regulatory uncertainty for service providers in the EU would be reduced (according to recital 5 of the Preamble)[17] and the Services Directive would contribute to the effective removal of the most burdensome barriers. Thus, the objectives of the Services Directive would be fulfilled. Unfortunately, the opposite is true. The reasons for which the impact of the Services Directive on the level of legal certainty should be assessed negatively derive from the complex system of exclusions and derogations from scope of application of the Services Directive and its judicial reception. Fragmented implementation by Member States has also negatively affected certainty as to the applicable legal regime. Their hesitance and reluctance concerning the implementation of the provisions of the Services Directive makes it far from complete. The problem of an unfinished eradication of barriers to cross-border trade and free flow of services in the Single Market persists. In this respect, the actions of the European Commission have also not been sufficiently effective. The Commission issued the jointly reasoned opinion on infringements of 12 Member States which failed to implement all provisions of the Services Directive in June 2010. The total number of judgements of the Court, initiated by the Commission, referring to the Services Directive, delivered after the lapse of its transposition period, amounts to 12, and in half of them the Commission made the complaint before the end of December 2009. The Commission also undertook various actions with the use of soft law measures to encourage and facilitate the transposition of the Services Directive for the Member States.[18] The attitude of Member States and lack of effects of Commission's enforcement efforts results in a significant disadvantage to the development of the internal market for services and economic growth in the EU.[19] The conclusions resulting from the data presented in ***Figure 1*** below are twofold.

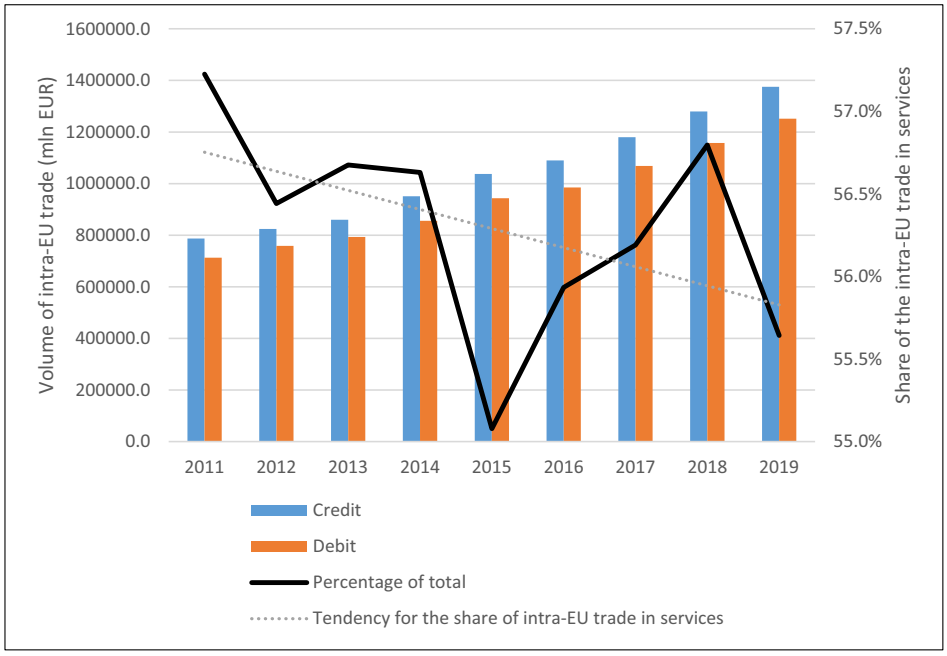

Figure 1 Intra-EU trade in services (volume and share of the intra-EU trade in comparison with the extra-EU trade).

Own study, source: *Eurostat*.

17 The amount of measures taken to implement the Services Directive varies from a handful (1 in Bulgaria and Estonia, 2 in Ireland, 4 in Poland) to several hundred (109 in Greece, 135 in Denmark, 220 in Germany and a record 524 in Hungary) as notified by the Member States. See: 'National transposition measures communicated by the Member States concerning the Services Directive' <*https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32006L0123*> accessed 12 April 2022.

18 See: Press release of the Commission, 'Services Directive: good progress on implementation, but more needs to be done', 24.6.2010, IP/10/821 <*https://ec.europa.eu/commission/presscorner/detail/en/IP_10_821*> accessed 19 April 2020). See also *Handbook on implementation of the Services Directive* (2008 Luxembourg), but see also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'On the implementation of the Services Directive. A partnership for new growth in services 2012–2015' COM(2012) 261 final.

19 Various reports indicate a possible significant GDP increase due to the fulfilment of the transposition of the Services Directive. See, inter alia, Josefa Monteagudo, Aleksander Rutkowski, Dimitri Lorenzani, 'The economic impact of the Services Directive: A first assessment following implementation' Economic Papers of the European Commission 456, June 2012. For more on the possible economic benefits, see Emilio Fernández Corugedo, Esther Pérez Ruiz, 'The Services Directive: Gains from Further Liberalization' IMF Working Paper, WP/14/113, July 2014. See also COMPET 437, doc. 9743/19 (n 13) point 7.

DOI: 10.36633/ulr.718

It shows that the volume of trade in services between the Member States was growing in the period between 2011 and 2019. However, this process has been not translated into the relative intensification of the intra-EU trade in services. The share of trade in services between the Member States has declined in comparison with the extra-EU countries and this tendency is relatively stable and clearly negative. This further reinforces observations that the significance of intra-EU trade in services for the EU economy has been gradually decreasing. This is contrary to the objectives set out in recitals 2–4 of the Preamble to the Services Directive. Hence, the Services Directive has so far failed to deliver the economic effects that have been aimed at.

In these circumstances, it might be useful to take a closer look at how the Services Directive has been interpreted at the EU level and what impact it might have on this economic sector. All the numerous instruments targeted at removal of barriers are admittedly less complex and confusing than the derogations and exclusions included in the Services Directive, yet still extensive. The instruments designed in the Services Directive are in part aimed at the legislative barriers in the Member States' legal orders that directly impede the freedom of establishment (such as authorisation schemes[20] or mandatory requirements related to the legal form, the shareholding structure, or providing services in accordance with the prescribed minimum/maximum tariffs[21]). Another group of provisions targets the freedom of services (these are bans on certain forms of commercial communication, excluding from certain forms of activity or limiting to the one precisely determined activity or imposing an obligation of maintaining the registered office in their territory[22]). Finally, some provisions address administrative burdens, such as fragmented procedures and forms of communication of the Member States' authorities with businesses in Europe[23] Additionally, the Services Directive directly addresses the rights of service recipients[24] and the harmonization of private regulations through the convergence programme.[25]

In general, the logic behind such a legal design received differing opinions from the commentators around the time when the Services Directive appeared. On the one hand, many authors raised the main flaw of the negotiations phase that had significantly impacted the final logic. According to them, it was the failure of the Commission to protect the 'country of origin principle' that had been originally provided by the proposal and that was replaced with the 'mutual recognition mechanism'.[26] This replacement was, in itself, a less ambitious approach than was both possible and needed. On the other hand, some authors argued that the main innovation and the biggest positive impact would not have resulted from the part directly related to removing the barriers (as the provisions of the Services Directive *merely* codified the case law that the Court had issued in that respect so far), but rather from harmonizing administrative procedures, modernizing and unifying ways of communication of administration with service providers throughout the EU, increasing cooperation of administration in the Member States and more user-friendly alternative disputes resolution instruments (such as the positively recognized system of administration cooperation, *SOLVIT*).[27] My own assessment of

20 Covered by Articles 9–13 of the Services Directive regulating respectively the conditions allowed for establishing or maintaining an authorisation scheme (Article 9), conditions for granting an authorisation (Article 10), duration of the authorisation (Article 11), selection from among several candidates (Article 12) and the authorisation procedures (Article 13). See further Barnard, (n 5) 352–356 and Hatzopolous Assessing (n 4) 254–255.

21 Articles 14 and 15 cover 'requirements prohibited or subject to evaluation', whereas requirements prohibited are covered by Article 14 and requirements to be evaluated by Article 15; see further Barnard (n 5) 356–359 and Hatzopolous, *Assessing* (n 4) 254–255.

22 Covered by Article 16, see further Barnard (n 5) 359–371.

23 These are provisions aimed at administrative simplification in Chapter II, regulating simplification of procedures (Article 5), points of single contact (Article 6), right to information (Article 7) and procedures by electronic means (Article 8), as well as in Chapter VI dealing with administrative cooperation regulating mutual assistance (Articles 28, 29 and 35), rules on supervision of Member States (Articles 30 and 31), alert mechanisms (Article 32), exchange of information on the good repute of providers (Article 33), accompanying (Article 34) and implementing (Article 35) measures. See more in the literature referred to in footnote 32.

24 Covered by Articles 19–21, regulating prohibited restrictions (Article 19), non-discrimination clauses (Article 20) and assistance for recipients (Article 21). See further Barnard (n 5) 371–376 and Hatzopolous, *Assessing* (n 4) 255–256.

25 Covered by Articles 37–43; see further Hatzopolous, *Assessing* (n 4) 256–257.

26 See further Hatzopoulos, Assessing (n 4) 236–261; Hatzopoulos, *Regulating* (n 6) 274–287, Barnard (n 5) 360–363, Sørensen (n 6); contra: Davies (n 5) 238–239.

27 See further Barnard (n 5) 381–393, Hatzopolous, *Assessing* (n 4) 258–260, Hatzopolous, *Regulating* (n 6) 284–286 and Davies (n 5) 239–242 and 243–246 (critical).

and elaboration on the judicial reception of the provisions of the Services Directive in respect of removing barriers and the CJEU's contribution to achieving its objective, are presented further in the paper.

3. RELATION OF FREEDOM OF SERVICES AND FREEDOM OF ESTABLISHMENT

Along with the reasoning presented in recital 5 of the Preamble to the Services Directive, its provisions cover the freedom of establishment and free movement of services. It results from the lawmakers' belief that 'providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State'. This ability to choose would be distorted if the barriers established in the Member States' legislation related only to the one kind of Single Market freedoms. Therefore, the freedom of establishment is covered by Chapter III of the Services Directive entitled 'Freedom of establishment for providers', whilst the free movement of services is covered by Chapter IV under the title 'Freedom to provide services and related derogations'. Both freedoms are regarded among scholars as interrelated, complementary, and converging.[28] The TFEU itself provides clearly in Article 57 that the freedom of services is the secondary-choice freedom to the freedom of establishment and all other freedoms of the Single Market.[29] It is thus understandable why the delimitation between the freedom of establishment and the free movement of services has not featured predominantly in the CJEU's activities.[30]

As is observed further in this Section, this matter had a limited impact on the possibility of completing the Single Market for services and thus contributing to the main objective of the Services Directive. However, due to the nature of the cases presented to the CJEU, it had to adopt a case-by-case approach. The CJEU did not go beyond the established understanding of the definitions included in the Treaty provisions and developed in the CJEU's case law. This understanding has been repeated for the interpretation of the provisions of the Services Directive – thus the added value of this legal act in this respect has been related to other features.[31]

One of the most recent examples of the CJEU's approach towards delimitations between the freedom of establishment and the free movement of services, in *PI*, was related to providing prostitution services under the cover of a massage parlour by a Bulgarian national in Austria.[32] The Court reiterated in this ruling that prostitution, if provided for remuneration, might be deemed a 'service' within the meaning of the Services Directive, as was previously stated in *Trijber*.[33] However, if this activity is pursued 'for an indefinite period and through a stable infrastructure', it falls within the scope of freedom of establishment, thus under the provisions of Chapter III of the Services Directive, rather than under Chapter IV.[34] Exceptionally, it was of

28 Robin CA White, *Workers, Establishment and Services in the European Union* (Oxford 2004); Alina Tryfonidou, 'Further steps on the road to convergence among the market freedoms' [2010] 35(1) ELR 36–56; Hans D Jarass, 'A Unified Approach to the Fundamental Freedoms' in Mads Andenas, Wulf-Henning Roth (eds) *Services and Free Movement in EU law* (Oxford 2002); Peter Oliver, Wulf-Henning Roth, 'The Internal Market and the Four Freedoms' [2004] 41 CMLR 407–441; Miguel Poiares Maduro, 'Harmony and Dissonance in Free Movement' [2001] 4 Cambridge Yearbook of European Legal Studies 315–341.

29 The definition of services explicitly states that the free movement of goods, capital and people (including the free movement of workers and freedom of establishment) are primary: 'Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'. See also Davies (n 5) 234–236.

30 See in this context the judgment of the Court of 11 June 2020 in Case C-206/19 *KOB*, ECLI:EU:C:2020:463, paras 21–28, where the Court exhaustively presents the analysis leading to the choice of the applicable freedom between the freedom of establishment and free movement of capital, which is an exception rather than the rule.

31 This observation only applies to the delimitation between the freedom of establishment and the free movement of services – there are features of the Services Directive which have been an added value in relation to the Treaty provisions. For example, the provisions of the Services Directive might be applied to purely internal situations, some restrictions are unconditionally prohibited (listed in Article 14). These features have been further developed in the case law of the Court which is not discussed in this contribution.

32 Case C-230/18, *PI*, ECLI:EU:C:2019:383.

33 Joined Cases C-340/14 and C-341/14 *Trijber et al*. ECLI:EU:C:2015:641.

34 See Case C-230/18, *PI* (n 32), paras 46–48. A similar statement, though in the context of Treaty provisions, was issued by the Court in Case C-342/17 *Memoria and Dall'Antonia* ECLI:EU:C:2018:906, para 44.

practical importance for the final outcome of the case since, under the provisions of Chapter III, Member States may introduce authorisation procedures such as exist in Austria, which are not provided for by Chapter IV.[35]

However, the CJEU held, in its ruling in *X and Visser*, that the main purpose of covering the freedom of establishment with Chapter III of the Services Directive was to increase the level of legal certainty.[36] Protecting the freedom of establishment was necessary to achieve the objectives of the Services Directive – eradicating obstacles to trade in services in the internal market. The CJEU added, in *Rina Services*, that 'barriers to freedom of establishment may not be removed solely by relying on direct application of Article 49 TFEU, owing, inter alia, to the extreme complexity of addressing barriers to that freedom on a case-by-case basis'. Therefore, the system established by Chapter III of the Services Directive should deliver an ad hoc exhaustive legislative harmonisation of the requirements imposed by the Member States.[37] As was stated in the Section 2 above, the aim of the Services Directive has not been fulfilled successfully through the legislation, and the practical removal of barriers on a case-by-case basis remains relevant. Nevertheless, the CJEU used cited observations to ground its theleological interpretation and to signal the intention of applying the provisions of the Services Directive to maximize the realisation of the objectives of the Services Directive. Hence, it can be observed that including both freedoms in the Services Directive reinforces the fulfilment of the objective of completing the Single Market for services.

The CJEU has also interpreted the objective of the Services Directive in the context of both freedoms in the following way:

> in that regard, it is clear from Recitals 2 and 5 in its preamble that [the Services Directive] is intended to remove restrictions on the freedom of establishment for providers in the Member States and on the free movement of services between the Member States, in order to contribute to the completion of a free and competitive internal market.[38]

Hence, both freedoms reinforce each other and mutually contribute to the achievement of the Single Market for services. Service providers should have the possibility to choose freely between two regimes, as the CJEU put it in one of the cases, citing recital 5 extensively.[39]

Therefore the details of determining the applicable regime have been dependent on the circumstances of a particular case and were established by the CJEU on an ad hoc basis. These details were frequently determined by the choice of the national court addressing a particular provision in its reference for a preliminary ruling. The CJEU has generally not undermined the choice of national courts regarding the legal benchmark against which the national provisions were examined. Thus, besides an obvious circumstance of carrying out any given activity for remuneration 'for an indefinite period and through permanent infrastructure' clearly indicating the freedom of establishment,[40] the CJEU has not provided to date any general interpretation of the principles, which clearly shows the inherent overall limitations of the regime of Single Market freedoms. These limitations also persist in the more specific context of delimitation between the application of the provisions of Chapter III and Chapter IV of the Services Directive. Therefore, it should be observed that the Services Directive might contribute to the establishment of the Single Market for services and present added value in comparison with the provisions of the TFEU through harmonisation of national legal orders (according to recital 6 of the Preamble). However, this harmonisation has not removed the need to determine the applicable regime on a case-by-case basis and nor has the CJEU's interpretation of the Services Directive's provisions.

The reason why this situation might not be effective in removing barriers to the establishment of the Single Market for services is the risk of fragmentation in the adopted approach of the

35 The lawfulness of which, however, was not under scrutiny by the Court in the case at issue.

36 See Joined Cases C-360/15 and C-31/16 *X and Visser* ECLI:EU:C:2018:44, paras 91–95.

37 See Case C-593/13 *Rina Services* ECLI:EU:C:2015:399, paras 37–38; Cases C-458/14 and C-67/15 *Promoimpresa et al.* ECLI:EU:C:2016:558, para 61.

38 See Case C-119/09 *Société fiduciaire nationale d'expertise comptable* ECLI:EU:C:2011:208, para 26; Case C-57/12 *Femarbel* ECLI:EU:C:2013:517, para 31.

39 See Case C-179/14 *European Commission v Hungary* ECLI:EU:C:2016:108, para 112.

40 In this context see also Case C-215/01 *Bruno Schnitzer* ECLI:EU:C:2003:662, para 31.

Member States. The delimitation between the freedoms is important from the perspective of permissible restrictions, and, as has been shown in the *PI* case, might be of relevance for the practical solution of a case. Therefore, the less room there is for manoeuvre for the Member States in determining the applicable regime, the more harmonised are the conditions for conducting activities by service providers in the EU. Assessing the applicable regime on a case-by-case basis is thus less effective in providing clarity, predictability and stability as to how different forms of activities should be regulated throughout the whole EU and decreases the incentives for services providers for cross-border expansion of their activities (especially for small and medium enterprises according to recital 4 of the Preamble). This observation applies not only to the freedom of establishment and free movement of services but also to other Single Market freedoms.

In of the more recent cases the CJEU declared that even if the overlap between two possibly applicable regimes (freedom of services and freedom of capital) existed, it should be resolved to base the ruling on the grounds of only one of the regimes. Since the national provisions at issue had limited the access to acquire agricultural land for the purposes related to pursuing farming activities, it was not possible to delimit between the free movement of establishment and the free movement of capital solely based on the wording of the national provisions. Consequently, the Court took a subjective perspective and examined the intention of the party whose freedom was limited. As it seemed clear that the individual, in this case, was seeking to acquire the land with the intention of pursuing farming activities by himself, and not only to hold the asset for investment purposes, the CJEU declared that the national provisions fell within the scope of freedom of establishment and thus were covered by the Services Directive.[41]

This example illustrates how much depends on the individual assessment of the national courts and the CJEU and what problems that might cause for potential cross-border providers of services. The assessment of personal motivations is always less precise and subject to diverse interpretation than a harmonized framework provided by legislation at EU level. As part of such a framework, one could determine both time thresholds and the binding definitions of 'permanent infrastructure' that would provide legal certainty and allow for the making of an informed decision on cross-border expansion without the need to check the conditions set out in the legislation of all 27 Member States. This fundamental principle is more addressed to the lawmakers than the CJEU, but the evidence on the current insignificant effect of the Services Directive on the market for services in the EU, as presented in the Section 2, suggests that there exists significant room for improvement, both through legislation and case law. In these circumstances, in my view, the current situation has not contributed positively to the achievement of the objectives laid out in the Services Directive and has not been resolved by the CJEU in the interpretation of the Directive's provisions.

4. JUDICIAL RECEPTION OF THE LIBERALISATION MODELS OF THE SERVICES DIRECTIVE

The delimitation between the applicable regimes of the freedom of establishment and the free movement of services is relevant in the context of the adopted liberalisation model for each freedom. The liberalisation model also determined the effectiveness of the Services Directive in eradicating barriers for the trade in services in the EU. Therefore, assessment of the contribution of the Services Directive to the completion of the Single Market for services is only possible on the analysis of the case law related to the relevant provisions of the Services Directive. The CJEU, in its interpretation, focused mainly on the following groups of instruments: authorisation schemes covered by Article 9, Article 10, Article 11, Article 12, and Article 13 of the Services Directive which were the subject of scrutiny in 9 rulings,[42] and the mandatory 'prohibited' national requirements for establishing providers' services in the Member States, listed in Article 14, and requirements 'to be evaluated' covered by Article 15 of the Services Directive, which

41 Case C-206/19 *KOB* (n 30), paras 21–31.

42 Case C-206/19 *KOB* (n 30); See also Case C-62/19 *Star Taxi App* ECLI:EU:C:2020:980; Case C-724/18 *Cali Apartments* ECLI:EU:C:2020:743; Case C-293/14 *Hiebler* ECLI:EU:C:2015:843; Cases C-340/14 and C-341/14 *Trijber* (n 33); Cases C-458/14 and C-67/15 *Promoimpresa* (n 37); Case C-393/17 *Kirchstein* ECLI:EU:C:2019:563; Case C-137/17 *Van Gennip et al.* ECLI:EU:C:2018:771; Case C-316/15 *Hemming et al.* ECLI:EU:C:2016:879.

were jointly referred to by the CJEU in 12 rulings.[43] Further, the CJEU analysed the conditions for restrictions on the freedom of services covered by Article 16 and Article 17 mentioned in 3 rulings,[44] the conditions for commercial communication by the regulated professions covered by Article 24 of the Services Directive analysed in 1 ruling[45] and the requirements which oblige providers of services to exercise a specific activity exclusively or which restrict the exercise jointly or in partnership with different activities covered by Article 25 of the Services Directive mentioned in 2 rulings of the CJEU.[46]

This brief quantitative presentation gives an insight into what problems constitute the core of the judicial activity of the Court and simultaneously allows one to draw initial conclusions. Firstly, the CJEU's rulings are (almost) exclusively related to the provisions constituting the codification of its jurisprudence. It is not all the fault of the CJEU, as it is bound by the scope of preliminary questions and the infringement proceedings initiated by the Commission. Nevertheless, these circumstances translate into a limited impact for adding a new dimension to the established legal regime of providing services in the EU. The need for such innovation is justified to overcome the negative (or at least neutral) impact of the Services Directive for the services market in the EU. As stated in the Section 2, such a situation is in strong contrast to the high hopes of establishing a new legal framework and principles for conducting services in the EU, originally related to the proposal of the Services Directive and is also contrary to the Services Directive's objectives. However, as will be observed further in this Section it could still present an added value concerning the legal certainty, clarity and consistency on the provisions of the Services Directive.

Secondly, the quantitative analysis of cases dealing with certain parts of the Services Directive indicates important characteristics of its judicial reception and practical application. At the level of national courts, questions on the freedom of establishment arise more frequently than questions regarding the interpretation of the provisions aimed at removing the restrictions on the free movement of services. The enforcement activity of the Commission is also focused on the requirements, which have been maintained or newly introduced by the Member States, for establishing service providers, rather than on any other issue. This shows that effective and comprehensive implementation of the main objective of the Services Directive rests on the Commission, the CJEU and the national courts. Simultaneously the focus of these actors has shifted towards national regulations affecting freedom of establishment and, to a lesser extent, towards free movement of services. It might result from the fact that national courts are more accustomed to the national provisions and interpretation traditions on access to various professions and services (in particular, the long-established ones). However, in the context of a declining share of trade in services within the EU, as presented in the Section 2, such an approach could further decrease the incentives for cross-border activities, especially from the perspective of small and medium enterprises (SMEs).[47] The current focus on the freedom of establishment may be effective for removing barriers for permanent and durable presence in another Member State, but not for the occasional providing of services in the cross-border context. As the evidence suggests, the lack of cases related to the free movement of services is not a signal that this regime is perfectly suited for its purpose and does not generate any litigation and disputes. It might result from the fact that these barriers are less evident and thus more difficult to be addressed by the national courts or the Commission.

43 Case C-593/13 *Rina Services* (n 37); Case C-727/17 *ECO-WIND Construction* ECLI:EU:C:2020:393; Case C-297/16 *CMVRO* ECLI:EU:C:2018:141; Case C-31/16 *X and Visser* (n 36); Case C-377/17 *European Commission v Federal Republic of Germany* ECLI:EU:C:2019:562; Case C-729/17 *European Commission v Republic of Greece* ECLI:EU:C:2019:534; Case C-209/18 *European Commission v Republic of Austria* ECLI:EU:C:2019:632; Case C-171/17 *European Commission v Hungary* ECLI:EU:C:2018:881; Cases C-473/17 and C-546/17 *Repsol et al.* ECLI:EU:C:2019:308.

44 Case C-179/14 *Commission v Hungary* (n 39); Case C-171/17 *Commission v Hungary* (n 43); Case C-66/18 *European Commission v Hungary* ECLI:EU:C:2020:792.

45 Case C-119/09 *Société fiduciaire nationale d'expertise comptable* (n 38).

46 Case C-384/18 *European Commission v Kingdom of Belgium* ECLI:EU:C:2020:124; Case C-209/18 *Commission vs. Austria* (n 43).

47 Fragmentation of the legal framework related to services has been identified as an 'obstacle' by 70% of respondents in the survey conducted for the European Commission among SMEs in the EU, according to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An SME Strategy for a Sustainable and Digital Europe, 10.3.2020, COM(2020) 103 final, p. 7.

Thirdly, the focus of the Court has been on the core of the Services Directive – the provisions which regulate removing the restrictions in access to foreign markets for service providers in the EU. It proves that the CJEU's role in achieving the objective of establishing the Single Market for services has not diminished with the adoption of the Services Directive. In the context of the above, the CJEU is still relevant and indispensable for realising its aims. The CJEU, thanks to its unique institutional position and an unquestionable authority, is usually perceived as the most 'pro-Union acting' institution of the EU and is also best suited for this role.[48] It remains the sole politically neutral and independent guarantor of the common interests of the EU within the institutional matrix of implementing the Services Directive. As opposed to the self-oriented particularities and a certain degree of hesitance of Member States in implementing the Services Directive, as well as politically determined and oriented priorities of the Commission, it may act in a fully objective-oriented way and further reinforce the harmonisation of regulations on the market for services in the EU. The next two Sections contain the analysis of the CJEU's activity related to two areas that determine the extent of the services market liberalisation – national legislation which constitutes restrictions on the freedom of establishment and the free movement of services, and the justified exceptions under the regime provided by the Services Directive.

5. FORMS OF RESTRICTIONS

The CJEU delivered, in its rulings, an extensive overview of the forms of restrictions. As such have been interpreted any legislative requirements of the Member States, which hinder providers or recipients of services in the Single Market from making use of their freedoms enshrined in the Services Directive. Among such requirements, there are different kinds of instruments and measures, some of which may seem very far removed from regulating the services themselves. The Court, as explained above, had to take a case-by-case approach towards determining which kinds are covered by particular provisions of the Services Directive. This is quite understandable, considering the variety of cases that were presented to it by national courts or by the Commission. The analysis also covers the issue of the horizontal direct effect of the provisions of the Services Directive and to what extent the Member States are accountable for the actions of entities other than public authorities. What also follows from the analysis of the rulings, is that the Court consistently sought a connection with the Services Directive, sometimes arguably extending the scope of its application further than prescribed by the Services Directive's provisions. The analysis contained in this Section has been structured around the subject of the restrictions at issue.

5.1. RESTRICTIONS RELATED TO THE QUALITY OF SERVICES

As a restriction related to the quality of services, the ban on undertaking multidisciplinary activities imposed on financial accountants by a national professional association that in effect precludes combining the exercise of this profession with others (such as a real estate agent, an insurance broker or providing certain financial services), has been recognised by the CJEU. This ban was introduced by the professional association in its Code of Ethics which was later endorsed by Royal Decree.[49] Additionally, this Code prohibited financial accountants from undertaking ancillary activities such as artisanal, agricultural, or commercial activities.[50] Both of these limitations, stemming from the internal regulations adopted by the private bodies and endorsed by the state authorities, were acknowledged by the CJEU as **'**requirements for the regulated profession' in the meaning of Article 25(1) of the Services Directive, and thus subject to further scrutiny of their compatibility with justification principles. A similar interpretation was applied in the case of national provisions that set limitations on civil engineers on establishing companies with persons who 'carried out trade'.[51] However, the situation in which a ban on canvassing imposed by a professional national association of qualified accountants was interpreted by the CJEU as a prohibition of commercial activity imposed on the regulated

48 See Hatzopolous, *The Court's* (n 20) 498–500.

49 Case C-384/18 *Commission v Belgium* (n 46), paras 43–45.

50 Case C-384/18 *Commission v Belgium* (n 46), paras 65–68.

51 Case C-209/18 *Commission vs. Austria* (n 43), paras 116–119.

profession within the meaning of Article 24 of the Services Directive[52] may be regarded as another example of making a Member State accountable for the actions of the professional association.

These situations presented examples of indirect horizontal effectiveness of the Services Directive – the actions were undertaken at the level of professional associations but were endorsed and authorized by the state authorities. Such an effect has been not immediately evident from the wording of the provisions of the Services Directive, even though the Preamble and Article 22 explicitly refer to codes of conduct at the national level (it should not be confused with the encouragement given in recitals 100–113 and Article 37 to create codes of conduct at the European level for professional associations for certain professions). The analysis of the case law also provides an argument for the conclusion that, under the requirements of Articles 24 and 25 of the Services Directive, private bodies may become accountable for their restrictions if they have power conferred by the state to regulate access to certain professions. The CJEU thus showed a consistent and coherent approach and strengthened the objective of the Services Directive in the form of removing barriers for the trade in services within the EU.

5.2. RESTRICTIONS PRESENTING REQUIREMENTS 'PROHIBITED AND TO BECOME EVALUATED'

Another group of rulings constituted the cases in which the CJEU acknowledged certain obligations imposed by national provisions of Member States as mandatory 'requirements' within the meaning of Article 14 or Article 15 of the Services Directive. The CJEU declared that 'any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States'[53] should be interpreted as a 'requirement'.

One such issue, most frequently presented in the rulings of the CJEU, was an obligation imposed by the Member States on the providers to establish the registered office in that Member State where the service is provided.[54] Since such requirement is explicitly covered by the prohibition included in Article 14 of the Services Directive, the CJEU on numerous occasions interpreted this requirement as irreconcilable with the freedom of establishment and the objectives of the Services Directive. The CJEU treated in the same way the imposition of maximum tariffs for certain occupations, such as architects and engineers for planning services,[55] introducing a state monopoly for providing services of mobile payments[56] and imposing certain requirements regarding the ownership of shares in retail companies concerned with veterinary medicines,[57] imposing a territorial restriction on licences for carrying out the services of a chimney sweep[58] or pursuing the retail sale of clothes and shoes.[59] The conditions of domicile and language proficiency in a national language imposed on private persons wishing to acquire agricultural land in Latvia to pursue farming activities[60] were also interpreted as discriminating and falling within the scope of the freedom of establishment. As being incompatible with Article 14(6), the CJEU also acknowledged the presence of potential competitors in the collegiate body appointing the operation permit to applicants.[61]

The approach of the CJEU has been uniform in all the cases presented above – if the CJEU found any possibility to regard national legislation in the light of the requirements of Article 14, such legislation was interpreted as constituting unconditionally prohibited action. The unequivocal

52 Case C-119/09 *Société fiduciaire nationale d'expertise comptable* (n 38), paras 24–42.

53 Case C-171/17 *Commission v Hungary* (n 43), para 77; Case C-31/16 *X and Visser* (n 36), para 119.

54 As was the issue for veterinary surgeons in Case C-209/18 *Commission vs. Austria* (n 43); issuing voucher cards of employers in Case C-179/14 *Commission v Hungary* (n 39); providing certification services in Case C-593/13 *Rina Services* (n 37).

55 Case C-377/17 *Commission v Germany* (n 43); Case C-261/20 *Thelen Technopark Berlin v MN*, ECLI:EU:C:2022:33, para 46.

56 Case C-171/17 *Commission v Hungary* (n 43).

57 Case C-297/16 *CMVRO* (n 43).

58 See Case C-293/14 *Hiebler* (n 42).

59 See Case C-31/16 *X and Visser* (n 36).

60 Case C-206/19 *KOB* (n 30), para 28.

61 See Case C-325/20, *BEMH and Conseil national des centres commerciaux* ECLI:EU:C:2021:611.

wording of Article 14, in the clear and coherent interpretation of the CJEU, constitutes an added value of the Services Directive in achieving its objectives of establishing a Single Market for services.

The following were in contrast interpreted as 'other' requirements, 'to be evaluated': the conditions referring to the legal form and/or shareholding structure,[62] limiting access to certain activities due to their specific nature,[63] provisions imposing minimum or maximum tariffs for services of architects and planning engineers or delivery of gas bottles,[64] obliging the provider of the service to exercise an ancillary service to the main one,[65] preserving the issue of voucher cards for banking and financial establishments,[66] as well as laying out limitations on trade in certain goods in prescribed areas in a local zoning plan.[67] Classification under Article 15 was declined in the case of legislation which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function, under the reasoning that producing a product (electricity) cannot be regarded as a service in itself.[68]

Out of all the forms of restrictions described above, the acknowledgment of the local zoning plan as a requirement relating to the location of the establishment of the provider of services within the meaning of Article 15 of the Services Directive, declared by the CJEU in its ruling *X and Visser*, is particularly surprising. A few years earlier, the CJEU declared in its ruling in *Libert*, that Recital 9 of the Services Directive pointing at 'requirements, such as (...) rules concerning the development or use of land, town and country planning, building standards' jointly with Article 2(2)(j) of the Services Directive related to social housing, resulted in the inapplicability of the Services Directive to examining the prohibition of certain local zoning plans.[69]

In contrast, in *X and Visser*, the CJEU explicitly dismissed the observation from *Libert*. Instead, it declared that, while the prohibition on certain activities laid out in the local zoning plan was equally influencing the legal position of individuals acting in their private capacity and pursuing an economic activity, it set conditions that were necessary to be fulfilled by the service providers and might weaken their chances of establishing a business in a certain area. Hence, the local zoning plan, by excluding a certain area of the town from the possibility of providing services of trade in certain goods there, had solely an effect on conditions of performing such services, even though the local zoning plan itself did not formally address the providers of services specifically, but all citizens generally.[70] Recital 9 alone, as consistent with the objective of the Services Directive, did not lead to the general exclusion of local zoning plans from the scope of its application. Therefore, the local zoning plan might be interpreted as imposing 'requirements' within the meaning of the Services Directive.[71] The main consequence of such an outcome was that the Court could apply the proportionality test to the provisions (prohibitions) of the local zoning plan (when Article 15, and not Article 14 applied) and assess their conformity with the overriding reasons related to public interest and thus with the provisions of the Services Directive and consequently becoming subject to the notification procedure.

It is quite a far-reaching interference with the local planning competence of municipalities and not particularly aligned to the subsidiarity principle of EU law. An argument for approving such

62 Case C-209/18 *Commission vs. Austria* (n 43), paras 78–84 for civil engineers, patent agents and veterinary surgeons; Case C-729/17 *Commission v Greece* (n 43), paras 56–63 for institutions educating mediators; Case C-179/14 *Commission v Hungary* (n 39), paras 59–65 to the extent of maintaining the prescribed legal form for issuers of voucher cards; Case C-297/16 *CMVRO* (n 43), para 77 for the conditions imposed on holders of shares in companies trading in veterinary medicines.

63 Case C-297/16 *CMVRO* (n 43), paras 51–53 where the Court examined limitations in access to the activity of trading in veterinary medicines; Case C-171/17 *Commission v Hungary* (n 43), paras 77–79 where the limited activity was the provision of mobile payments.

64 Case C-546/17 *Repsol* (n 43), paras 41–44; Case C-377/17 *Commission v Germany* (n 43), paras 59–66.

65 Case C-546/17 *Repsol* (n 43), para 42.

66 See Case C-179/14 *Commission v Hungary* (n 39), para 82.

67 Case C-31/16 *X and Visser* (n 36), paras 124–131.

68 Case C-727/17 *ECO-WIND* (n 43), paras 57–60.

69 Joined Cases C-197/11 and C-203/11 *Libert et al*. ECLI:EU:C:2013:288, paras 103–107.

70 Case C-31/16 *X and Visser* (n 36), paras 124–125.

71 Case C-31/16 *X and Visser* (n 36), paras 122–123.

an approach of the CJEU would imply that the local authorities of Member States should not be able to circumvent the provisions of the Services Directive through banning certain activities in certain areas and by exploiting the zoning planning competencies to protect certain markets, local providers, etc. from the competition of foreign or external providers. On the other hand, it is highly dubious whether the CJEU, even by knowing the facts presented by the national court in the preliminary procedure, is in a better position to evaluate properly the local circumstances leading to the issuing of a local zoning plan at municipality level. Even though the CJEU did not expressly control the legality of the discussed prohibition in the local zoning plan, but limited itself to examining the justification for prohibiting the retail of certain goods in a certain area, it is still a competence that the legislators seemingly did not wish to confer on the CJEU.

Recital 9 is unequivocal in its wording that local plans should be excluded from the scope of application of the Services Directive. This is not repeated in the text of the Services Directive itself, but the CJEU did not provide sufficient reasoning for interpreting recital 9 contrary to its explicit wording. The CJEU indicated that a prohibition on locating certain shops in certain areas enshrined in the local zoning plan was addressed only to individuals contemplating the pursuit of retail in certain goods, and not to the individuals acting in their private capacity.[72] However, by stating this, the CJEU neglected the perspective of potential recipients of the services, as well as the owners of neighbouring premises who would act in their private capacity by, for example, shopping in the area if it was allowed by the local zoning plan. For those reasons, the reasoning of the CJEU, related to acknowledging the local zoning plans as a form of restriction within the scope of the Services Directive, should be evaluated critically.

5.3. FREEDOM TO PROVIDE SERVICES

On the margin of observations related to Article 14 and Article 15, it should be noted that, to a limited extent, the CJEU also interpreted Article 16 of the Services Directive. According to the CJEU's interpretation, setting the conditions for maintaining an office in every municipality above a certain threshold of the population is equal to 'imposing an obligation' within the meaning of this provision.[73] The same consequence was attributed to the mandatory condition of offering higher education in the state in which the institution concerned had its seat.[74] The limited case law in this area does not allow a formulation of more detailed conclusions.

5.4. RESTRICTIONS IMPOSED BY AUTHORISATION SCHEMES

As mentioned above, the CJEU put under scrutiny national provisions introducing authorisation schemes. The zoning plans discussed under 5.2 were declared not to have such a character, as the CJEU regarded them as falling outside the scope of the definition provided in Article 4(6) of the Services Directive.[75] The nature of an authorisation scheme was most recently confirmed by the obligation to register as residents in one of the Member States and to demonstrate that their knowledge of the official language of that Member State corresponds to at least level B.2, which requires them to be able to converse on everyday subjects and on professional matters in the official language of that Member State, in order to be able to acquire agricultural land with the intention of pursuing the activity of farming thereon.[76] The CJEU also declared that such a category could be fulfilled by schemes of legislation at municipal level for regulating services in the field of accommodation[77] and intermediary services between taxi drivers and passengers.[78] Simultaneously, the CJEU provided a distinction between authorisation schemes and requirements within the meaning of the Services Directive, observing that the distinction is to be drawn 'inasmuch as [authorisation] involves steps being taken by the service provider and

72 See Case C-31/16 *X and Visser* (n 36), para 124.

73 Case C-179/14 *Commission v Hungary* (n 39), paras 104–107.

74 See Case C-66/18 *Commission v Hungary* (n 44), paras 198–200.

75 Case C-31/16 *X and Visser* (n 36), paras 113–118; Case C-206/19 *KOB* (n 30), para 35.

76 Case C-206/19 *KOB* (n 30), paras 31–35.

77 Case C-724/18 *Cali Apartments* (n 42), paras 46–53, where the Court examined whether 'the exercise of certain activities consisting in the letting of residential premises subject to prior authorisation is covered by the concept of "authorisation scheme"'.

78 Although with an inconclusive result of this examination – see Case C-62/19 *Star Taxi App* (n 42), paras 85–89.

DOI: 10.36633/ulr.718

a formal decision whereby the competent authorities authorise that service provider's activity' whilst 'requirements' do not demand that the provider must undergo the specified procedure.[79]

The character of authorisation schemes has been also attributed by the CJEU to concession schemes[80] and the automatic renewal of them was declared by the CJEU to constitute an explicit infringement of Article 12(2) of the Services Directive.[81] By contrast, the CJEU allowed the maintaining of double (federal and local) authorisation schemes for the same activity (storage of fireworks) if it leads to the protection of different values and the pursuit of different objectives (public order/security and environmental protection).[82] The CJEU also interpreted as an authorisation scheme national provisions making mandatory the soliciting of the competent authorities in order to obtain a formal document authorizing a service provider to confer master's degrees.[83] Another example of an authorisation scheme was referred to in the ruling in *Hiebler* in which the Court held that any limiting of licences for chimney sweeping to a particular geographical area might constitute a restriction on the freedom of services.[84] Imposing an obligation to pay a fee for renewal of authorisation is also covered by the Services Directive, specifically Article 13(2) and the conditions for charges allowed for granting authorisation provided therein.[85]

The CJEU exhaustively referred to some of the conditions set out for authorisation schemes by the Services Directive in its ruling in *Trijber.* First, limiting the number of authorisations available is possible only if the overriding reason relates to public interest.[86] If such a situation occurs, then the authorisations should not be for an unlimited period, following Article 11 of the Services Directive.[87] Under Article 10(3) of the Services Directive, Member States are not allowed, in principle, to introduce requirements to obtain an authorisation conditional on possessing a certain level of language attainment if this is not justified by overriding reasons related to the public interest,[88] so any such requirement would also constitute a restriction.

5.5. INTERIM CONCLUSIONS

It follows from the rulings analysed in paragraphs 5.1 to 5.4 that the CJEU was rather flexible in its decisions to include various legislative measures of the Member States as 'obligations', 'authorisations', or 'requirements' within the meaning of the Services Directive. However, the sole existence of such authorisation schemes, requirements, or obligations was not sufficient to enable a declaration to be made of contradiction with the objectives of the Services Directive (except for the unconditionally prohibited requirements covered by Article 14). In all the circumstances in which the character of restriction was attributed to national legislation, this classification has been followed by an examination of the justification grounds pursuant to the provisions of the Services Directive.

6. JUSTIFICATION GROUNDS

The need for including certain justification grounds for restrictions on the freedom of services imposed by Member States follows from the obvious reflection that there exist contrasting interests and public policy objectives, which need counterbalancing with the objective of completing the Single Market for services. These interests and objectives, framed as 'overriding reasons related to the public interest', have been the common object of analysis of the CJEU in its rulings related to the elimination of barriers. Balancing of contrasting interests

79 Case C-724/18 *Cali Apartments* (n 42), para 49.

80 Cases C-458/14 and C-67/15 *Promoimpresa* (n 37), paras 39–45.

81 Cases C-458/14 and C-67/15 *Promoimpresa* (n 37), paras 49–52.

82 See Case C-137/17 *Van Gennip* (n 42), paras 78–88.

83 Case C-393/17 *Kirchstein* (n 42), paras 64–65.

84 See Case C-293/14 *Hiebler* (n 42), paras 49–50.

85 See Case C-316/15 *Hemming* (n 42), paras 26–28.

86 See Joined Cases C-340/14 and C-341/14 *Trijber* (n 33), para 60.

87 See Joined Cases C-340/14 and C-341/14 *Trijber* (n 33), paras 62–64.

88 See Joined Cases C-340/14 and C-341/14 *Trijber* (n 33), paras 68–69. In this particular case it was the condition for the recipients of the services of window prostitution brothels to possess the language capability for communicating with providers – 'recipients' being in this case prostitutes and 'providers' the operators.

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and objectives has been also the final stage of examination, which determined whether the legislation imposed by the Member State could be interpreted as remaining in conformity with the Services Directive.

To begin with, it should be observed that the CJEU laid out the general system of justification grounds provided by the Services Directive and the difference between the regimes set out in Article 14 and Article 15. Not every category of actions by the Member States constitutes equally grave forms of misconduct. Therefore, the Services Directive distinguishes between the requirements that are unconditionally prohibited and the requirements that are to be evaluated. For instance, the CJEU declared that the requirements listed in Article 14 of the Services Directive were prohibited and could not be justified in any way and provided a thorough analysis of the reasons for distinguishing between two groups of requirements.[89] The CJEU stated that the aim of an absolute prohibition of restrictions listed in Article 14 is 'to ensure the systematic and swift removal of certain restrictions on the freedom of establishment' that adversely affect the proper functioning of the internal market.[90]

The CJEU also stated that the possibility of justifying these restrictions would undermine the general scheme enshrined in the Services Directive, which clearly distinguishes the requirements listed in Article 14 and in Article 15, as well as the possibility that justifying these restrictions on the justification grounds enshrined in the Treaty would undermine the ad hoc harmonisation intended by the Services Directive.[91] Such an interpretation of the requirements listed in the unequivocal Article 14 of the Services Directive was the only possible approach of the CJEU.[92] Thus, the dedication to the objectives of the Services Directive and the coherent reasoning of the Court stressing the nature of Article 14 deserves a positive assessment.

For comparison, one should look at Article 15 and another scheme enshrined in the Services Directive. This provision explicitly enables justifying the maintaining or introducing of certain requirements on the grounds listed in Article 15(3) of the Services Directive. According to the wording of Article 15 and the interpretation of the CJEU, such justification is only possible if three conditions are fulfilled cumulatively.[93] Firstly, the requirement listed in Article 15(2) and maintained in the legal order of Member States, should be non-discriminatory and not distinguish the situation of providers with residence or nationality other than that of the Member State in question. Secondly, the requirements should be necessary to achieve the objectives constituting overriding reasons related to the public interest. Thirdly, the requirements have to remain proportionate – 'suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective, and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result'.[94]

Furthermore, the objectives should be pursued in a systemic and consistent manner.[95] Additionally, the CJEU added that such an assessment 'may vary over time, depending on the relevant market and its evolution' and can be subject to periodic reexamination and dependent on the *ratione personae* of the recipients of the services.[96] The Court also held that different assessments should be conducted for services of general economic interest on the grounds of Article 15(4) of the Services Directive. Pursuant to this provision the test presented above applies to the services of general economic interest only inasmuch as it 'does not obstruct the performance, in law or in fact, of the particular task assigned to [the providers of these services]', which should nevertheless guarantee the providers economic equilibrium.[97]

89 See Case C-593/13 *Rina Services* (n 37), paras 31–40; Case C-179/14 *Commission v Hungary* (n 39), paras 43–47.

90 Case C-593/13 *Rina Services* (n 37), para 39; Case C-179/14 *Commission v Hungary* (n 39), para 46.

91 Case C-593/13 *Rina Services* (n 37), para 29 and para 37.

92 Case C-209/18 *Commission vs. Austria* (n 43), para 52; Case C-206/19 *KOB* (n 30), para 38.

93 Case C-171/17 *Commission v Hungary* (n 43), para 83.

94 Case C-179/14 *Commission v Hungary* (n 39), para 56; Case C-209/18 *Commission vs. Austria* (n 43), para 81; Case C-293/14 *Hiebler* (n 42), para 55; Case C-546/17 *Repsol* (n 43), para 45; Case C-729/17 *Commission v Greece* (n 43), para 57; Case C-171/17 *Commission v Hungary* (n 43), para 80; Case C-377/17 *Commission v Germany* (n 43), para 62; Case C-297/16 *CMVRO* (n 43), para 54.

95 Case C-377/17 *Commission v Germany* (n 43), para 89.

96 Case C-546/17 *Repsol* (n 43), paras 55–64.

97 Case C-293/14 *Hiebler* (n 42), paras 71–76; Case C-171/17 *Commission v Hungary* (n 43), para 62 and para 84; Case C-546/17 *Repsol* (n 43), para 47.

DOI: 10.36633/ulr.718

The CJEU consequently assessed the justification of requirements introduced or maintained in all cases related to the application of Article 15 and the main focus of the analysis, in virtually all of them, was on the proportionality test.[98] The CJEU reinforced the effectiveness of this Article by explicitly endorsing its direct effect.[99] It is not my aim to present in detail all the cases, as such presentation would be rather unproductive, especially as the reasoning of the CJEU followed a very similar pattern of analysing whether less restrictive measures were possible or proposed by either of the parties to the dispute. However, it is worth mentioning which interests, protected by the national legal orders, were acknowledged by the CJEU as overriding reasons related to the public interest.

The 'overriding reasons related to the public interest' were defined in Article 4(8) of the Services Directive, which listed a catalogue of such reasons as 'recognized as such in the case-law of the Court'.[100] However, since its adoption, this list has been supplemented or specified with the following examples. In the rulings related to the justification of restrictions on the grounds of Article 15(3) of the Services Directive, the CJEU held that such an overriding reason related to the public interest might constitute the need to ensure objectivity, integrity, impartiality and independence of the professions of civil engineers, patent agents and veterinary surgeons[101] and financial accountants,[102] protection of health (also of animals),[103] providing high quality services for training professional mediators and facilitating the establishment of training institutions in the outermost regions,[104] ensuring proper quality planning services, consumer protection, building safety, preservation of the '*Baukultur*' and ecological construction via establishing minimum tariffs, and consumer protection to avoid distortions to competition resulting from the asymmetry of information via guaranteeing transparency of maximum tariffs,[105] protecting the urban environment and good town and country planning[106] and the effective operation of fire safety measures and the improvement of measures for the prevention of fires, explosions and gas poisoning.[107]

The overriding reasons related to the public interest were also of central importance for the possibility of justifying the restrictions introduced on the grounds of authorisation schemes covered by Articles 9–13 of the Services Directive. To this end, the CJEU acknowledged, as such overriding reasons, ensuring a sufficient supply of affordable long-term rental housing,[108] the need to ensure a high level of higher education and to protect the recipients of services,[109] protection of public safety and health, and the protection of the environment,[110] safeguarding the principle of legal certainty,[111] safeguarding legitimate expectations of holders of authorisations that enable them to recoup costs of investments[112] and preventing criminal offences being committed against prostitutes, in particular human trafficking, forced prostitution, and child prostitution.[113]

98 The exception being Case C-31/16 *X and Visser* (n 36) (n 41) where the Court conferred the responsibility for the analysis of proportionality of restrictions imposed by the local zoning plan for trade in certain goods, on the national court.

99 See Case C-31/16 *X and Visser* (n 36), para 130.

100 Article 4(8) of the Services Directive provides: 'public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives'.

101 Case C-209/18 *Commission vs. Austria* (n 43), paras 87–89.

102 See Case C-384/18 *Commission v Belgium* (n 46), paras 45–58 – however the analysis was based on Article 25(1) of the Services Directive.

103 Case C-209/18 *Commission vs. Austria* (n 43), paras 87–89; Case C-297/16 *CMVRO* (n 43), paras 56–57.

104 Case C-729/17 *Commission v Greece* (n 43), para 67.

105 Case C-377/17 *Commission v Germany* (n 43), paras 69–72.

106 Case C-31/16 *X and Visser* (n 36), paras 134–135.

107 Case C-293/14 *Hiebler* (n 42), paras 57–58.

108 Case C-724/18 *Cali Apartments* (n 42), paras 65-69.

109 Case C-393/17 *Kirchstein* (n 42), paras 71-72.

110 Case C-137/17 *Van Gennip* (n 42), paras 82-83; Joined Cases C-340/14 and C-341/14 *Trijber* (n 33), para 64.

111 Cases C-458/14 and C-67/15 *Promoimpresa* (n 37), para 71.

112 Cases C-458/14 and C-67/15 *Promoimpresa* (n 37), paras 52–53.

113 Cases C-340/14 and C-341/14 *Trijber* (n 33), para 68.

Pursuing the overriding reasons related to the public interest is, however, not the only condition for justifying the restrictions imposed by authorisation schemes. The mandatory condition for all authorisation schemes is that they include only the easily understood conditions, that are laid out in advance and are therefore transparent and accessible.[114] The CJEU added elements of justification by an overriding reason relating to the public interest and proportionality to this list of conditions.[115] The CJEU also endorsed the straightforward interpretation of the wording of provisions of the Services Directive by stressing that if the number of authorisations available is limited by an overriding reason relating to the public interest, they have to be valid for a defined period (Article 11(1) of the Services Directive)[116] and that if the number of authorisations is limited because of the scarcity of natural resources, granting the authorisation must be subject to a selection procedure which ensures impartiality and transparency which, in effect, precludes an automatic renewal of the authorisations granted (Article 12(1) of the Services Directive).[117] As was mentioned before, it is also possible to establish double authorisation schemes (federal and regional), if they enable the protection of separate legal objectives.[118]

In general, the analysis by the CJEU of the justification of authorisation schemes on the grounds of Articles 9–13 of the Services Directive was based on a similar pattern as the requirements on the grounds of Article 15 of the Services Directive. Article 10(2) was most frequently referred to by the CJEU,[119] since this provision contains a justification ground pursuant to which the schemes should be of 'non-discriminatory character, justified by imperative reasons in the general interest' and proportionate to that objective, which means that they are 'suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it'.[120] This provides a uniform approach between various types of barriers to the freedom of establishment. It is further reinforced by the fact that the CJEU pointed to the same catalogue of justification grounds in Article 24(2) of the Services Directive.[121] The scarcity of case law related to the conditions laid out in Article 16 and related to the limits to the free movement of services makes it impossible to formulate any general conclusions concerning this provision.

What follows from the broad list of justifications presented above, which have been recognized by the CJEU as overriding reasons related to the public interest, is that the Member States could invoke a very wide catalogue of public policy objectives to counterbalance the openness to free movement of services. The proportionality test, as it is known from the previous case law of the CJEU, has not been revisited and, as presented, the CJEU has been quite generous in acknowledging certain legal objectives as overriding reasons related to the public interest. The Services Directive, as indicated in its recital 7, aims to ensure respect for the balance between an objective of eliminating obstacles to the Single Market and safeguarding specific characteristics of certain activities.[122] The Court has not shifted this balance in its application of the Services Directive in any direction.

7. CONCLUSIONS

The analysis presented in this contribution indicates one, perhaps surprising, tendency in the application of the Services Directive. The number of rulings related to the provisions covered

114 Case C-137/17 *Van Gennip* (n 42), para 80; Case C-393/17 *Kirchstein* (n 42), para 80.

115 Case C-724/18 *Cali Apartments* (n 42), para 77.

116 Cases C-340/14 and C-341/14 *Trijber* (n 33), paras 61–62.

117 Cases C-458/14 and C-67/15 *Promoimpresa* (n 37), paras 49–51.

118 Case C-137/17 *Van Gennip* (n 42), paras 78–82.

119 The general system of the Services Directive in respect of authorisation schemes has been laid out by the Court in the following way: 'Article 9 of the [Services Directive] governs the option of the Member States to make access to a service activity or the exercise thereof subject to an authorisation scheme. Article 10 of the directive concerns the conditions for the granting of authorisations and Article 11 of the directive concerns their duration.' – see Cases C-458/14 and C-67/15 *Promoimpresa* (n 37), para 37, see Case C-206/19 *KOB* (n 30) para 32.

120 Case C-137/17 *Van Gennip* (n 42), para 80; Joined Cases C-340/14 and C-341/14 *Trijber* (n 33), para 70; Case C-393/17 *Kirchstein* (n 42), para 80; Case C-724/18 *Cali Apartments* (n 42), para 86 – 'imperative reasons in the general interest' were interpreted by the Court as bearing the same meaning or synonymous with the notion 'overriding reasons related to the public interest'.

121 Case C-119/09 *Société fiduciaire nationale d'expertise comptable* (n 38), para 45.

122 Case C-57/12 *Femarbel* (Case C-57/12) (n 38), para 39; Joined Cases C-340/14 and C-341/14 *Trijber* (n 33), para 52.

by Chapter III relating to the freedom of establishment greatly outnumber the rulings on the grounds of the provisions covered by Chapter IV concerning the freedom of services. Therefore, the conditions for the establishment of business activities and conducting services in another Member State (or within a domestic one, as Chapter III of the Services Directive is directly applicable to purely domestic situations[123]), in a more organised and permanent manner, are currently a more explored method of the liberalisation of trade in services in the Single Market than the possibility of making use of the free movement of services on a temporary basis. The fact that the Court has been not delimiting both regimes very sharply, as was stated in Section 3, allows one to conclude that both regimes of the Services Directive should be jointly regarded as one complementary system of liberalisation of trade in services instead of two separate methods. Permanent exceptions (authorisation schemes, various legal requirements to conduct certain professions or activities) are seemingly more obvious. Therefore, it is easier to get 'under the radar' of the preliminary questions and enforcement procedures of the Commission.

However, as outlined in Section 2, the current status of the implementation of the Single Market for services does not allow the achievement of the objectives of the Services Directive in economic terms. The activity of the CJEU has, hitherto, not been particularly meaningful in this respect. No new elements, that could make the removal of barriers for services more advanced, have been added. Such an effect of innovation would be possible if the CJEU decided to attribute direct effectiveness to the provisions of the Services Directive on notification obligations. The obligation of Member States concerning the notification of technical provisions that could result in limiting the freedom of movement proved to be one of the most effective tools and measures in the field of trade in goods. The Court, in its case law, had also added a very significant dimension to this method of removing the barriers for trade in goods via a limited 'triangular' direct effect of the provisions of the Directive in relations between equal parties (of horizontal nature).[124] Taking all of the differences between characteristics of trade in goods and trade in services into account, an analogous approach of the Court would have a very serious impact and present a significant new development.[125] Simultaneously, the Commission should take a closer look into the restrictions imposed by national legislation concerning the free movement of services. As has been shown, the current disproportion between the freedom of establishment cases and the free movement of services cases may have significant negative effects for the completion of the Single Market for services, and for fulfilling the objectives of the Services Directive. As these objectives are aligned to broader policy objectives of the EU, the Commission, as the guardian of the Treaties, has a clear mandate to step up the enforcement of the provisions of the Services Directive in this respect.

In my opinion, the approach of the CJEU adds another layer to the existing effect of disappointment that the Services Directive remains a sort of unfinished business, a poor compromise, and an unfulfilled promise. Thus, the practical interpretation of the Services Directive provided by the CJEU does not contribute to the achievement of its objective of removing barriers to the Single Market for trade in services in a way that is satisfactory and matches its potential. Obviously, the CJEU should neither act *ultra vires* nor replace the Commission, Member States, and the European Parliament in the process of lawmaking. Nevertheless, it had proved many times that, solely by the application and interpretation of legislation together with a little addition of respectable judicial activism, it can influence substantially and improve the effectiveness of the implementation of the fully-functioning Single Market for services without barriers in accordance with the Treaty provisions.[126] It should be encouraged to try harder in the course of further functioning of this legal act and to unblock the potential of the Single Market for services so as to contribute to the process of economic recovery after the Covid-19 pandemic within the EU.

123 It follows from the Court's rulings in Joined Cases C-340/14 and C-341/14 *Trijber* (n 33); Case C-31/16 *X and Visser* (n 36), and has been also confirmed in Case C-393/17 *Kirchstein* (n 42); Case C-724/18 *Cali Apartments* (n 42); Case C-377/17 *Commission v Germany* (n 43).

124 See Case C-194/94 *CIA Security International v Signalson and Securitel*, ECLI:EU:C:1996:172.

125 See further Hatzapolous, *Regulating* (n 6) 277–278. It is not completely beyond the imagination, as the Court applied the reasoning from Case C-194/94 *CIA Security* (C-194/94) (n 124) to the field of services in its judgment of 19 December 2019 in Case C-390/18 *Airbnb Ireland* ECLI:EU:C:2019:1112 paras 88–96, although it is outside the scope of application of the Services Directive (in the context of the notification obligation provided by Directive 2000/31). The directive on 'services norification' was ultimately withdrawn by the Commission due to the fact that the legislation was persistently blocked by the Member States in the Council.

126 See further Hatzapolous, Assessing (n 4) 216–228.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR CONTRIBUTIONS

The contribution was funded by the National Science Centre, Poland under the project with registry No. 2017/27/B/HS5/02073.

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TO CITE THIS ARTICLE:
Wojciech Lewandowski, 'Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice' (2022) 18(1) Utrecht Law Review 57–75. DOI: *https://doi.org/10.36633/ulr.718*

Published: 05 May 2022

Utrecht Law Review is a peer-reviewed open access journal published by Utrecht University School of Law.