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Authorisations under EU internal market rules**

Vassilis Hatzopoulos*

Introduction

That the requirement of a prior authorisation, as a precondition for the exercise of any economic activity, may restrict the freedom of establishment and the free provision of services is a truism. If an authorisation is required in the Member State where establishment is to take place or the service is to be offered (host Member State), then operators who lack such authorisation are in no right to proceed to the projected activity. Therefore, as soon as it is being accepted that the EU internal market rules are not only about discriminatory measures, but also cover mere restrictions, it comes as no surprise that national authorisation systems come to be scrutinized under the Internal Market rules.

This has been acknowledged by the Court in an explicit manner already in its 1986 Insurance cases¹ and constantly thereafter. The idea that authorisations restrict the provision of services has been enshrined into secondary legislation in many sector-specific texts starting with the “passport” systems in the field of insurance, banking and financial services.² The ‘internal market clause’ introduced by the Television without Frontiers (TVWF) Directive and the e- Directives also tries to side-step the need for obtaining a fresh authorisation in the host state. The sector-specific directives for the network-bound industries also describe several conditions for the authorisation of operators in order to curb Member State discretion.³ More importantly and in a horizontal way, authorisations are solemnly held to be against the free provision of services by Articles 9-13 of the Services Directive. The fact, therefore, that national authorisation systems may fall foul of the Internal Market rules is granted.

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¹ See most prominently Case 205/84 *Commission v. Germany (insurance)* [1986] ECR 3755 paras 42 *et seq.*

² For which see broadly Lomincka, E., ‘The Home Country Control Principle in the Financial Services Directives and the Case Law’ in Andenas, M. and Roth, W.H. (eds), *Services and Free Movement in EU Law* (Oxford: OUP, 2002) 295-319.; and before that Hatzopoulos, V., *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services* (Athènes/Bruxelles: Sakkoulas/Bruylant, 1999) 414-49.

³ See in particular Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) [2002] OJ L 108/21.

Indeed, the applicability of the Internal Market rules may offer not only a different specter of analysis than the application of the competition rules, especially since public measures are at stake. What is more it may allow the CJEU to tackle technical issues even though it is lacking the technical information that an appreciation under the competition rules would require.⁴

This, however, does not lead to all national authorisation systems being struck down. On the contrary, the recent case law of the Court of Justice of the EU (CJEU) offers extremely interesting indications as to the situations where an authorisation system could be accepted (I), the conditions that such a system should fulfill in order to comply with the Internal Market requirements (II) and the extent to which the host Member State is obliged to take into account authorisations delivered in other Member States (III).

I. When may an authorisation system be justified?

The answer to the above question calls for the exploration of two further questions, ie what are the grounds on which a Member State may introduce an authorisation system (a) and to what extent does the Member State in question has to prove that such a system is necessary and proportional (b).

a. Grounds for justification of an authorisation system

i. The provision of some service of general economic interest (SGEI)

Services of general economic interest have historically been offered by the State, especially within the continental tradition.⁵ The trend in the last twenty years, however, has been to entrust private entities with the accomplishment of several such services. In doing so, States have been awarding exclusive or special rights to several undertakings. Such grant of exclusive or special rights is generally accepted under EU law. While at first Member States seemed to enjoy seamless discretion as

⁴ See eg Case C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349 for an example where the Court declared inadmissible a preliminary question for the application of Art 106(2) TFEU in conjunction with Art 102 TFEU, for lack of sufficient information contained in the preliminary ruling, but did go on and discussed the issues under the Internal Market rules; the same approach was followed in Case C-384/08 *Attanasio Group Srl* [2010] ECR I-2055.

⁵ For an excellent comparison of the continental to the anglosaxon tradition in relation to the provision of services of general interest see Harlow, C., 'Public service, market ideology and citizenship' in Freedland, M. and Sciarra, S. (eds), *Public services and citizenship in European law: Public and labour law perspectives* (Oxford: Clarendon Press, 1998) 48-56. Please note that the conversation which follows only concerns services of general economic interest, as opposed to non-economic services of general interest, over which EU law has, in principle, no impact.

to when/where they would award exclusive rights,⁶ more recent case law suggests that the grant of exclusive rights should be objectively justified and should not lead to an abuse of dominant position by the beneficiary undertaking.⁷ The Court's ambivalent approach has been recently resumed as follows:⁸

78 [...] the Treaty does not require national monopolies having a commercial character to be abolished completely, but requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States [...].

79 However, Article 49 EC [56 TFEU] precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State [...].

If exclusive and special rights are accepted, then the less restrictive authorisation systems – which only exceptionally entail exclusivity – should raise no worries under EU law. Therefore, in *BUPA*, the General Court accepted that a system of authorisation of several operators in the field of healthcare going 'beyond ordinary conditions of authorisation [...] satisfies the condition of a clear and precise definition of the SGEI obligations in question within the meaning of the first *Altmark* condition'.⁹ Thus, not only did the General Court accept that the system of prior authorisation established by the Irish legislation did not infringe the Internal Market rules, it also held that it qualified under the *Altmark* first condition, thus also allowing for the circumvention of the State aid rules.¹⁰

In a similar manner in *ASM Brescia* the Court in the name of legal security, approved of the extension, by way of a transitional period, of the exclusive public service licenses for the distribution of natural gas in southern Italy.¹¹ Although the licenses already in place had been granted without following the EU public procurement principles (of transparency etc)¹² and thus constituted 'indirect discrimination on the

⁶ Case 155/73 *Giuseppe Sacchi* [1974] ECR 409.

⁷ Case C-260/89 *ERT v. DEP and Sotirios Kouvelas* [1991] ECR I-2925; Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron GmbH* [1991] ECR I-1979.

⁸ *Centro Europa 7* above n 4, paras 78-9.

⁹ Case T-289/03 *BUPA* [2008] ECR II-81 paras 182-3.

¹⁰ Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

¹¹ Case C-347/06 *ASM Brescia SpA v Comune di Rodengo Saiano* [2008] ECR I-5641.

¹² For which see below n 18 and the corresponding text.

basis of nationality, prohibited under Articles 43 EC and 49 EC¹³, the Court accepted that ‘the principle of legal certainty not only permits but also requires that the termination of such a concession be coupled with a transitional period which enables the contracting parties to untie their contractual relations on acceptable terms both from the point of view of *the requirements of the public service* and from the economic point of view’.¹⁴

ii. The allocation of rare resources

The Court’s lenient approach in *ASM Brescia* is to be contrasted with its judgment in *Centro Europa 7*, where it Court condemned Italy for not taking the necessary legislative measures to ensure that operators who had previously obtained authorisations for radio broadcasting (according to the relevant EU directive¹⁵) do obtain the corresponding radio frequencies. Contrary to the situation in *Brescia* the Court held that ‘the Italian legislation [...] does not merely allocate to the incumbent operators a priority right to obtain radio frequencies, but reserves them that right exclusively, without restricting in time the privileged position assigned to those operators and without providing for any obligation to relinquish the radio frequencies’.¹⁶

The above case lies half-way between the organization of public service (of radio broadcasting) and the allocation of scarce resources (of radio frequencies). In this latter case, the institution of a system of authorisations is inevitable.

In relation to radio frequencies the grant of authorisation is organized by the relevant directive. For other scarce resources, for which there is no sector-specific legislation, Article 12(1) of the Services Directive provides that ‘Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.’

The principle remains, however, that scarce resources not only tolerate, but also call for a system of authorisations.

¹³ *ASM Brescia* para 60.

¹⁴ *Ibid* para 71, emphasis added.

¹⁵ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) [2002] OJ L 108/21.

¹⁶ *Centro Europa 7* above n 4, para 115.

iii. The protection of public policy, public security and public health

The above rule of the Services Directive draws its inspiration in the Court's judgment in *Placanica*, while at the same time complementing it. In this judgment the Court held that where a Member State decides to limit the number of authorisations/licenses granted for a given activity, *in casu* gambling, it should proceed to the 'revocation and redistribution of the old licences or the award by public tender of an adequate number of new licences'.¹⁷ The reference to a 'public tender' is a clear indication that the award of new licences should take place in accordance with the 'public procurement principles' based on transparency, which have been developed in the meantime by the Court of Justice.¹⁸

The ruling in *Placanica* is different from the rule of Article 12(1) of the Services Directive in that it acknowledges that an authorisation system may be justified not only in cases of natural/technical scarcity, but also where the 'artificial' restriction of a given economic activity is justified by reasons of public policy, public security or public health. Indeed, all the subsequent gambling and gaming cases iteratively confirm the discretion left to Member States to adopt systems of legal monopolies,¹⁹ or of strict (and even discriminatory) authorisation conditions, in order to combat fraud, protect consumers, restrain the propensity for gambling and the like. Such a system of authorisations, however, in order to be proportional should fulfil a further condition: it 'must be accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly [or authorisations] will in fact be able to pursue, in a consistent and systematic manner, the objective thus determined by means of a

¹⁷ Joined cases C-338 & 359 & 360/04 *Criminal Proceedings against Massimiliano Placanica ea* [2007] ECR I-1891, para 63.

¹⁸ By 'procurement principles' reference is made to the extremely reach body of case law, starting with Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG* [2000] ECR I-10745; Case C-234/03 *Contse SA, Vivisol Srl and Oxigen Salud SA v. Instituto Nacional de Gestion Sanitaria (Ingresa), formerly Instituto Nacional de la Salud (Insalud)* [2005] ECR I-9315; and Case C-458/03 *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585, whereby the Court acknowledges that the principle of non-discrimination and of equal treatment, and the principle of transparency that these entail, should apply to all procedures of award of some contract/authorisation by the public authorities, even if these do not fall within the scope of the public procurement directives; this is also known as 'the transparency case law'; for a brief discussion of the above developments see Bovis, C, 'Developing Public Procurement Regulation : Jurisprudence an its Influence on Law Making' (2006) 43 *CML Rev* 461-95 and more recently Bovis, C 'Public Procurement in the EU: Jurisprudence and Conceptual Directions' (2006) 49 *CMLRev* 247-90.

¹⁹ Case C-67/98 *Questore di Verona v. Diego Zenatti* [1999] ECR I-7289, para 35, and Case C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) eo* [2003] ECR I-8621, para 74, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633; Joined cases C-316/07 & C-409-410/07 & C-358-360/07 *Markus Stoß ea* [2010] ECR I-8069; Case C-347/09 *Jochen DICKINGER and Franz ÖMER* [2011] nyr.

supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities.²⁰

Therefore, where the imposition of a system of authorisations/licences is not dictated by objective (natural/technical) necessity but corresponds to the legitimate exercise of discretionary power by the Member States, such system should a) be part of a broader series of measures that pursue the same objective²¹ and b) be subject to control by the public authorities as to the actual achievement of the fixed objective. By this latter requirement authorisations justified by public policy rejoin those connected to the provision of some SGEI, who need also be subject to a system of supervision/evaluation – and possibly review.

iv. The pursuance of other overriding reasons of public interest (ORPIs)

If public policy and other express justifications foreseen in the Treaty allow Member States to put into place authorisation systems, the same is not clear in relation to ORPIs. The fact that up till now the Court has accepted ORPIs as the basis for justifying authorisation schemes could be undermined by recent case law.

Indeed, the Court has not only accepted ORPIs as the basis of imposition of an authorisation system,²² but it has occasionally used ORPIs indistinctively together with the protection of public policy, an express exception foreseen by the Treaty. Hence in *Stoss*,

the Court has observed that the objectives pursued by national legislation adopted in the area of gambling and bets, considered as a whole, usually concern the protection of the recipients of the services in question and of consumers more generally [two ORPIs], and the protection of public order [an express exception under Article 52 TFEU]. It has also held that such

²⁰ *Markus Stoss* para 83.

²¹ For an analysis of the requirements that measures be 'coherent and systematic' see Mathisen, G., 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 CML Rev 1021–48; my view is somehow different, since I understand this test as follows. Coherence is an internal test and looks into the very content of the measure under scrutiny, essentially asking the question 'does it make sense?' or 'is it logical?'. It looks into the restrictive measure and enquires whether the restriction is a standalone rule or, whether, on the contrary, it forms part of a coherent system. Consistency, on the other hand, is an external test and refers to the way the contemplated measure relates to other policies affecting the same legitimate objective; see Hatzopoulos *Regulating Services op.cit.* 176-8.

²² See eg recently Case C-400/2008 *Commission v Spain (Shopping Centers)* [2011] nyr, para 80, where the Court accepted that 'restrictions relating to the location and size of large retail establishments appear to be methods suitable for achieving the objectives relating to town and country planning and environmental protection'.

objectives are amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services'.²³

What is more, Article 9(1) of the Services Directive specifically provides that authorisation requirements may be justified by ORPIs.

This solution, systematically followed by the Court and expressly enshrined into the Services Directive, should be considered as the current state of the law.

This, however, should not veil the hints in the Court's case law which could eventually lead to dismissing ORPIs as a ground for upholding authorisation systems. Indeed, according to the Court's well-established – and yet non-systematic – case law, ORPIs may only serve as justifications to non-discriminatory restrictions, while discriminatory ones may only be saved by some of the express Treaty provisions (essentially public policy, public security and public health). It is true that several judgments deviate from this general rule,²⁴ but overall the Court seems still to be attached to it.²⁵

If this is so, then the judgments in which the Court implies that authorisation procedures are not merely restrictive, but plainly discriminatory should raise the question of whether they could validly be upheld by virtue of some ORPI. Such judgments are all but rare. If in the early *German Insurance* case the element of discrimination was looming, since *Placanica*, and even more since the recent *Costa and Cifone* judgments,²⁶ the Court has made it clear that under certain circumstances the requirement of an authorisation/licence will be discriminating in favour of the national undertakings already present in the market and against free movers from other Member States. It is in order to redress this discrimination that the Court suggested, in *Placanica*, that the Italian Government should either proceed to the 'revocation and redistribution of the old licences or [to] the award by public tender of an adequate number of new licences'.²⁷ Discrimination will be more pronounced whenever the delivery of a new authorisation/license is conditional upon some territoriality clause. In *Attanasio Group*, concerning the delivery of new authorisations for petrol stations in Italy subject to a territoriality clause, the Court held that²⁸

²³ *Stoss* para 74; this confusion is not uncommon in the case law; for a discussion see Hatzopoulos, V. 'La justification des atteintes aux libertés de circulation : cadre méthodologique et spécificités matérielles' in Dubout, A. & Lemaire, A. (eds) *L'unicité des libertés fondamentales du traité*, (Bruxelles : Bruylant/Larcier, under press); see also Hatzopoulos, V., *Regulating Services in the EU* (Oxford: OUP, 2012) 146-79.

²⁴ See in the previous n.

²⁵ See eg Case C-341/05 *Laval un Partneri Ltd* [2007] ECR I-11767, para 117; Case C-219/08 *Commission v. Belgium (posted workers)* [2009] ECR I-9213; Case C-153/08 *Commission v Spain (gambling tax)* [2009] ECR I-9735.

²⁶ Joined Cases C-72/10 and C-77/10 *Marcello Costa, Ugo Cifone* [2012] nyr.

²⁷ *Placanica* above n 17, para 63.

²⁸ *Attanasio Group* above n 4, para 45.

[s]uch a rule, which applies only to new service stations and not to service stations already in existence before the entry into force of the rule, makes access to the activity of fuel distribution subject to conditions and, by being more advantageous to operators who are already present on the Italian market, is liable to deter, or even prevent, access to the Italian market by operators from other Member States.

Similarly in the *Spanish Shopping Centres* case, the Court, while hinting to some kind of discrimination, held the authorisation procedures, in general, and the territoriality clause, in particular, to restrict market access for free movers from other Member States.²⁹

In *Costa and Cifone*, however, a follow-up case to the *Placanica* litigation, the Court opted for a more radical condemnation of the territoriality clause attached to the new licenses. It held that

The very fact that the existing operators have been able to start up several years earlier than the operators unlawfully excluded, and have accordingly been able to establish themselves on the market with a certain reputation and a measure of customer loyalty, confers on them an unfair competitive advantage. To grant the existing operators even greater competitive advantages over the new licence holders has the consequence of entrenching and exacerbating the effects of the unlawful exclusion of the latter from the 1999 tendering procedure, and accordingly constitutes a new breach of Articles 43 EC and 49 EC and of the principle of *equal treatment*.³⁰

[...]

In consequence, such a measure entails *discrimination* against the operators which were excluded from the 1999 tendering procedure.³¹

In this more recent case, therefore, the Court's analysis clearly moved from the logic of restrictions to market access, and identified a measure which is discriminatory (at least) in fact. The fact that in this very case the Court did accept ORPIs such as 'the reduction of betting and gaming opportunities, and the combating of criminality by making the operators active in the sector subject to control'³² as justifications, may not grant that ORPIs will be admitted in the future without more ado.

²⁹ Case C-400/08 *Commission v Spain (shopping centres)* [2011] nyr, para 64.

³⁰ *Costa and Cifone* para 53, emphasis added.

³¹ *Ibid* para 58, emphasis added.

³² *Ibid* para 61.

b. Burden of proof

Since any authorisation system constitutes a restriction to – if not a discrimination against – free movers, its imposition by a Member State need be justified. Such justification does not take place *in abstracto*, but needs be substantiated by the Member State concerned, against the allegations of the plaintiff undertaking (in preliminary rulings) or the Commission (in direct actions). Hence, the allocation of the burden of proof has a direct incidence on the kinds of authorisation systems which will be allowed by the Court. In this respect the Court's case law is clear in some respects and less clear in others.

i. Clear rules

Prima facie restriction: for the Commission or the plaintiff

In direct actions, it is clear that the Commission has to make a prima facie case by demonstrating that the contested authorisation scheme has as its object or effect to block market access or else to hinder free movement.³³ Over fifty-five years after the creation of the EEC, very few national measures will have as their proclaimed object the restriction of free movement; what becomes crucial, therefore, are the effects of any given measure. The Court will go as far as to ignore the expressed protectionist intent of any measure and will focus on its effects.³⁴

Similarly, in preliminary rulings, it is for the plaintiff to propose and for the referring court to substantiate the way in which the contested measure may affect free movement. Failing which the Court will reject the preliminary question as being inadmissible, either on the ground that it is purely hypothetical or that it is purely internal and bears no relationship with any of the Treaty freedoms.³⁵ In view of the well-established case law and the texts of secondary legislation discussed above,³⁶ however, it is highly unlikely that the Court will ever reject any preliminary question concerning some authorisation scheme.

The existence of justification: the Member State

Once this prima facie restriction has been established, then it is for the Member State to prove that its system of authorisations is justified by some objective interest. In this regard Member States enjoy unrestricted freedom to pick the policy objectives they consider fit, subject to minimal control by the CJEU. Indeed, in the fifty-five year of

³³ See eg Case C-565/08 *Commission v Italy (Lawyer's fees)* [2011] nyr, para 52.

³⁴ *Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

³⁵ See Davies Davies, G., 'Abstractness and concreteness in the preliminary ruling procedure: implications for the division of powers and effective market regulation', in Shuibhne, N.N. (ed), *Regulating the Internal Market* (Cheltenham/ Northampton: Edward Elgar, 2006) 210-43.

³⁶ In the previous paras of the present section.

internal market case law, only in a handful of occasions has the Court second-guessed the national preferences.³⁷ Rather, the Court exerts all its diligence on the issue of proportionality.

ii. Less Clear rules: proportionality

One would expect that the Member State which seeks to introduce a measure restrictive of some fundamental freedom should bear the burden of proving the proportionality of such measure. Indeed, in many cases the Court is quite demanding and requires that

the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom of establishment must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that Member State, and by *precise evidence enabling its arguments to be substantiated*.³⁸

Or that

In this connection, it is the Member State wishing to rely on an objective capable of justifying the restriction of the freedom to provide services which must supply the court called on to rule on that question with *all the evidence of such a kind* as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality³⁹

This seemingly heavy burden of proof, however, is being mitigated by three 'correctives'.

First, the Court admits that 'that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions'.⁴⁰ What is more, a claim that a measure is proportional may not be dismissed 'solely on the ground that that Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue'.⁴¹

Second, in an effort to dissipate fears of regulatory competition nurtured by its own case law i.a. on posted workers, the Court has repeatedly held in its recent case law that 'it is in particular not necessary, with regard to the criterion of proportionality, that

³⁷ See Barnard, C., 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 *Cambridge L J* 575-606 ; Hatzopoulos, V., 'Exigences essentielles, impératives ou impérieuses: une théorie, des théories ou pas de théorie du tout?' (1998) 34 *RTDE* 191-236.

³⁸ See eg *Spanish Shopping Centres* above n 29, para 83, emphasis added.

³⁹ See eg *Stoss* n 19, para 71 *in fine*; and *Case Dickinger and Ömer* n **Error! Bookmark not defined.**, para 54, emphasis added.

⁴⁰ Case C-518/06 *Commission v. Italy (motor insurance)* [2009] ECR I-3491, para 84.

⁴¹ *Stoss* n 19, para 72.

a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States'.⁴²

Therefore, not only is the 'precise' evidence required by the Court's earlier judgments emptied from much of its substance, but also the comparison with other Member States' practices which (as was the case in *Stoss*) may be more advanced and/or more efficient for securing the same interest, is not conclusive.

Third, in at least one case, concerning the shareholding of biomedical laboratories in France, the Court has even mooted the idea that it is for the Commission to prove 'that the risks for the profession of biologist [or any other protected interest] could be removed with the same degree of effectiveness' by other less restrictive measures.⁴³

It need not be stressed here that such a requirement, if it were to be generalised, would require from the Commission a *probatio diabolica* and that it would significantly impair the Commission's capacity in direct actions against Member States. What is more, such a position would be in clear retreat in relation to the proof requirements imposed under WTO law, and the GATS in particular. In the *US/Gambling* case, where the issue was extensively debated by the Appeal Body, a fine equilibrium has been traced, whereby if the complainant raises a WTO-consistent alternative measure, it is up to the respondent 'to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative'.⁴⁴

II. Conditions for the admissibility of an authorisation system : authorisations as public procurement contracts

a. Procedural

According to well-established case law any procedure for the delivery of authorisations should fulfill three requirements: a) it should be based on criteria which are objective, non-discriminatory and known in advance, b) it should be completed within reasonable time and c) it should be subject to review, either hierarchical or, wherever possible, judicial.⁴⁵

In the field of free movement of services, in particular, the Court has gone further by demanding that 'the authorisation procedure set up by the host Member State must

⁴² See eg *Stoss* para 80; in the same sense see *Liga Portuguesa* paras 57-8 and *Dickinger and Oemer* paras 46-7.

⁴³ Case C-89/09 *Commission v France (medical laboratories)* [2010] ECR I- 12941, para 83.

⁴⁴ See AB report in *US/Gambling, WT/DS285/AB/R*, para 311.

⁴⁵ See eg the judgments on patient mobility, such as Case C-157/99 *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, para 90; more recently see, Case C-203/08 *Sporting Exchange Ltd v Minister van Justitie* [2010] ECR I-04695, para 50, where it is made clear that negative decisions should be subject to judicial – as opposed to other types of – review.

neither delay nor complicate exercise of [the free provision of services]’;⁴⁶ it has even specified that where the conditions for the delivery of the authorisation are similar in the home and host States, and therefore open to mutual recognition⁴⁷ ‘any entry required on the trades register of the host Member State cannot be other than automatic, and [...] cannot constitute a condition precedent for the provision of services, result in administrative expense [...] or give rise to an obligation to pay subscriptions to the chamber of trades’.⁴⁸

These requirements have been fleshed out in the Services Directive. Indeed, Article 9(2) foresees that the criteria should be objective, known in advance etc, 9(3) that similar delivery conditions in the home and host States should be mutually recognised, 9(5) that the authorisation should be delivered without delay and 9(6) that negative decisions should be fully motivated and ‘open to challenge before the courts or other instances of appeal’. What is more Article 13, bears the title ‘Authorisation procedures’ and further details the conditions for the delivery of the authorisations. A very important rule is contained in Articles 13(3) and (4), whereby the host State authorities should respond to the application within a set timeframe, failing which an authorisation ‘shall be deemed to have been granted’. This possibility of ‘tacit acquiescence’ which reverses the age-old rule in force in most continental countries, whereby ‘silence means dismissal’, could revolutionise the way public administrations deal with applications.⁴⁹

Next to this first series of obligations, which tend to frame the discretion of national administrations and to offer minimal procedural guarantees to undertakings, a second set of procedural requirements has been progressively developed, aimed at securing effective competition between undertakings. Starting in *Placanica*, becoming more explicit in *Sporting Exchange* and *Engelmann*⁵⁰ and even more so in *Costa and Cifone*, the Court has put into place quite detailed rules concerning the conditions for the delivery of authorisations; rules which are derived from the ones applicable in the field of public procurement.⁵¹ Therefore ‘without necessarily implying an obligation to call for tenders, that obligation of transparency [...] requires

⁴⁶ Case C-58/98 *Josef Corsten* [2000] ECR I-7919, para 47; and Case C-215/01 *Bruno Schnitzer* [2003] ECR I-14847, para 36.

⁴⁷ For which see below under III.

⁴⁸ See eg *Schnitzer* para 37.

⁴⁹ This issue was extensively debated by the Court in the *Spanish Shopping Centers* case, above n. 29, where the Court found that no such obligation could stem directly from the Treaty rules themselves.

⁵⁰ Case C-64/08 *Criminal proceedings against Ernst Engelmann* [2010] ECR I-8219.

⁵¹ *Sporting Exchange* para 46 and on identical terms *Engelmann*, para 52.

the licensing authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the licence to be opened up to competition'.⁵²

Therefore, the 'revolution' started over ten years ago, whereby the Court actively completed the public procurement rules and imposed a 'transparency principle'⁵³ applicable in all situations where the State is to choose a co-contractor (such as concession contracts, public-private partnerships and below-the-threshold public contracts)⁵⁴ is being extended to situations of delivery of authorisations. As with authorisations, this case law only concerns situations of potentially trans-border interest.⁵⁵

This case law has prompted the Commission to come up with an interpretative Communication 'on the community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives' (the so called *de minimis* Communication).⁵⁶ It further pushed for a large consultation to take place in relation to concession contracts and public-private partnerships (PPPs).⁵⁷ All this, in turn, has led to fresh proposals in order a) to reshuffle the existing legislative framework for public procurement and b) to adopt legislation in relation to concession contracts.⁵⁸

Presumably, therefore, all the rules and principles set out by the Commission in the above texts of soft law also apply to the grant of authorisations. These also may be seen to flesh up the rule of Article 12(1) of the Services Directive, whereby a requirement of minimal publicity ensuring impartiality and transparency should apply in situations of natural and technical scarcity. What is more, they apply to situations where the limited number of authorisations to be delivered results from a deliberate

⁵² *Costa and Cifone* para 55.

⁵³ For the transparency principle see briefly above n 18 and the literature quoted there.

⁵⁴ For which see above n 18.

⁵⁵ See *Costa and Cifone* para 55; the requirement that the situation has to present some trans-border interest was spelled out in Case C-507/03 *Commission v Ireland (An Post)* [2007] ECR I-9777 and further explained in Joined cases C-147-148/06 *SECAP SpA and Santorso Soc. coop. arl v. Comune di Torino* [2008] ECR I-3565, para 24: 'the estimated value [of the contract] in conjunction with its technical complexity or the fact that the works are to be located in a place which is likely to attract the interest of foreign operators'

⁵⁶ OJ [2006] C179/2.

⁵⁷ Communication COM (2005) 569 final, 'on Public-Private Partnerships and Community Law on Public Procurement and Concessions'; and, as a follow up, Communication 2008/C 91/02 'on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP)' [2008] OJ C 91/4.

⁵⁸ See COM(2011) 897 final of 20.12.11; for all these proposals see the relevant Commission page at <http://ec.europa.eu/commission_2010-2014/barnier/headlines/news/2011/12/20111220_en.htm#> last accessed on 29/04/13

political decision of the Member State concerned and not from natural/technical constraints.⁵⁹

b. Substantial

i. Extending non-discrimination from the delivery of the authorisation to the delivery of the service itself

As explained above, the Court has come to treat several 'objective' conditions for the delivery of an authorisation as being discriminatory against operators from other Member States. This tendency has been floating in the Court's case law for some time, until it found a clear expression in *Costa and Cifone*.⁶⁰ This tendency seems confirmed by *Susisalo*, a recent judgment concerning the Finnish system of delivery of authorisations for branch pharmacies, whereby the University of Helsinki was subject to more favourable conditions than private parties.⁶¹ Without ever using the 'd' word, the Court held that 'the fact that the restrictive effects of that preferential system affect home country nationals and those from other Member States alike is not such as to exclude that *preferential* system from the scope of Article 49 TFEU'⁶² and therefore identifies a restriction by accepting that the 'licensing scheme for the operation of branch pharmacies specific to the [University] is *more favourable* than that applicable to private pharmacies'.⁶³ A restriction which was found to be justified, in view of the educational and other functions performed by the University hospitals. This judgment beefs up the finding in *Costa and Cifone*: *Costa* stands for the idea that authorisation conditions may be *de facto* discriminatory when they entail restrictions which were not applicable to the operators already in place, while *Susisalo* makes clear that the operators discriminated against need not be exclusively, or even essentially, from other Member States.⁶⁴

In *Costa and Cifone*, where the Court identified a discrimination in the above-mentioned terms,⁶⁵ it did so at the price of a logical leap: it moved from the formal/procedural conditions for the delivery of an authorisation to the material conditions of delivery of the service itself. According to the Court 'the principle of

⁵⁹ Directive 123/2006, art. 12(1) ; for a brief discussion of this provision and its relationship with the *Placanica* case law, see V. Hatzopoulos, « Que reste-t-il de la Directive Services » (2008) 43 *Cahiers de Droit Européen*, 299-358, 333-4.

⁶⁰ For a brief discussion of this trend see above the text accompanying n 27-31.

⁶¹ Case C-84/11 *Susisalo ea* [2012] nyr.

⁶² *Ibid* para 34, emphasis added.

⁶³ *Ibid* para 44 and operative part, emphasis added.

⁶⁴ See, recently, in the same logic Case C-542/09 *Commission v The Netherlands (student grants)* [2012] nyr para 38.

⁶⁵ See the text of n 30 and 31.

equal treatment requires moreover [on top of objective, non-discriminatory criteria which are known in advance, as described in the previous para of the Court's judgment] that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions' for the delivery of services.⁶⁶ This is not the case, however, where '[t]he very fact that the existing operators have been able to start up several years earlier than the operators unlawfully excluded, and have accordingly been able to establish themselves on the market with a certain reputation and a measure of customer loyalty, confers on them an unfair competitive advantage'.⁶⁷

Therefore, by virtue of the principle of non-discrimination, not only the purely procedural conditions for the delivery of the authorisation, but also the substantial conditions for the delivery of the service in question should not entail any discrimination. This is a clear spill-over, in two ways: from procedural to substantive rules, and from internal market to competition law objectives.

ii. Better regulation in the Member States?

The principle of non-discrimination does not only cover the issuance of the authorisation as well as the conditions of exercise of the activity; it also extends to the circumstances in which such authorisation may be withdrawn, since 'those situations also correspond in practice to conditions for obtaining a licence'.⁶⁸ Hence, 'the principle of transparency, which is a corollary of the principle of equality, [...] implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner'.⁶⁹ By way of extension, also 'the circumstances [of revocation] be set out in a clear, precise and unequivocal manner'.⁷⁰

In this way the Internal Market rules impact on the quality of national regulation, since it requires it to be clear, precise and unequivocal, so as to secure legal certainty. By the same token the Court judges of the quality of national regulation, since it may decide to set it aside (as, indeed, it did in *Costa and Cifone*), if it does not fulfil the above criteria. This, combined to the age-old principle that compliance with EU law

⁶⁶ *Costa and Cifone* para 57; the fact that the Court is concerned with the conditions of the delivery of services is confirmed by the following para of the judgment where the Court notes that 'the effect of that measure is to protect the market positions acquired by the operators who are already established to the detriment of new licence holders, who are compelled to open premises in less commercially attractive locations than those occupied by the former. In consequence, such a measure entails discrimination against the operators which were excluded from the 1999 tendering procedure'.

⁶⁷ *Costa and Cifone* para 53.

⁶⁸ *Ibid* para 68.

⁶⁹ *Ibid* para 73.

⁷⁰ *Ibid* para 78.

may not be secured through circulars or other acts of uncertain legal value and/or visibility,⁷¹ may impact severely on the administrative practices of several Member States (essentially in the south of the EU), where the actual content of the regulation is being specified by way of non-binding acts. It may, therefore, be said that the Court is pushing towards 'better regulation'.⁷²

c. Judicial control: withdrawal of licences subject to a 'remedies' directive?

Next to better regulation, the second aspect in which EU Internal Market Law impacts on the way national administrations run the various authorisation procedures, is by imposing extensive and effective judicial review obligations. Indeed, the Court finds that the principle of transparency requires that any decision taking back an authorisation or imposing a sanction having equivalent effect (such as a heavy fine) 'may only [be] based on a judgment which has the force of *res judicata* and concerns a sufficiently serious offence'⁷³ and, that any 'legislation which provides for operators to be excluded, even temporarily, from the market can be regarded as proportionate only if it provides for an effective legal remedy and compensation for any loss suffered'.⁷⁴

By asking for the above, the Court pushes beyond its well-established requirement for judicial review, in two ways. First, it requires that any exclusion from the market only becomes effective once the judgment pronouncing it becomes definitive. Therefore, it seems to be running against the generally accepted presumption of legality of administrative acts, whereby an appeal against an administrative decision or a judgment does not, on its own, suspend the effects of that very act. Second, the Court requires that judicial control is not only formal, but that it offers effective redress for any damage unduly suffered. In this way the Court seems to be pinpointing at extremely short limitation rules, as well as at restrictive proof rules concerning the damage suffered, common to most national legal orders.

The above two requirements call for two observations. Firstly, that, if the Court decides to push these requirements further, they may radically reform the way that justice is being delivered within Member States. Indeed, Member States' procedural autonomy is being framed – if not tamed – in view of securing the full *effet utile* of the Internal Market rules. If the consequences seem far-reaching, the logic of the Court is compelling. What is more, the Court's role as the EU's Constitutional Court, does call

⁷¹ See eg Case 167/73 *Commission v France (code du travail maritime)* [1974] ECR 359.

⁷² For the concept of better regulation see, the various contributions to Weatherill, S. (ed), *Better Regulation* (Oxford/ Portland: Hart Publishing, 2007).

⁷³ *Costa and Cifone* para 81.

⁷⁴ *Ibid.*

for unification of the law; and after fifty five years of bringing closer the substantive rules, it may be that some approximation of procedural rules is not completely misplaced.

Secondly, one may not miss the link between these two requirements and the public procurement 'Remedies Directive' 2007/66.⁷⁵ Indeed, what the Remedies Directive does is, among other things, that it sets clear periods during which the award procedure is being suspended and it makes sure that unduly excluded tenderers may receive just compensation.⁷⁶ The parallelism between the Court's judgment in *Costa and Cifone* and the Remedies Directive is further fleshed out by the fact that in the judgment in question, the plaintiff was admitted before the Court (and the preliminary question was not dismissed as inadmissible following the relevant argument by the Italian Government) despite the fact that it had not participated in the award procedure for the authorisations. This draws a clear parallel with Article 1(3) of the Remedies Directive and the Court's well-established case law according to which the procedures put into place by the Directive are available also to tenderers who have not participated to a given procedure, provided they can show some interest.⁷⁷

In this way a full circle is drawn and the transposition of public procurement rules and principles to the delivery of authorisations, under the Internal Market rules, seems to be perfect. Based on a general principle of non-discrimination and of transparency, supposedly governing the first stage of the award procedure and aimed at securing adequate publicity, the Court does much more: it circumscribes not only the material conditions for the award of the authorisation – and even the conditions for the exercise of the activity in question – but also sets extremely high review standards. Therefore, not only the requirements of Directives 2004/18, 2004/17 and the corresponding interpretative Commission Communications may be of relevance – if not directly, at least as yardsticks – for authorisation procedures, but also the very Remedies Directive.

⁷⁵ Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31.

⁷⁶ For a brief presentation of this Directive see, among many, E. Chiti 'Directive 2007/66 and the Difficult Search for Balance in Judicial Protection Concerning Public Procurements' [2010] *Italian Journal of Public Law*, 125-53, also available at <http://www.ijpl.eu/assets/files/pdf/2010_volume_1/E.%20Chiti%20-%20Directive%202007-66%20and%20the%20difficult%20search%20for%20balance%20in%20judicial%20protection.pdf> last accessed 29/04/13; see also E. Olsson 'The Full Force and Effect of Public Procedure Remedies – the general principles of directive 2007/66, available at <<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1560955&fileId=1565479>> last accessed 29/04/13, who in his concluding section specifically addresses the question of whether the directive satisfies to the principles of effectiveness and effective judicial protection – and finds to the positive.

⁷⁷ Case C-230/02 *Grossmann* [2004] ECR I -1829.

III. Mutual recognition of authorisations

Mutual recognition has always occupied a core role in the creation of an internal market for services.⁷⁸ It has served as the foundation of services liberalisation, by the judiciary, especially at times when secondary legislation in the field of services was scarce. Further, it has been put to work by the legislature, in different variants: EU passports for banks, insurance and financial service providers; internal market clause for ISP and e-commerce providers; country of origin principle (or almost) for TV broadcasters. The fact that the Services Directive was adopted only after the country-of-origin principle was dropped, means that, but for few sector-specific activities, there is no such thing as automatic recognition of authorisations of service providers (a). Indeed, if mutual recognition of authorisations in the field of goods is, henceforth, an issue extensively dealt with by secondary law, in the field of services the role of the Court continues being core (b).

a. Managed mutual recognition: Passports and Internal Market Clauses

The fact that authorisations at the national level create obstacles to free movement has prompted the EU legislature to intervene in key areas of economic activity and to put into place a system of managed mutual recognition. Hence, following some (more or less extensive) harmonisation, the authorisations delivered by the one Member State would be valid in all other Member States. The first areas in which such a system has been followed were financial and banking services, as well as insurance, by way of the so called 'European Passports'.⁷⁹ These Passports, initially issued and monitored by national authorities, have progressively been subject to extensive harmonisation⁸⁰ and, lately, also monitoring, at the EU level, in a way that nowadays one can talk of a centralized system of authorisation and control of financial institutions.⁸¹

⁷⁸ For an early analysis see V. Hatzopoulos *Le principe communautaire de reconnaissance et d'équivalence mutuelle dans la libre prestation de services* (Athènes/Bruxelles: Sakkoulas/Bruylant, 1999) ; for an updated evaluation see, by the same author 'Le principe de reconnaissance mutuelle dans la libre prestation de services' CDE (2010) 47-93; and for slightly different focus Hatzopoulos 'Forms of Mutual Recognition in the Field of Services' in I. Lianos and O. Odudu (eds) *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge: CUP, 2012) 59-98; see also K. Nicolaidis, 'Trusting the Poles? Constructing Europe through mutual recognition' (2007) 15 JEPP 682-698, who also uses the terms 'managed' and 'pure' mutual recognition, in the way they will be used hereunder.

⁷⁹ For which see, among many Lomincka above n 2.

⁸⁰ Especially so since the adoption of the MiFiD, European Parliament and Council Dir 2004/39/EC on markets in financial instruments [2004] OJ L145/1. The MiFiD itself was further modified by European Parliament and Council Directives 2006/31/EC [2006] OJ L114/60, 2007/44/EC [2007] OJ L247/1, 2008/10/EC [2008] OJ L76/33, 2009/65/EC [2009] OJ L 302/32 and 2010/78 [2010] OJ L 331/120.

⁸¹ For this evolution see, among briefly Hatzopoulos *Regulating Services in the EU* , 231-8 and the literature cited there.

More ambitious than the 'passport' system, has been the introduction of the 'internal market clause', to the extent that it was based on very light prior harmonisation. An early version of this clause was used in the 'Television Without Frontiers' (TVWF) Directive, adopted as far back as in 1989 and amended several times ever since, for the last time through the adoption of the so called 'Audio Visual Media Directive' (AVMS).⁸² Alongside this 'media' Directive are the two e-Directives, adopted during the dot-com bubble, with the aim of encouraging the emergence of pan-European providers of electronic services (e-services) that would be in a position to compete on the international scene. The first text concerns the provision of electronic signatures,⁸³ while the second is more concerned with content and e-commerce in general.⁸⁴

Internal Market Clauses take the form of a *quid pro quo*: home state authorities make sure that service providers established in their territory satisfy the minimum coordinated rules, which are essentially connected to the protection of general interest. In return, host state authorities cannot exclude such 'compliant' service providers, for any reason falling within the coordinated field. IMCs are based on strict 'nationality' requirements intended to restrict arbitrary or otherwise abusive 'regulatory shopping' by service providers.⁸⁵

The extent to which the Court is attached to the proper and effective application of Internal Market Clauses may be illustrated by reference to its recent judgment in *Mesopotamia*.⁸⁶ Was at stake the prohibition, by the German authorities, of the activities on German territory of two Danish companies broadcasting emissions and footages in favour of the Kurdish PKK, a terrorist organisation. The companies in question were authorized under Danish law, in compliance with the TVWF Directive. Therefore, despite the fact that the Court accepted the German view that the

⁸² Council Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23; modified by the European Parliament and Council Directive 97/36/EC [1997] OJ L202/60). European Parliament and Council Directive 2007/65/EC amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L332/27; on the AVMS see Geach, N., 'Converging Regulation for Convergent Media: an overview of the AVMS' (2008) 1 *J of Information L and Technology* 1-19, also available at <http://go.warwick.ac.uk/jilt/2008_1/geach> last accessed on 29/04/13; see also Valcke, P., Stevens, D., Lievens, E., and Werkers, E., 'AVMS in the EU, Next Generation Approach or Old Wine in New Barrels?' (2008) 71 *Communications and Strategies* 103-18.

⁸³ E-signature Directive (European Parliament and Council Dir 1999/93/EC on a Community framework for electronic signatures [2000] OJ L13/12).

⁸⁴ E-Commerce Directive (European Parliament and Council Dir 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1).

⁸⁵ The trend is for such requirements to become increasingly strict, as can be witnessed in the AVMS Directive.

⁸⁶ Joined Cases C-244-245/10 *Mesopotamia Broadcast and Roj* [2011] nyr.

contested emissions did constitute incitation to hatred and thus could justify measures based on public order, morality and security, it held that such measures could not hinder retransmission itself (covered by the Directive), but could only concern other related activities (such as the production of broadcasts and the organisation of events and sympathy actions) carried out on German territory. Hence, although the Court was openly sympathetic towards the German government's worries, it was not ready to loosen up the application of the Internal Market Clause.

This is a strong sign that in areas where the delivery of authorisations is subject to some EU harmonisation and/or overview, it will be extremely difficult for Member States to invoke national interests – unless these have been completely ignored by the EU legislature at the first place.

b. Pure mutual recognition

In areas not covered by any text of secondary law, where mutual recognition only delves on the Court's determinism, the Court has followed an ambivalent approach.

i. General trend: recognition of everything but the authorisation

According to well-established case law mutual recognition covers all the elements leading to the authorisation, *but* the authorisation itself. Therefore, the host Member State is supposed to recognise documents irrespective of whether these are harmonised⁸⁷ or not,⁸⁸ as well as conformity certificates and assimilated documents.⁸⁹ It is also supposed to recognise the professional qualifications acquired in any other Member State, irrespective of whether such qualifications fall within the relevant Directive⁹⁰ (which the Court interprets in an extensive manner)⁹¹ or not.⁹² What is more, guarantee deposits with Banks in other member states should always and under any circumstance be recognised. Any opposite solution would violate

⁸⁷ See eg Case C-326/00 *IKA v Ioannidis* [2003] ECR I-1703 and Case C-202/97 *Fitzwilliam* [2000] ECR I-883, for documents E 111 (covering urgent medical care) and E 102 (certifying affiliation to a compulsory pension scheme), respectively; see also Case C-476/01 *Kapper* [2004] ECR I-5205 concerning driving licences.

⁸⁸ See eg Case C-274/05 *Commission v Greece (University Degrees)* [2008] ECR I-7969.

⁸⁹ See eg Case C-6/05 *Medipac* [2007] ECR I-4557; Case C-489/06 *Commission v Greece (EC markings)* [2009] ECR I-1797; see also Case C-432/03 *Commission v Portugal, plastic pipes* [2005] ECR I-9665.

⁹⁰ The Professional Qualifications Directive 2005/31/EC [2005] OJ L 255/22, codifying various pre-existing texts; itself currently under review, see COM(2011) 883 final.

⁹¹ See eg Case C-313/01 *Morgenbesser* [2003] ECR I-13467 and Case C-234/97 *Bobadilla* [1999] ECR I-4773.

⁹² See eg Case 222/86 *Unectef v. Georges Heylens ao* [1987] ECR 4097; Case 71/76 *Jean Thieffry v. Conseil de l'ordre des avocats à la cour de Paris* [1977] ECR 765; and Case C-340/89 *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden- Württemberg* [1991] ECR I-2357.

simultaneously a) the free movement of service providers (being an indirect discrimination), b) the free movement of banking services (being an absolute prohibition) and c) the free movement of capital (being an absolute prohibition).⁹³

Another element which has been taken into account by the home Member State in order to deliver its authorisation should be duly taken into account by any other Member State. Two recent cases illustrate this obligation. In *Commission v Italy (sanitary services)*,⁹⁴ Italy was found in breach of Article 56 TFEU because the registration system it imposed did 'exclude from its scope a provider of services who is established in a Member State other than the Italian Republic and who [...] under the legislation of its Member State of establishment, already satisfies formal requirements equivalent to those under the Italian Law'. The Italian authorities should, before imposing any of the sanctions foreseen for breach of the registration procedure, examine whether the same or similar conditions as the ones required for registration were not already satisfied by the service providers in their home states.

In *Commission v Portugal (construction)* was at stake the system of prior authorisation of all construction workers operating in this country for a period exceeding a year.⁹⁵ The Court reminded that a service provision may go on for periods longer than a year, and repeated its settled case law according to which any prior authorisation requirement constitutes a restriction to Article 56 TFEU. It then went on to the control of proportionality of the measure. In this context it stated that 'a national authorisation scheme goes beyond what is necessary where the requirements to which the issue of authorisation is subject duplicate the equivalent evidence and safeguards required in the Member State of establishment, *inferring in particular an obligation on the part of the host Member State to take account of controls and verifications already carried out in the Member State of establishment*'.⁹⁶ The Court, thus, found that the Portuguese scheme could not be upheld since it 'precludes the possibility of account being duly taken of equivalent obligations to which such an undertaking is subject in the Member State of establishment or of the verifications already carried out in that regard by the authorities of that Member State'.⁹⁷ In this way the Court draws a very close line to the country of origin principle, vilified and abandoned by the Services Directive. Indeed, if the

⁹³ Case C-263/99 *Commission v Italy, transport consultants* [2001] ECR I-4195; Case C-279/00 *Commission v Italy, temporary labour agencies* [2002] ECR I-1425.

⁹⁴ Case C-358/98 *Commission v Italy (sanitary services)* [2000] ECR I-1255, para 13.

⁹⁵ Case C-458/08 *Commission v Portugal (construction)* [2010] ECR I-11599.

⁹⁶ *Ibid* para 100, emphasis added.

⁹⁷ *Ibid* para 101.

authorisation delivered by the home State of the service provider is not recognized as such by the host State authorities, all the elements leading to such authorisation should be. To the extent that, by virtue of the Services Directive, Member States need to justify all the authorisation schemes that they seek to maintain by reference to objective criteria, they are likely to end up imposing similar requirements for similar activities. Such requirements should, according to the above case law, be subject to mutual recognition, thus leading to *de facto* recognition of the authorisation itself.

The same idea is also expressed in Article 10(3) of the Services Directive, according to which 'The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State.'

ii. Sensitive areas: no mutual recognition at all!

A second, and opposing, tendency, however, may be identified in the Court's recent case law, whereby the very foundations of mutual recognition are being questioned. This 'assault' on mutual recognition has been essentially staged in the area of gambling and gaming, but 'collateral damages' may not be excluded.

Liga Portuguesa,⁹⁸ concerned the exclusive right given under Portuguese law to a single, state-controlled, operator to run all games of chance in the country. The Court reminded that in relation to gaming, an area where any harmonization is lacking, Member States enjoy wide discretion. It held that

'a Member State is therefore entitled to take the view that the *mere fact* that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, *in which it is established and where it is in principle already subject to statutory conditions and controls* on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime'.⁹⁹

This is a striking finding since it questions the fundamentals of mutual recognition, at least whenever such recognition is not 'managed', ie organized by some text of

⁹⁸Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633.

⁹⁹*Ibid* para 69, emphasis added.

secondary legislation proceeding to some degree of harmonisation. A first remark concerns the language used by the Court. What has been the quintessential condition on which mutual recognition has been grounded ever since *Van Binsbergen* and *Cassis de Dijon*,¹⁰⁰ ie the fact that the operator/product has been lawfully authorised in another Member State is here described as a ‘mere fact’. Second, it is clear from this very passage that the Court does not allude to any situation of abuse of rights or *fraude à la loi*, since it clearly states that the operator *is* established and *is* subject to statutory conditions and controls. Third, the Court states that the above holds true in the absence of harmonisation, but it is unclear how much harmonisation would be enough for mutual recognition to be operational: if full harmonisation, by definition, does not leave any place for mutual recognition, and no harmonisation at all excludes it (according to the above finding) then a grey area of ‘partial’ harmonisation is being designed by the Court and needs to be further clarified.

In the immediately following paragraph of the same judgment the Court makes reference to the specific nature of the internet and to risks associated with the lack of direct contact between the parties – a reference repeated in other gambling judgments.¹⁰¹ It could be thought, therefore, that the above negation of the principle of mutual recognition could be limited to situations where delicate services are offered over the internet. Such an explanation, however, has been tacitly dismissed by the Court. In *Dickinger and Ömer*, a case concerning the Austrian system of authorisations for online games, the Court without any reference to the internet solemnly stated that¹⁰²

‘no duty of mutual recognition of authorisations issued by the various Member States can exist in the current state of European Union law’ since ‘the mere fact that an operator lawfully offers services in one Member State, in which it is established and is in principle already subject to statutory conditions and controls on the part of the competent authorities of that State, cannot be regarded as a sufficient assurance that national consumers will be protected against the risks of fraud and crime’.

¹⁰⁰ Case 33/74 *Johannes Hervicus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

¹⁰¹ See eg Case C-258/08 *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator* [2010] ECR I-4757, para 55; Case C-212/08 *Zeturf Ltd* [2011] nyr, para 80.

¹⁰² *Ibid* para 96.

As if this were not clear enough the Court further explained that¹⁰³

‘A Member State may legitimately wish, moreover, to monitor an economic activity which is carried on in its territory, and that would be impossible if it had to rely on checks done by the authorities of another Member State using regulatory systems which it itself does not grasp’.

It is the first time to the knowledge of the present author that the Court pronounces such an outspoken negation of mutual recognition.¹⁰⁴ If it is precise that no mutual recognition of authorisations, as such, has ever been imposed by the Court, it has been explained above that the Court’s general case law pointed in the direction of recognizing everything *but* the authorisation itself. In these cases, however, the trend is clearly reversed: since mutual recognition is in principle dismissed, Member States are unconstrained to choose not only the level of protection but also the means appropriate for attaining it – excluding by the same token any alternative means. Hence in *Dickinger and Ömer* the Court accepted that Austria could freely opt for the more ‘archaic’ means of control instead of being forced into considering the efficiency of the (presumably better-performing) ITC-based means of control pioneered by Malta.¹⁰⁵ This is questionable on two accounts. First, because it approves of artificial and unnecessary grounds for partitioning the internal market since it allows full ‘sovereignty’ to national controls, however inefficient and/or arbitrary these may be. Second, because, contrary to previous case law where the Court pushes Member State authorities to improve and to rationalize their practices by reference to international practices,¹⁰⁶ here the Court readily settles for inefficiency. What is more, the above statements seem to be denying the idea that mutual recognition constitutes a general principle of law, applicable in all circumstances.¹⁰⁷

Conclusion

Authorisation systems offer efficient ways of regulating economic activities. Regulating through the delivery of authorisations may be justified either by natural/technical reasons, or by political choices; the EU may not change the former

¹⁰³ *Ibid* para 98.

¹⁰⁴ This pronouncement should be seen in combination with the finding in *Stoss*, above n para 109, according to which mutual recognition of authorisations is ‘*ex hypothesi*’ excluded in areas where the Member State concerned has opted for the existence of a monopoly.

¹⁰⁵ *Ibid* para 98.

¹⁰⁶ See eg in the field of healthcare, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473; Case C-368/98 *Vanbraekel* [2001] ECR I-5363; Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325.

¹⁰⁷ Idea explained by Hatzopoulos *op.cit.* above n 78.

nor second-guess the latter. It has, therefore, to put up with authorisation regimes put into place by Member States, even though these may constitute restrictions – and even discriminations – prohibited by the Internal Market law.

In doing so, however, the EU does impact on such regimes, in four ways. *First*, the EU Courts, prompted by the Commission, may exercise some (limited) control over the objective necessity for establishing an authorisation system. *Second*, and more spectacularly, the Court together with the Commission have been actively defining the conditions, procedural and material, for the delivery of authorisations. By so doing they have been actively interfering not only with the supposed ‘procedural autonomy’ of Member States, but also with the way national administrations operate. The Services Directive is also expected to have a very important input in this direction. *Third*, the Court and the legislature have been imposing quite extensive mutual recognition obligations. Mutual recognition may cover the authorisation itself, when it is managed through some text of secondary legislation, or all the elements but the authorisation itself, when it is imposed directly by the Court; exceptionally, in the absence of any harmonisation and in view of considerable differences mutual recognition may be altogether inoperative. *Fourth*, where mutual recognition proves not to be effective, the EU may take over from the Member States and fully regulate specific activities, such as financial and assimilated services. These four developments have been briefly presented in the present contribution.

The germs of such developments were present in the early case law of the Court, starting with *Van Binsbergen* and *Cassis de Dijon*.¹⁰⁸ The fact, however, that EU law would have such a profound impact on the way authorisation systems are decided, implemented and monitored by the Member States could have been hardly foreseen. Indeed, this outcome stems from several concurring developments: the expansive definition of the concept of restriction and/or discrimination by the Court, as well as the express consecration of the ‘market access’ criterion for the violation of the Internal Market rules; progressive recognition of the non-discrimination and transparency principles as guiding all ‘public procurement like’ procedures; the adoption of the Services Directive; the regulatory adjustments made essential in order to tame the financial and economic crisis, are just few of the jigsaw pieces which brought things where they stand today. The need to re-launch the European economy may only push further in the direction of Europeanization of authorisation regimes.

¹⁰⁸ Above n 100.



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