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THE POLICY AND REGULATORY LEEWAY AVAILABLE TO THE MEMBER STATES UNDER THE TFEU ON THE FREEDOM OF ESTABLISHMENT

A LEGAL MAPPING EXERCISE

BY THE LENDÜLET-HPOPS RESEARCH GROUP IN SPRING 2016

Hungarian Academy of Sciences, Centre for Social Sciences, Lendület-HPOPs Research Group

http://hpops.mta.tk.hu

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Executive summary

The liberalization and the regulation of the free movement of persons and companies for economic purposes in the Single Market under Article 49 TFEU, which under EU law falls under the notion of establishment, offers benefits to the Member States which would not be available to them when acting on their own. The benefits are provided under what is, in principle, a balanced and sustainable policy framework in which the liberalization agenda – executed in parallel at the level of primary and secondary law – is supplemented by parallel, potentially competing policy considerations. These range from controlling the abuse of freedom of establishment by companies aiming, for example, to damage public or private monetary interests to ensuring that States are able to exercise their tax powers over incomes made in other Member States using the EU fundamental freedoms. In order to maintain this balanced and sustainable policy framework, the Member States are allowed under the derogations available in the Treaties, and in some instances in EU legislation, to develop and introduce policies and specific legal and administrative frameworks at the national level giving effect to these parallel policy considerations.

Attaining the benefits of freedom of establishment comes with substantive and procedural restrictions for the Member States. These restrictions on national policy making and regulation follow not only from the EU provisions governing the liberalization of cross-border establishment, and from those coordinating the same, but also from the legal benchmarks which have emerged from the scrutiny by the Court of Justice of restrictions introduced by the Member States. These legal benchmarks are of particular relevance for the Member States as they determine how they may contribute through policy action at the national level to establishing and maintaining the balanced and sustainable policy framework of freedom of establishment. The restrictions applicable to Member State conduct were determined in parallel in legislation as a result of a political process and in the jurisprudence of the Court of Justice based on judicial involvement promoting the liberalization agenda of Article 49 TFEU, which mechanisms in some instances interacted in a dynamic process and which in some instances continue to supplement each other.

The restrictions imposed on the Member States correspond with the rules and principles of the overall Treaty framework. In particular, the Member States need to observe the equal treatment principle, they are unable to rely on derogations based on economic considerations which are incompatible with the idea of the Single Market, and they must meet the substantive and procedural requirements following from the proportionality principle. There are rather clearly defined considerations under the rule of law which the Member States need to observe when they interfere with the policy and

regulatory areas relevant for freedom of establishment. The jurisprudence of the Court of Justice relating to these restrictions provides a number of more detailed legal benchmarks and signposts for Member State policy makers which, in essence, demand that Member State policies and regulation meet standards of good governance and regulation. The most fundamental legal benchmark is the equal treatment principle which is enforced in different forms more or less consistently in the jurisprudence.

The law under Article 49 TFEU provides one major avenue for the Member States to depart from their core liberalization obligations. In areas listed in the Treaties and recognized in the case law, which are compatible with the idea of a balanced and sustainable European framework for freedom of establishment, the Member States are able to introduce restrictive measures autonomously provided that they follow the signposts and meet the legal benchmarks developed in the jurisprudence of the Court of Justice. The autonomy of the Member states in these domains is also supported by the fact that the European Union may not have competences – original or acquired – in these domains and that some of these areas may fall within the core of Member State sovereignty (e.g., direct taxation and tax enforcement powers). The ability of the Member States to intervene in these domains, as recognized by EU law, reflects the idea that freedom of establishment as a complex policy is governed and regulated, using not only negative (deregulatory) but also positive (constructive) measures, both at the European and the national level.

The policy and regulatory leeway available to the Member States under Article 49 TFEU is different in connection with domestic fiscal policy (taxation) measures and regulatory measures which may constitute a restriction on freedom of establishment. While regulatory measures, such as those governing the conditions of entry into a domestic market, are treated with the customary legal rigor as provide under the free movement provisions of the Treaties, fiscal measures introduced by the Member States – based mainly on considerations relating to the fiscal sovereignty of the Member states and to the lack of EU competences – may be given a more favorable legal assessment. Claims submitted by the Member States concerning national tax autonomy and tax sovereignty will be taken into account and judicial scrutiny may only focus on national fiscal measures meeting the most fundamental legal benchmarks (e.g., non-discrimination, or benchmarks relating to good governance and good regulation).

This difference in the legal scrutiny of restrictive Member State measures does not mean, however, that the fiscal policy considerations of the Member States will be given readily the green light in the process of justifying restrictions on freedom of establishment. Because they tend to violate the fundamental equal treatment principle – mainly, by subjecting taxpayers to differentiated tax treatment, they promote interests which cannot be

accommodated under the legal and policy framework of the Single Market (e.g., the loss of tax revenue as a result of free movement, or because they have been addressed in parallel EU or other instruments, establishing that the given fiscal policy objective may be pursued legitimately by the member State concerned has particular relevance under Article 49 TFEU and may provide to be near impossible. This has led to a massive body of jurisprudence dealing with the legitimacy of the general interest ground raised by the Member States in cases involving taxation measures. Following the general principle that derogations must be interpreted restrictively, the Court of Justice demands, in general, clear and precise, adequately (and specifically) targeted measures from the Member States so that the link between the restriction and the objective pursued can be established.

The weight of the Treaty restrictions on Member State policy and regulatory opportunities depends primarily on the intensity of the application of the necessity and proportionality test. In the case of Member State fiscal measures, elements of the test are often considered in the context of examining the legitimacy of the objective pursued by the national measure and the unjustifiability of the restriction is established without engaging directly in a scrutiny of proportionality. The legal requirements arising from proportionality are most confining when less restrictive alternative measures are demanded from the Member States. This could involve obliging the Member States to consider procedural solutions instead of imposing substantive restrictions, or applying market-friendly measures (e.g., compulsory insurances) instead of relying on inflexible administrative supervision and enforcement frameworks. The existence of parallel EU or other arrangements addressing a particular issue (e.g., administrative cooperation in taxation matters) can have a decisive influence on the proportionality of the national measure. Proportionality also imposes rather demanding requirements of good governance administration on the Member States requiring that national measures are adequately targeted, meet the obligations arising from legal certainty, or provide for adequately regulated administrative decision-making procedures involving discretionary powers which are subject to effective judicial remedies. Considerations relating to the rule of law, legal certainty in particular, may have direct relevance for national regulation and policy-making. The impact of EU law requirements often depends, however, on the possibility and the degree of deference to national discretion (to national courts and public authorities) in assessing the compatibility with EU obligations of national measures in light of the circumstances of the given case.

Introduction

The aim of the legal mapping exercise is to identify and analyze the legal boundaries of the leeway available to the Member States under the law on individual EU policies to develop and regulate national policies. It is carried out under the working premise that the law governing EU policies provides a framework for Member State policy and regulatory action which measures are adopted either to implement, supplement, or even correct European policies. EU law may also provide legal boundaries for autonomous Member State policies developed and executed in national competences. This legal mapping report offers an accessible and comprehensive review of the principles, detailed rules and practices governing and delimiting Member State conduct in a selected EU policy areas. It looks both at the benefits offered by the common policy to the Member States and the possibilities available under the common policy framework for Member State governments to pursues policies and adopt regulations on their own. The report reveals considerable substantive and procedural limitations in Member State action, which are, in general, adequately explained and duly substantiated. Member State governments interested in exploiting the room for maneuvering under the EU legal framework must meet high standards of good governance and administration.

1 The policy framework of the freedom of establishment

Restrictions and prohibitions

In Article 49 TFEU, the Member States imposed on themselves mutual legally enforceable obligations delimiting their policy in regulatory choices in matters, such as taxation, company law, regulating professions, or the regulation of market-entry. Article 49 TFEU has direct effect,[1] however, its realization and enforcement at the Member State level is not entirely independent from the EU adopting secondary legislation and the Member States implementing them.[2] The Treaty prohibitions are often interpreted and applied together with the general EU principles of equal treatment and proportionality. With non-discrimination on the basis of nationality and the principle of national treatment serving as the core obligation in Article 49 TFEU, their parallel application with the general principles of EU law boosts the policy embedded in this Treaty provision. Article 49 TFEU, when applied, overlaps considerably with the free movement of persons and other fundamental freedoms involving a movement of persons (i.e., the free movement of services and capital),[3] which means that in the assessment of the benefits and risks associated with freedom of establishment those relating to these policy areas must also be taken into account.[4]

Direct effect and graduality

The direct effect of Article 49 TFEU[5] was recognized after the expiry of the transitional period provided in the Treaties for the gradual implementation of Treaty obligations.[6] The jurisprudence of the EU Court of Justice made it clear that the restrictions imposed on the Member States are applicable irrespective of whether all the necessary measures prescribed in the Treaties[7] to give effect to the freedom of establishment had been adopted.[8]

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[1] The direct effect of provisions of Association Agreement on the right of establishment were also accepted, para. 32, Case C-63/99 Gloszczuk; para. 33, Case C-235/99 Kondova; para. 33, Case C-257/99 Barkoci; para. 28, Case C-268/99 Jany

[2]

[3] The right guaranteed under the Treaties of every citizen of the European Union to move and reside freely within the territory of the Member States finds specific expression in the Treaty provisions on the freedom of movement of workers and on freedom of establishment, para. 18, Case C-152/05 COmmision v Germany.

[4] See legal mapping reports by HPOPs

[5] Which was held to be a fundamental provision of EU law, Para. 40, Case C-9/02 Lasteyrie du Saillant FMC Paras. 7-8 Theiffry holding that achieving the Treaty objective of free movement of persons and services the Treaty stipulates the right of establishment in other Member States. But held to be an objective of the Treaty in para. 15. A 'fundamental principle of the Community', para. 13, 270/83 Commission v France.

[6] inter alia para. 15 daily mail

[7] These are a 'general programme' of progressive abolishment of restrictions in the course of the transitional period for realizing the freedom of establishment, the adoption of directives to ensure the mutual recognition qualifications in order to facilitate access to another Member State, and the general coordination of national laws to ensure that the right of establishment can be exercised.

[8] The result called for by Article ?? TEC, which was equal treatment, represented a sufficiently 'precise result', the fulfilment of which was made easier by, 'but not made

Initially, direct effect was recognized only with regards the prohibition concerning nationality requirements and non-discrimination on the basis of nationality as in the Court of Justice's interpretation the legislative contribution by the Union to enable the easier exercise of the right of establishment was still necessary.[9] The judgment *Patrick* relaxed this limitation subsequently when it held that the effective exercise of the right of establishment can be ensured by virtue of the applicable national laws and regulations without there being a need to wait for EU legislation to impose and to specify the non-discrimination obligation arising from Article 49 TFEU.[10] The ruling in *Thieffry* relied on the principle of loyalty (now, Article 4(3) TEU) when it argued, in support of the direct enforceability of rights provided under EU law, that the 'practical benefit' of the right of establishment cannot be denied from individuals by national law, or by virtue of the practices adopted by professional bodies simply because the legislative measures proposed by the Treaty had not been adopted by the Union.[11] The jurisprudence also recognized the direct effect of the directives implementing the right of establishment in regards, specifically the obligation of mutual recognition and the right to practice a profession, which was held to apply to the period when the directive, in violation of EU law, had not been implemented or had only been partially implemented.[12]

1.1 The expected benefits of the free movement of capital

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dependent on', the implementation of that legislative programme, paras. 26-27 Reyners. The explicit provision on the transitional period, and that that period expired without the required measure having been adopted or only with part of the required measures having been adopted were held as not affecting the enforceability of the non-discrimination requirement embedded in Article ?? TEC, paras. 28-29 ibid. Para. 10 Klopp. Para. 13, C-340/89 Vlassopoulou The prohibition on introducing any new restrictions on the right of establishment was held to be 'legally complete' and directly effective as early as Costa v ENEL. This interpretative approach follows from the Court of Justice considering the place of the right of establishment in the 'general structure of the Treaty' and in light of the objectives of the Treaty, para. 15, 136/78 Auer

[9] Paras. 30-31 Reyners

[10] Para. 17, C-11/77 Patrick, the fact that the prescribed directives 'have not yet been issued does not entitle a Member State to deny the practical benefit of that freedom to a person (…) when the freedom of establishment (…) can be ensured in that Member State by virtue in particular of the provisions of the laws and regulations already in force.'

[11] Paras. 16-17, Thieffry para. 14, C-340/89 Vlassopoulou and para. 9 C-104/91 Borrell The Court offered the explanation that the freedom of establishment can be realized in the course of the operation of national law and as a result of the actions of national bodies, and that in some circumstances its practical enjoyment may depend solely on national practice and legislation. The national, and, thereby, the horizontal dimesion of the obligations under Article 49 TFEU were further reinforced when the Court continued that in case Union obligations are followed in the application of national law and in the operation of national bodies the Treaty objectives can be adequately achieved. Paras. 17-18, ibid.

[12] paras. 12-16, 271/82 Auer. The right to practice the profession in the host Member State applies upon the date of expiry of the period available for the implementation of the directive, which is not an 'ex nunc' right to practice a profession, subject to the provisions of that directive (e.g., a certificate issues by the home State). See also para. 8 Rienks

The abolishment of Member State restrictions on freedom of establishment was undertaken bearing in mind the benefits offered by cross-border mobility for economic activity in an open and integrated European market. The right of establishment enables individuals – natural and legal persons – to participate in the economic life of other Member States, mainly in the services economy, and to profit therefrom.[13] With this, they – businesses and self-employed professionals – contribute to the desired 'economic and social interpenetration' within the Union in the sphere of economic activities.[14] This objective of integration in the host Member State[15] was interpreted to include under freedom of establishment the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period and to presuppose actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there.[16] For individuals, freedom of establishment was held to offer a 'complete equality of competition'[17] in the entire Single Market, which reaches down to the most basic conditions of a person being present in the economic and social life of another Member State.[18] In the specific area of cross-border company transformations, it was held that freedom of establishment makes it possible for them 'to pursue a particular activity in new forms and without interruption, thereby reducing the complications, times and costs associated with other forms of company consolidation.'[19] For companies, freedom of establishment offers the possibility of choosing the most advantageous national regulatory and taxation environment for carrying on an economic activity.[20] At the level of individuals, freedom of establishment also enables choosing the most advantageous regulatory and taxation environment as offered by the legal system of the different Member States,[21] although there is no guarantee under EU law that those benefits may actually be realized.[22] As a policy, it offers through cross-border mobility new business opportunities and economies of scale which is expected to lead to economic growth, enhanced productivity and

[13] Facilitate the pursuit by Union citizens of occupational activities of all kinds throughout the Union and preclude national legislation which might place Union citziens at a disadvantage, para. 13, 143/87 Stanton; para. 28, C-106/91 Ramrath. It was held to be an essential component of the Single Market – as part of the broader free movement of persons – where nationals of the Member States have the opportunity to carry out economic activities in any place within the territory of the Union, paras. 17-18 136/78 Auer

[14] Para. 21 Reyners para. 25 Gebhard. This, according to the Court of Justice, is a matter fo fact which needs to be determined by the national authorities and courts, para. 35 SEVIC

[15] Para. 54 . Case C-196/04 Cadbury Schweppes

[16] Para. 54.

[17] Para. 16 63/86 Commission v Italy

[18] ibid., such as access to housing or access to financial support to have access to housing.

[19] para. 21 SEVIC

[20] 138 Inspire art; para. 27 Centros, para. 16 Segers

[21] Centros.

[22] paras. 62-63, National Grid.

competitiveness, growing employment, increased consumer welfare, and to enhanced opportunities for individuals to make life choices.[23] Since the core aspect of freedom of establishment – mobility – is intrinsically linked to freedom of movement of persons (labor) and to the integration of the European service market under the free movement of services.[24]

1.2 A balanced and sustainable policy framework

Under Article 49 TFEU, a balanced and sustainable policy framework was created for the cross-border mobility offered to professionals and undertakings under the freedom of establishment in the Single Market.[25] The central liberalization agenda is counterbalanced – by means of introducing legal safety valves in the form of derogations – by parallel policy objectives so as to exclude, or at least to manage the risks associated with the freedom of movement. The Member States also took particular care that their taxation powers are not severed unduly by their EU obligations. In its current form, the legal framework – at Treaty-level and in secondary legislation – recognizes policy and regulatory considerations which balanced against the fundamental obligations laid down in Article 49 TFEU can be pursued by the Member States within the policy framework of the Treaties. Predominantly, Member State action restricting or interfering with cross-border establishments is allowed for the purpose of establishing and maintaining a balanced and sustainable integrated space for economic activity in the EU where considerations and interests relevant for the operation of that market space are given sufficient recognition even in the form of Member State action.[26] Member State measures may also be introduced to prevent individuals relying on the freedom of establishment for

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[23] Stated in general in connection with the Single Market, Commission Communication, Uprgading the Single Market: more opportunities for people and business, COM(2015) 550 final.
The other general of the Single Market, such as 'a single space for production', 'enables the effective disvision of tasks in a larger economic space', 'enables the effective use of resources', 'enables cost-effective operation', 'leads to more effective production', 'ensures greater competition', 'enables the introduction of new technologies into production', 'enables mass production', 'eliminates protected monopolistic positions in national markets', 'ensures competitive prices, continuous investment and technological modernization, and the continuous improvement of quality', Spaak, p. 13

[24] Effective allocation of resources, the effective use of production and the workforce, the free circulation of factors of production, Spaak p. 15

[25] The Spaak Report's general balanced approach to the creation of the common market provides the basis of the balanced and sustainable framework, see Introduction, 13-26.

[26] It must be borne in mind, however, that these possibilities are not made available 'to reserve certain matters to the exclusive jurisdiction of Member States', but they offer the possibility for 'national laws to derogate from the principle of free movement to the extent to which such derogation is and continues to be justified for the attainment of the objectives' identified in the Treaties, para. 41, C-421/98 Commission v Spain

illicit purposes (e.g., tax avoidance) jeopardizing the policy balance established under Article 49 TFEU.[27]

Freedom of establishment allows the Member States to realize policy opportunities both by complying with the restrictions imposed on them and by maintaining national policies and regulations within the legal framework allowed under the Treaties and in secondary legislation. Beyond the earlier mentioned general benefits, the collective undertaking of mutual obligations under Article 49 TFEU by the Member States enables them to avoid the negative consequences of policy unilateralism including unilateral retaliatory action taken by other Member States and of what may be called as 'beggar-thy-neighbor' approaches to controlling and restricting free movement. In parallel, the Member States are entitled to shape the integrated European market through national policies and measures so that the freedom of movement can be reconciled with interests, such as the balanced allocation of taxation powers among the Member States, effective cross-border tax enforcement, the adequate regulation of professions, the effective regulation of market-entry, the useful regulation of company law, or the effective delivery of national social, health care, and other policies.

1.3 Legal and policy recognition of a balanced and sustainable policy framework

Member State expectations that a balanced and sustainable policy for freedom of establishment will be created, where the liberalization of movement is not absolute and the necessary controls may be introduced and where the Member State are able to maintain largely autonomous taxation and other policies, are reflected in the relevant legal provisions. This understanding of the right of establishment is also reflected in the Member States establishing a transitional period to progress with freedom of establishment and in the Treaty-recognized linking of the realization of this policy to legislative activity in the EU political arena.[28] Even though the actual enforcement of Member State obligations under Article 49 TFEU gained convincing relevance only later in the development of European integration, the robust policy graduality of the free movement of capital was not followed in this domain.[29]

The constitutional frame provided by Article 49 TFEU clearly reflects the idea of a balanced and sustainable policy of freedom of establishment within the European Union where its benefits are balanced against its risks and

[27] The jurisprudence under *Centros*, infra n, distinguishes the abuse of Article 49 TFEU from its use for purposes of operating in the most beneficial regulatory environment.

[28] It was indicated earlier that the failure of the EU legislature to produce the promised legislative measures did not prevent imposing the obligation on national legal systems and administrations to ensure the right of establishment, supra.

[29] Supra n. direct effect.

where the central rationale of free cross-border movement is accompanied by parallel regulatory and policy considerations.[30] The liberalization obligations of Article 49 are supplemented by Article 52, the content of which are presented in the table below.

Article 52 TFEU allows the Member States to

- apply provisions laid down by law, regulation or administrative action providing for special treatment for foreign national on grounds of public policy, public security or public health.

The possibility granted under Article 51 TFEU to individual Member States to exempt, having regard to local circumstances, activities connected 'with the exercise of official authority' from the obligations under Article 49 TFEU enables that values and other considerations connected to certain forms of State employment or service relationships, such as a higher degree of loyalty or trust, are not undermined by the cross-border mobility of persons.[31]

The need to take account of the risks of cross-border mobility enabled by freedom of establishment and to develop a balanced policy framework was given particular expression in the gradualist approach promoted by the original provisions of the Treaty of Rome. Ex Article 52 TEC spoke about the abolishment of restrictions of the freedom of establishment 'by progressive stages' in the course of the transitional period made available to the Member States.[32] The obligation of progressive abolition imposed on the Member States was explained and, thus, moderated by ex Article 54 TEC which put forward the obligation for the Council to develop a 'General Programme'[33] for the abolition of existing restrictions[34] containing the

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[30] The General Programme repeatedly emphasized that the obligation of the Member States to gradually deregulate or bring in line national law with EU obligations is subject to the exemptions or special provisions laid down in what are not Articles 51 and. 52 TFEU.

[31] See, infra n. The Member States are also enabled under Article 346(1)(b) TFEU to exclude the production of or trade in war material.

[32] The risks were explicity recognized in ex Article 57(2) holding that unanimity in the Council is required for adopting directives 'on matters which are the subject of legislation in at least one Member State and measures concerned with the protection of savings, in particular the granting of credit and the exercise of the banking profession, and with the conditions governing the exercise of the medical and allied, and pharmaceutical professions in the various Member States.' Paragraph 3 of the same Treaty article stated furthermore that in the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions 'shall be dependent upon co-ordination of the conditions for their exercise in the various Member States.'

[33] *General Programme for the abolition of restrictions on the freedom of establishment (OJ, English Special Edition, Second Series (IX), p. 7)* It was held to offer a 'useful guidance for the implementation of the relevant provisions of the Treaty,Para. 15197/84 Steinhauser para. 15, Segers

general conditions under which freedom of establishment was going to be achieved 'in the case of each type of activity and in particular the stages by which it is to be attained.' The 'General Programme' was regulated to be implemented through the adoption of a series of directives.[35] For the eventuality that the 'General Programme' is not adopted in the Council, ex Article 54 TEC ordered that the implementing directives mark the stages 'in attaining freedom of establishment as regards a particular activity'.[36] The prohibition in ex Article 53 TEC on introducing new restrictions also confirms that the graduality of compliance with EU obligations did not allow completely unfettered discretion for the Member States even in the preliminary stages of market integration.

The timetable set out in the 'General Programme' under Title IV provides an indication that policy graduality under freedom of establishment was not simply a matter of ensuring in the preliminary stages of European integration Member State compliance in a sensible manner, but also a way to ensure that obligations are enforced having regard to competing considerations and sensitivities at the national level in the general interest. The timetable is summarized in the table below.

'General' economic activities: early in the transitional period.

Construction carried out under public work contracts: a set deadline, but an explicit recognition that

- 'in view of the particular nature and requirements of this sector and in order to ensure that restrictions are lifted in a progressive and balanced manner and that the removal of restrictions is accompanied by appropriate measures for the coordination of procedures';
- which provided the basis for the exemption clause allowing the Member States to exclude, when a quota threshold for public works contracts has been exceeded, from public works contracts the national, companies or firms of other Member States until the end of the year in question.

Annex II activities and direct insurance services, other than life insurance: later in the transitional period

[34] It spoke about the obligation of the Member States to deregulate provisions and practices which for nationals of other Member States exclude, limit or impose conditions on the exercise of professions.

[35] It was held that only the Council may act under the legislative powers provided by the Treaties and that the Commission lacked those powers, C-57/95 France v Commission

[36] Further planned legislative activity in the transitional period were regulated in ex Articles 56 and 57 TEC concerning the coordination of the derogations available to the Member States and concerning the mutual recognition of diplomas and qualifications, the coordination of national provisions governing the pursuit of activities by self-employed persons,

- regarding direct insurance services subject to the clause that the lifting of restrictions must be 'dependent on coordination of the conditions for the taking up and pursuit' of these activities.

Annex III activities and life insurance services: even later in the transitional period

- regarding life insurance services subject to the clause that the lifting of restrictions must be 'dependent on coordination of the conditions for the taking up and pursuit' of these activities;

- this clause is, however, limited by the requirement fix a limit 'on the conditions in this respect' during the transitional period.

Annex IV activities: the latest in the transitional period.

Agriculture is subject to a separate timetable and temporal exemptions.

Transport as stated in the timetable laid down in the 'General Programme',

- but subject to the condition that the implementation of what is now Article 49 TFEU 'will be accompanied by such measures for the coordination (of national provisions) (…) as necessary for the avoidance of distortions arising from the abolition of restrictions', which coordination is carried out under the common transport policy;

- and subject the requirement that 'a General Programme for sea and air transport will be decided on by unanimous vote of the Council'.

The intention of maintaining a balanced policy framework for freedom of establishment, which takes into account not only the benefits, but also its risks and which aims to reconcile the core liberalization agenda with countervailing policy considerations, was given further recognition in individual areas of legal development, or in clauses addressing the issue of policy coherence in the Single Market. The introduction of the derogations concerning Member State tax policy interests regulated under the free movement of capital in the jurisprudence of the Court of Justice to deal with restrictions imposed through national tax measures on freedom of establishment indicates that Member State obligations under Article 49 TFEU concerning fiscal measures are subject to similar limitations as those under Article 63 TFEU. Legislation introduced to coordinate cross-border movement in individual professions, such as the subsequent lawyers' directives,[37] and the related jurisprudence of the Court of Justice[38] indicate a

[37] DIR

clear commitment to reconcile freedom of movement with detailed considerations influencing the exercise of a profession which may have a constitutional footing, such as the right to a fair trial, or which may have an impact on the operation of fundamental State structures, such as the judiciary. In the regulated professions, in general, this aim of maintaining a balanced and sustainable framework was given special relevance from early on in the development of the law. In the early, still relevant jurisprudence, the Court of Justice accepted as valid the imperative that the regulated professions are practiced by individuals that meet the relevant rules regulating entry into the profession and the exercise of those professions as established by the Member States or by national professional bodies within their own competences.[39] It pointed out that the Union's involvement in this domain, by means of the mutual recognition principle and through the coordination of the relevant national measures, follows the aim of reconciling the freedom of establishment 'with the application of national professional rules justified by the general good'.[40] The need to maintain coherence with other policies was clearly expressed in a State aid case where the Court of Justice held that 'it is clear from the general scheme of the Treaty' that EU State aid law 'must never produce a result which is contrary to the specific provisions of the Treaty'.[41]

1.4 EU measures to maintain a balanced and sustainable policy framework

With the achievement of liberalization under Article 49 TFEU entrusted, in part, on EU secondary legislation, establishing and maintaining a balanced and sustainable framework for freedom of establishment in the Single Market was not left solely to Member State policy and regulatory action.[42] It was also indicated earlier that the implementation obligations by the Member States under Article 49 TFEU, in meeting which the risks as well as

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[38] Barreaux

[39] Para. 15, *Case C-71/76 Thieffry v Conseil de l' Ordre des Avocats à la Cour de Paris [1977] ECR 765*; KLopp, lawyers directive

[40] Paras. 11-12 Thieffry. Professional rules were defined as specific measures which are required by the specific nature of the professional activities in question, para. 29 C-106/91 Ramrath

[41] para. 78, C-156/98 Germany v Commission, it continued that 'State aid, certain conditions of which contravene other provisions of the Treaty, cannot therefore be declared by the Commission to be compatible with the common market.' See, paras. 151-152, Case C-222/04 Cassa di Risparmio di Firenze SpA, concerning a tax advantage: in case it is categorized as State aid, it will have to be withdrawn, with the result that there will remain no difference in treatment capable of violating the fundamental freedoms; in case it is not categorized as State aid, the question of the existence of restrictions on the fundamental freedoms will not arise.

[42] EU public procurement law governing access to public markets in the Member States is the subject of another legal mapping report.

the benefits of freedom of establishment are taken into account and the realization of short-term aims does not jeopardize the sustainability of the policy on the long-run, require support from the European Union in the form of legislative intervention coordinating or facilitating implementation efforts at the national level. The 'General Programme' itself made it clear that progression with the abolishment of restrictions in the Member States, in certain instances, is subject to the EU coordinating 'the conditions for the taking up and pursuit' of economic activities in national law. Besides coordination, EU measures were adopted to facilitate freedom of establishment in the national regulatory and administrative arena through regulating mutual recognition, harmonization, giving effect to Treaty prohibitions, and ensuring cross-border, horizontal cooperation between Member State authorities.

The Treaties themselves identify a number of areas where EU legislation is required, or in some instances, is expected to contribute to the realization of freedom of establishment throughout the EU. These are summarized in the table below.

Article 52(2): directives must be issued for the coordination of national provisions 'providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.

Article 51(1): legislation may be passed to determine in relation to which activities must freedom of establishment not be applied.

Article 50(1)-(2): directives must be issued 'in order to attain freedom of establishment as regards a particular activity', in particular in the areas of

- progressing freedom of establishment as a priority in regards activities where 'freedom of establishment makes a particularly valuable contribution to the development of production and trade';
- ensuring close cooperation between the competent authorities of the Member States in connection with freedom of establishment;
- abolishing administrative procedures and practices which form an obstacle to freedom of establishment;
- ensuring that EU workers are entitled to remain in the territory of the Member State concerned for the purpose of taking up activities as self-employed persons;
- enabling EU nationals to acquire and use land and buildings situated in another Member State;
- effecting the progressive abolition of restrictions on the right of secondary establishment of companies and as regards the conditions governing the appointment of personnel belonging to the main establishment into managerial and supervisory posts in

the agencies, branches and subsidiaries established in another Member State;

- coordinating to the necessary extent the safeguards in company law concerning the protection of the interests of members and others with a view to harmonizing such safeguards in the EU ('making such safeguards equivalent' in the EU);

- ensuring (the Member States 'satisfying themselves') that the conditions of establishment are not distorted by State aid.

The obligation to enact directives under Article 53 TFEU for the mutual recognition of diplomas, certificates and other evidence of formal qualifications was laid down with the purpose of facilitating freedom of establishment ('to make it easier for persons to take up and pursue activities as self-employed persons') as well as coordinating national provisions concerning the exercise of the right of establishment ('the taking up and pursuit of activities as self-employed persons').[43]

The 'General Programme' also indicated explicitly areas where EU level coordination through legislation is expected. In case of the mutual recognition of diplomas and qualifications, in harmony with its generally cautious approach being aware of the risks as well as the benefits of freedom of establishment, its Title V held that parallel to the drafting of the legislative instruments (directives) implementing the 'General Programme' for each activity covered, it must be examined 'whether lifting of restriction on freedom of establishment should be proceeded, accompanied or followed' by the mutual recognition of diplomas, certificates and other qualifications, or by the coordination of the national provisions 'on respect of the taking up and pursuit of these activities.'[44] The coordination of the safeguards in company law concerning the protection of the interests of members and others, 'to the extent necessary and with a view to making such safeguards equivalent', was 'intended' by Title VI to take place in the second stage of the transitional period.

Because freedom of establishment, often in parallel with the free movement of capital, affect the effective administration of national tax systems, the EU assisting the Member States in this domain adopted a number of measures facilitating cross-border, horizontal administrative cooperation between the Member States. The availability of these measures, as discussed below, has an impact on the ability of the Member States to rely on certain

[43] See para. 32, Hocsman.

[44] Title V also recognized the possibility of introducing a 'transitional system' for mutual recognition, for the the coordination of national provisions, and for facilitating the exercise of the right of establishment and avoiding distortions. Transitional systems were recommended to include provisions 'for the production of a certificate establishing that the activity in question was actually and lawfully carried on in the country of origin.'

derogations relating to the use of taxations powers at the national level by pre-empting the application of certain unilateral legislative and administrative restrictions on cross-border establishment.

The Mutual Assistance Directive (Directive 2011/16/EU, formerly Directive 77/799/EEC)[45] lays down obligations of administrative cooperation among the Member States 'with a view to exchanging information that is foreseeably relevant to the administration and enforcement' of national tax laws and it regulates 'rules and procedures under which the Member States are to cooperate on matters concerning coordination and evaluation' (Article 1). The directive includes provisions concerning the organization and operation of competent authorities in the Member States (Article 5) and it distinguishes between exchanges of information on request, mandatory automatic and spontaneous exchanges of information (Articles 5-10). As to further forms of administrative cooperation, the directive allows the officials of the requesting competent authority to be present in the administrative offices and to participate in the administrative enquiries of the requested authority (Article 11), multiple Member States to organize 'simultaneous controls' (Article 12), the competent authorities to request the competent authority of another Member States to notify the address of any instruments and decisions which emanate from the administrative authorities of the requesting Member State (Article 13), the competent authority providing information under Articles 5-9 to request feedback from the competent authority which receives the information (Article 14), and the competent authorities to share best practices and experience (Article 15). In Chapter IV, the directive regulates the conditions governing administrative cooperation among the Member States (e.g., official secrecy, the use of the information in other procedures and for other purposes, the limits of the obligation to exchange information, the obligations as to comply with a request for information, wider cooperation with third States, standard forms and computerized formats, 'practical arrangements', and the specific obligations of the Member States).

The mutual assistance obligations of the Member States are also regulated in connection with the recovery of claims which arise in another Member State relating to 'all taxes and duties of any kind levied by or on behalf of the Member State' or 'on behalf of the Union'.[46] The directive includes

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[45] Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L64 (2011), 1-12; Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ L336 (1977), 15-20. See also the mutual assistance provisions of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, OJ L235 (2003), 10-21.

[46] Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L84 (2010), 1-12. The obligations also relate to the recovery of refunds, interventions and other measures forming part of the system of total or

provisions concerning the organization and operation of competent authorities in the Member States (Article 4) and it distinguishes between exchanges of information on request and without prior request (Articles 5-6). It allows the officials of the requesting competent authority to be present in the administrative offices and to participate in the administrative enquiries of the requested authority (Article 7). The directive also regulates mutual assistance in the notification of all relevant documents emanating from the requesting Member State (Articles 8-9) and the mutual assistance in the application of recovery and precautionary measures (Articles 10-20). In Chapter V, the directive regulates the general rules applicable to all types of assistance requests (e.g., standard forms and means of communication, use of languages, official secrecy and disclosure of information and documents).

1.5 The dynamics of EU intervention to ensure the freedom of establishment

As indicated earlier, in the context of the effective enforcement of EU obligations under Article 49 TFEU at the national level the law was required to address the relationship between Treaty provisions and the Treaty-envisaged secondary legislation and, also in this connection, the relevance of national rules and administrative action in realizing the related objectives of the Treaties.[47] The relationship between Treaty-based deregulation and implementation though secondary legislation also have relevance in terms of the restrictions imposed on the Member States from the perspective of the earlier discussed implementation agenda under Article 49 TFEU which required the coordination as well as the facilitation of implementation at the Member State level by means of adopting EU legislation for those purposes. With multiple, overlapping instruments available at different levels of governance to realize the Treaty objectives, the jurisprudence of the Court of Justice had to develop boundaries as to their relative applicability.

In this regard, the Court of Justice held that the enforcement of the core Treaty requirement of non-discrimination cannot alone ensure 'completely' the freedom of establishment, and other restrictions, which may escape the equal treatment requirement – for instance, those resulting from disparities between different national laws – require EU legislative intervention adopted to facilitate the effective exercise of the right of establishment.[48] From the perspective of the restrictions imposed on the Member States under Article

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partial financing of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), including sums to be collected in connection with these actions, and levies and other duties provided for under the common organisation of the market for the sugar sector.

[47] Supra note.

[48] paras. 21-?????

49 TFEU, this serves as an important principle available to curb back the Treaty-based deregulation of national measures and make Member State compliance obligations subject to the adoption of the relevant EU legislative measures. A general principle framed in this manner, nevertheless, leaves considerable uncertainty as to the scope of obligations arising directly from Article 49 TFEU, and require the interpretation on case-by-case basis of the possibilities and boundaries affecting Member State economic regulation under the broader framework of freedom of establishment as governed at the specific time by Treaty provisions and EU legislative instruments.
The signposts indicated by the jurisprudence of the Court of Justice in this regard are summarized in the table below.

In the instance when the profession in question is not subject to legal rules in the Member State concerned, the EU directives adopted to coordinate the relevant national measures 'cannot be applicable'.[49]

- Nonetheless, the general Treaty-based rules, such as the non-discrimination requirement or the prohibitions imposed by the fundamental freedoms themselves are applicable, which could entail subjecting the conduct of national authorities to the requirements laid down in the relevant jurisprudence.[50]

Member State restrictions could be subject to parallel assessments under the relevant EU directives (here, the EU company directives) and the Treaty rule of freedom of establishment, latter being applied to the restrictions which are not covered by EU legislation.[51]

In the implementation of EU directives, the Member States are not required to adopt, in the legislation transposing the relevant directive, provisions recalling the obligation to comply with the fundamental freedoms laid down in the Treaties, which may be applicable only in limited circumstances.[52] This, however, 'does not call into question' the applicability of those Treaty rules to the relevant public contracts.[53]

The mutual recognition of diplomas and other qualification is subject primarily to the relevant EU directives regulating in detail Member State obligations under the mutual recognition principle, and the detailed obligations laid down on the same matter before the adoption of those directives will be applicable to matters which fall outside the scope of those directives but are still covered by Article 49 TFEU.[54]

The direct effect of the fundamental non-discrimination requirement 'may not be used in order to evade the obligation to implement a

[49] Para. 29, *C-164/94 Aranitis*
[50] Para. 30-31, ibid
[51] Para. 71, Case C-167/01 Inspire Art; Paras. 33-36, Case C-453/04 innoventif
[52] Para. 67, Case C-412/04, Commission v Italy (as a requirement of transparency and equal treatment in the context of public service concessions and calls for tender, para. 66.)
[53] Para. 68.
[54] See, Vlassopoulou infra n,

directive providing for specific measures to facilitate and secure the full application of that principle in the Member States.'[55]

The Treaty provisions alone are insufficient to require the Member States to modify the provisions applicable to the establishment of their own nationals as professionals (i.e., entering a profession or access to the training to enter a profession), as such obligations may only arise from EU legislation adopted to coordinate the relevant national rules.[56]

The impact of deregulation on the basis of the Treaty provisions depends on the ability of the Union to regulate a certain area, or to accept rules which facilitate the exercise of Union rights.[57]

- As to when and how the EU will regulate, the Court of Justice could offer little certainty for the Member States as it confirmed that the Union enjoys broad discretion as to the timetabling ('the stages') of legislative activity bearing in mind the difficulty of drawing up of common rules when national rules are 'diverse' and 'complex' and the challenge of having those measures accepted by the Member States in the Council.[58]

In areas where EU legislative competences are weaker, such as social security legislation, the relationship between Treaty-based obligations and EU legislative intervention affecting the restrictions which may follow from Article 49 TFEU for the Member States is even more uncertain. In *Hervein*, the Court of Justice, having recognized the lack of EU competences to harmonize this area and that the competence for the coordination of national legislation leaves the substantive and procedural differences between the social security systems of individual Member States 'unaffected', held that the Treaty provisions themselves will not enable a 'neutral'[59] treatment of the social security implications of exercising the right of establishment and that the disadvantages suffered in this domain are not contrary to Article 49 TFEU provided that they do not entail unlawful

[55] Para. 29, 29/84 Comission v Germany
[56] Para. 11, 98/85 Bertini. In C-15/90 Middleburgh, the Court held that in the absence of the necessary EU measures to be adopted to regulate social security entitlements in the Member States in the context of freedom of movement, the Member States are entiled to maintain restrictions on the access of the children of a self-emplozed person residing in another Member States to those entitlement, paras. 14-15.
[57] para. 10-13, Vlasso. The Court, however, also accepted that in case EU directives 'provide for harmonization of the measure necessary to ensure the protection' of a ground for derogation, the derogation opportunity offered by the Treaty will no longer be available ('recourse to it is no longer justified') and 'the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonosing directive', para. 42, C-421/98 Commission v Spain
[58] para. 10-11, 63/89 Les assurances, which meant in the particular case that the non-contractual liability in tort of the Union cannot be established in a simple case of unlawful action by the Union.
[59] The consequences in terms of social security entitlements may be advatageous or disadvantageous for the person concerned, over which EU law has no influence, para. 51.

discrimination prohibited under the Treaties.[60] The legal situation is different, however, when issue raised in domestic social security law (here, a social security contribution imposed) has a direct basis in a generally applicable measure of EU law adopted to ensure the exercise of Treaty-based rights (here, the right of free movement), whereby the equal treatment of persons in the Member State concerned and the principle that persons must not be penalized for exercising their right of free movement is enforced irrespective the differences in the various national social security laws.[61] This jurisprudence, just as the earlier case law concerning the relationship between Treaty-obligations and EU legislation adopted to coordinate or facilitate freedom of establishment in the Member States, confirms that the right of establishment is available to be exercised subject to the applicable national measures without offering special treatment for the nationals of other Member States under EU law and that the obligations and restrictions which may follow for the Member States under the broader framework under Article 49 TFEU depends on the competences available to the EU and on how those competences have been exercised.

[60] paras. 50-51, oined Cases C-393/99 and C-394/99 Hervein 'if that legislation does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return.'

[61] Paras. 32-32, Case C-249/04 Allard

2 The limits of EU intervention with establishment in the Single Market

Competences and scope

Member State governments must be aware that the obligations imposed on them under Article 49 TFEU have limitations. On the one hand, the Treaty obligations have or only limited application in areas outside of the competences of the European Union. On the other, the scope of the freedom of establishment is confined by the availability of EU obligations in parallel policy areas. While this latter does not present the Member States the same opportunities as the first limitation because their conduct falls under the scope of another Treaty prohibition, the fact remains that their policies and measures may be subjected only to a single set of legal restraints under EU law.

2.1 Competence matters

The general formula used by the Court of Justice states that in absence of harmonizing measures or specific EU rules[62] on the matter, regulation (and its application) remains within the competence of the Member States (that matter remains governed by national law)(the Member States are free to regulate that matter).[63] In this regard, it was recognized in the jurisprudence that the difficulties arising from the 'situation' that the Member State concerned, in absence of harmonizing or other measures from the EU, is able to regulate a certain matter 'do not affect the freedom of establishment'.[64] The Court of Justice continued that 'those difficulties are

[62] In specific circumstances, the competence of the Member State may follow from international law (e.g., concerning the conditions for the acquisition and loss of nationality), para. 10, C-369/90 Micheletti

[63] Para. 34, Case C-379/92 Peralta concerning technical rules applicable to maritime transport undertakings; Para. 48 Reyners para. 9, C-340/89 Vlassopoulou para. 17 Klopp on access to (the practicing of) certain professions (e.g., knowledge and qualifications requirements and rules on certifying those); Para. 10-11 198/86 Conradi, concerning commercial activities in the distribution sector and distinguishing between wholesale and retail trade (see paras 12-15 establishing that an EU measure giving definitions for these activities in a different context cannot be raised for the purpose of interfering with Member State autonomy) para. 12, 61/89 Bouchoucha on determining what acts are restricted to the medical profession; Para. 9, 221/85 Commission v Belgium concerning the provision of certain services; para. 10 143/87 Stanton and para. 9, Case C-53/95 Kemmler, 'retained legislative jurisidiction' in the social security for self-employed persons; para. 13, 221/89 Factortame on the resigration of vessels; para. 14, C-168/91 Konstantinidis concerning the transcription of a Greek name in Roman characters in the registers of civil status; Paras. 20-21 Thieffry, concerning the disctinction between the 'academic' and the 'civi; effects of recognizing the equivalence of a qualification; para. 23 , C-514/03 Commission v Spain define the conditions for the pursuit of the activities in the private security services sector

[64] Para. 34, Case C-379/92 Peralta

no different in nature from those which may originate in disparities between national laws governing, for example, labor costs, social security costs of the tax system.'[65]

EU law may also offer a more general recognition of certain matters falling within Member State competences.[66] For instance, in the area of professional services the Court of Justice recognized that the Member States are entitled to require compulsory registration with, or membership of a professional organization, or body for the purpose of ensuring 'the observance of moral and ethical principles and disciplinary control of the activity of professionals.[67] This particular principle is connected to the more general acceptance in the jurisprudence that the regulation of the general interest grounds, which are recognized as derogations in the Treaties or in the jurisprudence, falls within national competences subject to meeting EU obligations.[68] It also follows from the general arrangement under the Article 49 TFEU that the right of establishment is available to be exercised subject to the legal and administrative requirements of the Member State concerned. This was formulated by the jurisprudence under the national treatment requirement as the clause that 'freedom of establishment is to be exercised under the conditions which the legislation of the country of establishment lays down for its own nationals' and that 'where the taking-up or pursuit of a specific activity is regulated in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with those conditions.'[69]

The competence of the Member States to regulate these matters is also supported by the fact that regulatory efforts, in general, are unlikely to be vitiated by discrimination prohibited under Article 49 TFEU.[70] The Member States, because their measures do not involve discriminatory provisions, are, in principle, at liberty to foster the setting up of professional organizations for the pursuing an economic activity, require membership in professional organizations, regulate the formal qualifications required to take up and to pursue an economic activity/profession, adopt measures governing professional ethics, ensure the supervision of economic activity,

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[65] Ibid.

[66] The issuing of driving licences and the recognition of foreign driving licences or their exchange for domestic driving licence is for the Member States to determine in their competences relating to road safety, Para. 6, 16/78 Choquet

[67] para 18, 271/82 Auer; para. 29, 292/86 Gullung para. 26 130/88 van de Bijl. They, however, have to be relevant from the perspective of the area regulated, see para. 21 Klopp concerning territorial limitations and their relevance for the enforcement of professional ethics rules.

[68] Infra

[69] para. 36, Case C-55/94 Gebhard; para. 25, Case C-108/96 Mac Quen; para. 28, Case c-330/03 CICCP.

[70] Nationals of other Member States must in principle comply with these, para. 36 Gebhard. See also INFRA concerning examples of national measures meeting the requirement of equal treatment.

to establish frameworks concerning the liability of economic operators, or to regulate the conditions of using professional titles. This was made visible by the Court of Justice's assessment of the regulation of opening and closing times which was held to fall within Member State competences because it does not, by its nature, entail discrimination on the basis of nationality or residence, and also because it does not regulate the conditions concerning the establishment of undertakings and 'any restrictive effects which it might have on freedom of establishment are too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom.'[71]

In areas where EU legislative competences are weaker, such as social security legislation, the ability of the Member States to introduce and maintain divergent regulatory arrangements reflecting local social and political considerations has a particularly strong legal footing.[72] When the EU lacks competences for harmonization and the possibility of its intervention is reduced to the coordination of national legislation, the Member States will be able to develop regulatory arrangements which are different from those of other Member States both in substantive and procedural terms.[73] Member State competences in such domains are only confined by the requirement that they observe the prohibition of non-discrimination arising from Article 49 TFEU.[74] The Member States are, therefore, entitled to apply different levels of social security contributions as well as administrative arrangements of different complexities.[75] Member State competences, and their ability to introduce and maintain different regulatory arrangements, are, however, much more confined when the regulatory domain is subject to an EU harmonization measure, or it is, or at least some aspects of it, are subject to directly applicable EU legislative instruments.[76]

The competence of the Member States to regulate particular matters and to regulate them in a particular fashion may also follow from EU law, as a

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[71] para. 32, Joined cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 Semeraro Casa Uno

[72] This also follows from the jurisprudence which recognizes that EU law 'does not detract from the powers of the Member States to organize their social security systems, Para. 27 *C-70/95 Sodemare.*

[73] The consequences in terms of social security entitlements may be advatageous or disadvantageous for the person concerned, over which EU law has no influence, para. 51.

[74] paras. 50-51, oined Cases C-393/99 and C-394/99 Hervein 'if that legislation does not place that worker at a disadvantage as compared with those who pursue all their activities in the Member State where it applies or as compared with those who were already subject to it and if it does not simply result in the payment of social security contributions on which there is no return.'

[75] para. 58.

[76] paras. 66-67 oined Cases C-393/99 and C-394/99 Hervein; Paras. 32-32, Case C-249/04 Allard

matter of its scope, not recognizing a particular entitlement of individuals. In case of the regulation of national company laws, the right of transfer of seat, which is not provided by certain national company laws, is not provided under Article 49 TFEU and the Member States remain free to regulate this question according to their own policy preferences. This finds its footing in the general clause that in the present state of EU law companies are the creatures of national law which exist only by virtue of national law governing their incorporation and functioning.[77] The relevant formula used in the jurisprudence states that differences in how the Member States regulate the connecting factors for the incorporation of companies and the regulation of whether and how the cross-border transfer of seat of a company may take place 'are not resolved by the freedom of establishment'.[78] In another context, the fact that the qualification could not be regarded as a professional qualification in the meaning of EU law (its 'scope and value are not recognized' by EU law), meant that

> criminal proceedings on the basis on national law prohibiting the unlawful exercise of a profession can be launched when that law, in contrast with the law of the Member State where the qualification was obtained, regards a particular activity open to be exercised by members of a profession,[79] and
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> in such instances, the Member State can rightfully tie the practicing that activity to a higher qualification and exclude the exercise of that activity provided that the restriction is not arbitrary.[80]

Criminal legislation has been recognized, as a matter of principle, to fall within the competences of the Member States.[81] It entails, in particular, their freedom to impose criminal penalties in respect of the illegal pursuit of an activity irrespective whether it falls under the scope of EU law.[82] Another formula reserves this freedom for the Member States in the absence of EU

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[77] para. 19, 81/87 Daily Mail

[78] para. 23, 81/87 Daily Mail. The Member States are free to determine, and they determine differently, the connecting factor of companies – the factor which provides the connection to the national territory required for the incorporation of companies – and the question whether that connecting factor can be modified subsequently by the company concerned, paras 20-21 81/87 Daily Mail (the Treaty places the different national laws in this regard on the same footing.)

[79] para. 14 61/89 Bouchoucha (osteopathy must be performed by medical doctors). See also *Joined Cases C-54/88, C-91/88 and C-14/89 Nino*

[80] para. 15,

[81] Para. 68, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica

[82] paras. 18-19, C-104/91 Borrell, especialy, where the individual concerned has failed to seek verification as to whether the diploma or qualificiation awarded to him in his State of origin is equivalent to that required in the host State, or cases whwere such equivalence has not been recognized.

rules regulating the matter.[83] As in case of more general Member State regulatory competences, the criminal measures introduced and applied are subject to compliance with EU law, especially with the fundamental freedoms.[84] This latter principle applies even in case of criminal penalties imposed in national procedures governing the exercise of the right of establishment where the failure to observe formalities or procedural rules was the cause of the Member state concerned violating its EU obligations.[85]

The European Union has not been endowed with powers of direct taxation. As a consequence, its interferences under the Treaty provisions with the substance of Member State tax regimes are influenced by the fact that these competences have remained with the Member States.[86] According to the EU Court of Justice, in absence of EU competences and EU unification or harmonization measures on this matter, the Member States are free to exercise their powers of taxation.[87] In other words, the Member States enjoy autonomy is fiscal matters, which is also expressed in the grounds available to justify Member State interferences with the freedom of establishment, such as the aim of effective fiscal supervision or the effective collection of taxes.[88]

On this basis, despite the potential negative consequences of Member State diversity in tax regulation, under freedom of establishment it was recognized that the tax position of tax subjects depends on the national law applied to them and that national tax laws may be characterized by local particularities and there can be considerable differences between them.[89] Furthermore, the Member States are not obliged to adapt their own tax systems to the different system of tax of the other Member States (adjust their tax rules on the basis of those of another Member State.[90] In other words, the Member States are not oblige to ensure taxation 'which remedies any disparities arising from national tax rules.'[91]

The specific rules on Member State fiscal autonomy, also recognized under the free movement of capital,[92] are presented in the table below.

Specifically, in the field of direct taxation, which falls within the

[83] Para. 25, Case C-230/97 Awoyemi
[84] Para. 68, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica
[85] Para. 69
[86] Para. 57 Case C-307/97. Saint-Gobain Para. 26, Case C-324/00 Lankhorts-Hohorst
[87] para. 56, Case C-307/97. Saint-Gobain Para. 26, Case C-324/00 Lankhorts-Hohorst
[88] Infra
[89] Para. 24270/83 Commission v France; para. 62, National Grid. The transfer of seat to another Member State is not guaranteed to be neutral as regards taxation: it may be to its advantage in terms of tax or not, according to circumstances, para. 62 National Grid
[90] Para. 62, National Grid. See, from the free movement of capital, para. 39, Case C-157/10 Banco Bilbao and para. 80, Case C-322/11 K.
[91] paa. 62, National Grid
[92] para. 41, Case C-489/13 Verest.

competence of the Member States

- 'it is for each Member State to organize, in compliance with Community law, its system of taxation of distributed profits and, in that context, to define the tax base as well at the tax rates'.[93]

Specifically, in the field of avoiding double taxation[94]

- 'in the absence of unifying or harmonising measures adopted in the Community (…), the Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means, inter alia, of international agreements. In this context, the Member States are at liberty, in the framework of bilateral agreements concluded in order to prevent double taxation, to determine the connecting factors for the purposes of allocating powers of taxation as between themselves.'[95]

- 'it is for the Member States (…) to establish, either unilaterally or through DTCs concluded with other Member States, procedures intended to prevent or mitigate such a series of charges to tax and that economic double taxation.'[96]

The regulation of the fundamental matters of company law has been recognized to fall within Member State competences, and the Member States enjoy considerable autonomy in making fundamental choices in national company law.[97] This issue is raised regularly as a preliminary question determining whether freedom of establishment is indeed applicable in the particular case. It was emphasized that determining the national legal measures within the autonomy available to the Member States does not in itself lead to the breach of Articles 49 and 54 TFEU.[98] According to the general clause developed in the case law confirming this autonomy,

[93] para. 50, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation

[94] The general attitude of the Court of Justice towards bilateral tax (double taxation) conventions is somewhat controversial. On the one hand, it acknowledges that the problems addressed under EU law arose primarily from the Member States starting to expand their tax jurisdiction in competition with each other in order to secure the base for national taxation. It accepts this a cause for the adoption of instruments to address the imposition of a series of charges or double taxation on incomes (infra n, and see para. 51, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation). It is, therefore, reluctant to tolerate interferences with free movement introduced in this context (infra n). In contrast, the new case law regarding the allocation of taxation powers among the Member States indicates, however, a more welcoming attitude towards these international agreements (infra n).

[95] para. 56, Case C-307/97. Saint-Gobain. para. 45, National grid (the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation).

[96] para. 54 Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation

[97] In the Court of Justice's definition, the Treaty provisions do not infringe the powers of the Member States to regulate the fundamentals of company law (see what below) and their 'determination of the rules governing the incoroporation and functioning of companies (resulting from a cross border conversion)', para 30 VALE

[98] para. 50 VALE

'companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning.'[99] As stated by the Court of Justice, it is for national law to determine – as a matter preliminary to the application of the freedom of establishment – what organizations qualify as companies which could benefit from that freedom.[100] This follows from the fact, which is also confirmed by the words of Article 54 TFEU, that EU law has not provided – presumably, because it lacks the competences, or because the Member States were not willing to introduce such rules at the Treaty level – a uniform definition of companies 'which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company'.[101]
Similarly, it belongs to the remit of national law, in the absence of EU competences, to define what EU law calls the 'connecting factor' which is necessary for determining both whether the company concerned can be regarded as incorporated under national law and whether the company concerned is able subsequently to maintain that status.[102] On this basis, the Member States are able determine in the case of companies incorporated under its law restrictions on the transfer abroad of their place of effective management when those companies want to retain their legal personality under the law of the State.[103] This latter issue is connected to the general autonomy enjoyed by the Member States in regulating company law on the basis of which they can chose between different methods for the incorporation of companies, each representing different burdens for the cross-border transfer of a company seat.[104]
The autonomy available in regulating company law can be linked with the autonomy the Member States enjoy in the area of national procedures and remedies, which fall under the control of EU law according to the principles governing that area.[105]
The jurisprudence has found actual uses in the course of testing restrictions imposed by the Member States for national regulatory autonomy in company law. It has provided a basis of judicial deference to national discretion, in particular, to determining the substantive and procedural legal conditions of cross-border company transformations,[106] and, in this context, of the judicial recognition that the application of those rules, for instance,

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[99] Case 81/87 *Daily Mail* [1988] ECR 5483, paragraph 19, and *Cartesio*, paragraph 104; para. 27 VALE which '"permits" the incorporation of the company", 32.
[100] para. 28, VALE; Case C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraph 26
[101] ibid
[102] para. 29, VALE; *Cartesio*, paragraph 110, and *National Grid Indus*, paragraph 27
[103] para. 27, National grid; para. 70, Überseering
[104] Para. 28 National grid
[105] 48-49, VALE
[106] paras. 50-51 VALE

those requiring the drawing up of lists of assets and liability and property inventories, is permissible under EU law.[107]

The judgment in *National Grid* clarified an important limitation of Member State regulatory autonomy. The Court of Justice held that the autonomy enjoyed in regulating the fundamentals of company law, for instance demanding that companies leaving national territory are wound up and liquidated, does not extend to the exercise of taxation in relation to cross-border company transformation operations (here, transfer of seat),[108] irrespective of whether their company law is 'more advantageous from the point of view of the single market' by allowing a transfer of seat while retaining legal personality.[109] According to the judgment, such measures do not concern the conditions under which a company may be able to retain its legal status under national law, rather it attaches tax companies to a transfer abroad of seat without the transfer actually affecting the status of companies in the Member State concerned.[110]

However, as in other areas of EU law, the lack of EU competences to regulate directly certain matters does not mean that the Member States would enjoy complete freedom from their EU obligations. Even in these domains, they are required to observe the principle of equal treatment,[111] act in accordance with the fundamental freedoms,[112] especially the freedom of establishment,[113] or depending on the formulation to meet their EU obligations[114] or exercise their competences consistently with EU law.[115] The same hold true for national taxation regulation and the conclusion of double taxation agreements with other Member States.[116] The regulation of national company law, for instance, those relating to the incorporation and the winding up of companies, is also subject to meeting Articles 49 and 54 TFEU.[117] In case of cross-border company conversions, this could mean

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[107] para. 52 VALE

[108] paras. 31-32, National grid

[109] As claimed by the Member States in para. 29, National Gird

[110] para. 31, national grid

[111] Para. 18 Klopp; para 19, 271/82 Auer; para. 29, 292/86 Gullung; para. 12, 61/89 Bouchoucha para. 16 80/94 Wielockx para. 36, C-107/94 Asscher As it may follow from the general equal treatment clause or from its manifestations is specific Treaty prohibitions.

[112] para. 10, C-369/90 Micheletti

[113] Para. 20 Klopp

[114] Para. 10-11 198/86 Conradi; paras. 18-19, C-104/91 Borrell, specifically the obligations concerning the examination of equivalence of a diploma or qualification; Para. 9, 221/85 Commission v Belgium; para 10 143/87 Stanton and para. 9, Case C-53/95 Kemmler, concerning directly applicable rules of EU law

[115] para. 16 80/94 Wielockx para. 36, C-107/94 Asscher para. 14 221/89 Factortame Paras. 22-24, Case C-108/96 Mac Quen, para. 57 Case C-307/97. Saint-Gobain

[116] Paras. 24 and 26 270/83 Commission v France paras. 54 and 55 Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation

[117] Para. 112, Cartesio; Para. 30, national grid; Paras. 32-33, VALE interpreting para. 112 Cartesio as not 'seeking to remove, from the outset, the legislation of the host Member State on company conversions from the scope' of the Treaties;

that the rules of both the Member State of origin and the Member State of destination must comply with the Treaties.[118] The formula in *Thieffry* addressing the penetration of EU obligations into national legal order stated that national competences must be exercised and their consequences must be assessed by national authorities having regard to the objectives of EU law.[119] In case of criminal penalties imposed by the Member States in matters covered by EU law, the Court of Justice has held the penalties may not be 'so disproportionate to the gravity of the infringement as to become an obstacle to the free movement of persons'.[120] Determining compliance with EU law in exercising such competences may in certain instances be deferred to national authorities and courts.[121] The limitation on national competences may also follow from the interpretative exclusivity of provisions of EU law. In connection with the derogation under Article 51 TFEU concerning the exercise of official authority, it was held that 'the Union character' of that provision must be maintained in order to avoid that the Member States acting in their competences undermine the effectiveness of the freedom of establishment.[122]

2.2 Definition matters

For a national measure to fall under the scope of Article 49 TFEU, it needs to affect the cross-border mobility of individuals in pursuance of the aim of taking part of the economy of another Member State on a stable and continuous basis.[123] Restrictions of limited scope or of minor importance are also prohibited.[124] Because the freedom of establishment deals with issues related to cross-border mobility, there may be significant overlaps with the other fundamental freedoms,[125] especially with the free movement of services and persons under Articles 21, 45 and 56 TFEU,[126] and with the free movement of capital under Article 63 TFEU, especially in matters

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[118] paras. 37-36 SEVIC ('Articles 49 TFEU and 54 TFEU require Member States which make provision for the conversion of companies governed by national law to grant that same possibility to companies governed by the law of another Member State which are seeking to convert to companies governed by the law of the first Member State')
[119] Paras. 20-21 Thieffry.
[120] Para. 26, Case C-230/97 Awoyemi, here concerning the effect of the right to drive a motor vehicle on the ability to exercise a trade or a profession.
[121] Para. 14 Klopp Para. 23-24 Thieffry
[122] Para. 50 Reyners. Member State interpretation and application of national provisions can be overridden by EU law on this basis, paras. 51-52, the function exercised by lawyers does not constitute an exercise of official authority (lawyers' contacts or compulsory cooperation with the national courts of justice (and generally their 'typical activities'), because they do not affect the discretion of judicial author and the free exercise of judicial power in the Member States).
[123] Paras. 25-26 Gebhard
[124] Para. 43 Case C-9/02 Lasteyrie du Saillant
[125] VMI, de nem biztos h kell
[126] Para. 20 Gebhard

relating to the taxation of capital incomes from investments made abroad.[127] Establishing under which Treaty provision the national measure may fall has particular legal importance,[128] although often the actual legal assessment under the different fundamental freedoms may not differ.[129] In order to avoid the abuse of the different scopes of the different fundamental freedoms, the jurisprudence holds that the scope of Treaty freedoms cannot be interpreted in a way so that the applicability of a certain freedom enables individuals to benefit from another fundamental freedom, the scope of which does not extend to them.[130]

Firstly, the freedom of establishment, when interpreted narrowly, merely requires that non-nationals are treated on the basis of conditions which apply to nationals and, as stated earlier already, it entails no obligation to provide a more favorable treatment of non-nationals than of nationals, as it may follow under the free movement of services.[131] In case Article 49 TFEU is interpreted to cover the national treatment requirement only,[132] compliance with which may, nevertheless, prove to be burdensome for the Member State concerned, the Member States, as recognized by the jurisprudence of the Court of Justice, have a much broader leeway in regulating matters[133] than under other fundamental freedoms.[134]

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[127] Para. 89, Case C-35/11 Test Claimants in the FII Group Litigation; Haribo Lakritzen Hans Riegel and Österreichische Salinen, paragraph 33, andAccor, paragraph30; para. 56 *-367/98 Commission v Portugal*

[128] See, the judgment in Royer, the Court of Justice held that the no new restriction clause under ex Article 53 TEC prevents the Member States from reverting to less liberal measures or practices than those adopted in the course of implementing obligations under other Treaty provisions (here, the free movement of workers and Directive 64/221/EEC). Also, in connection with the professional mobility of lawyers, until the directive on their freedom of establishment was adopted, the restrictions imposed by the Member States fell under different legal assessment depending on whether they fell under the scope of the free movement of services, and thus, the relevant EU directive (Directive 77/249), or under the scope of the freedom of establishment, where deregulation obligations followed directly from the Treaties and not from a more detailedly regulated directive.

[129] See para. 61. Case C-313/01 Morgenbesser

[130] para. 100, Case C-35/11 Test Claimants in the FII Group Litigation.

[131] See para. 11, 38/87 Commission v Greece, where the freedom of establishment was equated with the non-discrimination principle and the free movement of services was interpreted to cover non-discriminatory restrictions following from economic operators facing a multiple regulatory burden. The latter restriction was refused to be examined under the freedom of establishment.

[132] For instance, in the context of regulating the taking up and the pursuit of regulated professions, para. 26 130/88 van de Bijl *see the judgments of 3 December 1974 in Case 33/74 van Binsbergen ((1974)) ECR 1299 and of 7 February 1979 in Case 115/78 Knoors ((1979)) ECR 399*

[133] paras. 10-11, C-101/94 Commission v Italy

[134] Because mutual recognition is not provided directly under Article 49 TFEU, the regulatory burdens applicable to nationals in the host Member State cannot be avoided. It must be noted, however, that national treatment may ental sufficiently burdensome obgliations for the Member State concerned as it must overlook the very significant circumstance that the person concerned comes from another Member State. This necessarily has an impact on the

Furthermore, the legal thresholds for invoking the difference fundamental freedoms to challenge national measures could be different (e.g., decisive (definitive) influence of shareholder to invoke the freedom of establishment and the free movement of capital being available irrespective of the size of the shareholding).[135] This means that Member State governments face different limitations when they regulate, for instance, the taxation of interests paid out after loans or of dividends distributed to shareholders.[136]

For a national measure or practice to fall under Article 49 TFEU, it must have a cross-border dimension.[137] Purely internal situations are, therefore, exempt from the Treaty prohibitions. The judicial formula holds that the Treaty rules and the relevant EU legislation adopted for their implementation 'cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all respects within a single Member State.'[138] Territorial restrictions imposed on freedom of establishing within the territory of a Member State are not regarded as purely internal because they have the effect of delimiting access to a national market.[139] In case of a cross-border sale of property, the applicability of this criterion must be examined with care as the position of both the transferor and the vendor are of relevance as the burden faced by one of them (a national under national law) may affect the burdens faced by the other (the non-national).[140] According to long-standing jurisprudence, the treatment of own nationals having exercised their right of free movement under the Treaties, in connection with matters affected by that circumstance, will not qualify as a purely internal affair.[141] The fact that the seat of the companies involved is in a single Member State is not sufficient to establish that the case involved a purely internal situation as 'it is possible' that undertakings established in other Member States may be

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availability of arguments outside of the domain of cross-border taxation suggesting that the persons concerned are in an objectively different situation.

[135] Case C-251/98 Baars [2000] ECR I-2787, paragraph 22; Cadbury Schweppes and Cadbury Schweppes Overseas, paragraph 31; and Test Claimants in the Thin Cap Group Litigation, paragraph 27; Paras. 66-68, Case C-436/00 X and Y ECLI:EU:C:2002:704Para. 18, Case C-282/12 Itelcar Test Claimants in the FII Group Litigation, paragraph 99, and Case C-168/11Beker[2013] ECR, paragraph 30

[136] See also the recurring assessment in the *Open Skies* cases that whereas the provisions on the free movement of services are not applicable to transport services, this restriction does not apply to the freedom of establishment which is, thus, applicable to transport.

[137] Sometimes the presence 'of certain cross-border interest' (undertakings which might have an interest in the domestic market but which are located in other Member States) may be sufficient, Para. 66, Case C-412/04, Commission v Italy

[138] Joined Cases C-64/96 and C-65/96 Land Nordrhein-Westfalen v Uecker and Jacquet v Land Nordrhein-Westfalen [1997] ECR I-3171, paragraph 16; Case C-134/95 USSL No 47 di Biella v INAIL [1997] ECR I-195, paragraph 19, and Case C-332/90 Steen v Deutsche Bundespost [1992] ECR I-341, paragraph 9)

[139] Case C-134/05 Commission v Italy

[140] para. 19, C-1/93 Halliburton

[141] Para. 24 Knoors para. 42 Case C-9/02 Lasteyrie du Saillant

interested in providing the economic activities concerned.[142] The nature of the restriction in question may also be of relevance in this regard, as the apparent confinement of the restriction to the territory of a single Member State may simply be the consequence of discriminatory practices barring undertakings from another Member State from the domestic market.[143]

In contrast, the benefits of the right of establishment are not available to companies formed under the law of the Member State concerned without them exercising their right of movement.[144] In the same vein, the application of domestic planning regulation and prior planning authorization for commercial premises in a case concerning the national of the Member State concerned which operates exclusively in that State does not have an element which goes beyond a purely national setting.[145] The same holds true for the treatment under national law of nationals trained in the Member State concerned and work in that Member State,[146] the imposing of tax burdens on nationals residing in another Member State, but work in the territory of the Member State concerned and receive all or almost all their income there or hold all or most of their assets there, heavier than those imposed on nationals who reside in the Member State concerned,[147] and for the treatment under national law of the operation of companies, 'which is confined in all respects within a single Member State, such as that where a company whose seat is in one Member State supplies services, without using workers from other Member States or even envisaging using such workers, to a public body established in that same Member State.'[148]

According to long-standing jurisprudence, the application of the different fundamental freedoms is 'mutually exclusive'.[149] The applicability of the

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[142] Para. 55. Case C-458/03 Parking Brixen

[143] Para. 55

[144] para. 8 Fearon

[145] para. 11, 20/87 Gauchard and 10 204/7 Bekaert

[146] *oined Cases C-225/95, C-226/95 and C-227/95, Kapasakalis* ECLI:EU:C:1998:332

[147] para. 16 C-112/91 Werner, not even under the general equal treatment clause arguing that conduct allowed under Article ?? TFEU canno be prohibited under Article ?? TEU (the only non-national element is that the national of the Member State concerned resides in another Member State).

[148] C-134/95 USSL nº 47 di Biella ECLI:EU:C:1997:16

[149] Para. 20 Gebhard. The golden shares cases: the resulting restrictions on freedom of establishment 'are a direct consequence of the obstacles to the free movement of capital (…) to which they are inextricably linked.' Consequentlythere is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment, para. 43, oined Cases C-282/04 and C-283/04 Comission v Netherlands; ase C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 86). Para. 71, Case C-347/04 Rewe Zentralfinanz, since the provisions of the Treaty relating to freedom of establishment thus preclude national legislation such as the legislation at issue in the main proceedings, it is not necessary to consider whether the provisions of the Treaty relating to free movement of capital also preclude that legislation. restrictive effects on the free movement of services and the free movement of capital, such effects are an unavoidable consequence of any restriction on freedom of establishment and do not justify, in any event, an independent

different fundamental freedoms depends mainly on the factual circumstances of the given case and is determined on a case-by-case basis.[150] The Treaty definitions of the fundamental freedoms may also assist in making this distinction, although considering the broad, subsidiary definition given to services in the Treaties this exercise is not without difficulties.[151]

When distinguishing between the free movement of services and freedom of establishment, the case law normally examines whether the economic operator is established in the Member State in which it offers the services in question[152] which is interpreted as the operator offering its services on a stable and continuous, as opposed to a temporary, basis from an established professional base in the Member State of destination.[153] The duration of carrying out the economic activity,[154] and also its regularity, periodicity, or continuity are taken into account.[155] These criteria may not be particularly helpful in case of distinguishing between the freedom of establishment and the free movement of workers,[156] although because these two fundamental freedoms are based on the same principles as regards entry into and residence in the territory of the Member States and as regards the prohibition of all discrimination on grounds of nationality[157]

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examination of that legislation in the light of both provisionsPara. 33, Case C-196/04 Cadbury Schweppes

[150] In light of the activities intended to be pursued on the territory of the host Member State, para 32 Gebhard

[151] See para. 22, Gebhard holding that the free movement of services are subordinate to the right of establishment in that, first, service providers and recipients are assumed to be established in two different Member States and, second, that the provisions on free movement of services apply on when those relating to the right of establishment do not.

[152] Para. 24, Case C-171/02 Commission v Portugal

[153] Para. 25 Case C-171/02 Commission v PortugalParas. 25-26 Gebhard. The applicable national rules, for instance, the requirement in national law to belong to the professional body or to pursue economic activities in collaboration or in association with persons belonging to that body, are not regarded as relevant for this purpose, Paras. 28-31, Gebhard. Services may be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States, for example the giving of advice or information for remuneration; no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty, Para. 26 Case C-171/02 Commission v Portugal

[154] The fact that an economic operator established in one Member State provides services in another Member State over an extended period is not in itself sufficient for that operator to be regarded as established in the latter Member State, Para. 27, Case C-171/02 Commission v Portugal

[155] Para. 27 Genhard, mentioning that the provision of services does not exclude the provider setting up some for on infrastructure in the host Member State in so far as that is necessary for performing the services in question.

[156] It is clear, nevertheless, that paid (employment) activies are not covered, Para. 27 Case C-456/02 Trojani

[157] para. 29, C-107/94 Asscher *Case C-106/91 Ramrath v Ministre de la Justice [1992] ECR I-3351, paragraph 17*

their distinguishability in law may not be that relevant.[158] As indicated above, in cases involving ownership in companies, gaining a definitive influence over the company's decisions and the ability to determine the company's activities will trigger Article 49 TFEU, whereas the free movement of capital will apply to circumstances when definite influence over the decisions of the company is not gained and the activities of the company concerned remain determined by others.[159]

The general clause in the jurisprudence interprets the scope of Article 49 TFEU[160] as covering the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, entails for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, branch or agency.[161] Article 49 TFEU grants the rights of both primary and secondary establishment,[162] the rights of both natural persons[163] and 'companies or firms formed in accordance with the law of a Member State',[164] and the rights of both incoming and outgoing establishment.[165] It covers, as a general principle of EU law, the

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[159] Para. 39-40, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation;. Para. 31, Case C-196/04 Cadbury Schweppes

[160] Entitlements enumerated in the General Programme: enter into contracts for work, business or agricultural tenancies and contracts of employment, and to enjoy all rights arising under such contracts to participate in tenders for contracts with the State or with any other legal person governed by public law, and to acquire, use or dispose of movable or immovable property of the rights therein.

[161] Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 35; *Marks & Spencer*, paragraph 30; and Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29). Para. 25, Case C-347/04 Rewe Zentralfinanz Para. 41, Case C-196/04 Cadbury Schweppes

[162] Setting up agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. paras. 17-18, 81/87 Daily Mail, taking part in the incorporation of a company in another Member State, if necessary after winding up and settling public debts (settling tax position), but does not cover transfer of seat that falling within the remit of national law

[163] Self-employed, and their descendants who are dependent of the self-employed person, para. 29, 337/97 Meussen

[164] Article 54 TFEU, and which, as a condition to exercise the right of establishment, have their registered office, central administration or principal place of business within the EU. See, para. 14, 79/85 Segers. Companies and firms are defined as companies and firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit making, see para. 31 C-379/92 Peralta. It covers company transformation operations aiming to 'respond to the needs for cooperation and consolidation between companies established in different Member States' (SEVIC and VALE), cross-border mergers (SEVIC), cross-border conversion (VALE), cross-border transfer of seat (Daily Mail).

[165] para. 16, 81/87 Daily Mail Para. 42, Case C-196/04 Cadbury Schweppes Para. 31 C-379/92 Peralta. Economic activites (transport services) carried out between a Memmber State and third-States: 'if their business in that State consists of services directed to non-

right to set up and maintain more than one place of establishment within the Union (the right to be established in more than one Member State),[166] which the Member States cannot contradict by requiring a single place of establishment in the Union.[167] In the case law dealing with the wrongful uses of the right of establishment, it was defined as the 'actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period', which 'presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there.'[168] Its personal scope was defined, in general, as covering any national of a Member State, irrespective of his place of residence and his nationality, who has exercised the right of establishment.[169]

Because of its overlap with the free cross-border movement of persons, the right of establishment has been framed as a general entitlement under the free movement of persons involving clauses addressing specifically entitlements under the free movement of workers. It was held when defining the scope of freedom of establishment that the freedom of movement for persons are intended to facilitate the pursuit by European Union nationals of occupational activities of all kinds throughout the European Union and that it precludes preclude measures which might place those nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State,[170] especially which prevent or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement, even if they apply without regard to the nationality of the workers concerned.[171]

It was held to cover

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member countries', para. 124, *C-467/98 Commission v Denmark.* National rules and practices applied as regards own nationals provided that they have exercised their fundamental freedoms provided by the Treaties, paras. 12-18 Knoors (who obtained their professional qualification or gained professional practice in another Member State/who are established in another Member State and who take advantage of the facilities offered by EU law in order to pursue their activities in the territory of their own Member State). See paras. 11-13, 292/86 Gullung concerning individuals with dual nationality. See also paras. 27-28 136/78 Auer concerning subsequently naturalized nationals of other Member States holding that the Treaty applies to the nationals of the Member States irrespective when they lose the nationality of one and acquire the nationality of another.

[166] Para. 24 Gebhard

[167] Para 19 Klopp; para. 11 C-351/90 Commission v Luxembourg. national restrictions cannot interfere with the decision and choice to establish in one particular Member State by leaving options open to individuals which they do not want to choose, paras. 23-24 221/89 Factortame

[168] para. 34, VALE; Case C-196/04. See the principle of integration in the host Member State above defined as the allowing of participation in the economic life of that State effectively and under the same conditions as national operators, supra n.

[169] para. 20, Case C-152/05 COmmision v Germany

[170] para. 21, Case C-152/05 COmmision v Germany

[171] para. 22

The organization for remuneration of university courses when that activity is carried on by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State.[172]

Traineeships, when it 'comprises the pursuit of activities, normally remunerated by the client or by the firm for which the trainee works, with a view to access to a regulated profession.[173]

The rights of entry to and residence in a Member State.[174]

Rules and practices enacted and followed by local authorities.[175]

Rules enacted by non-State entities defined as provisions 'which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services'.[176]

As indicated earlier, freedom of establishment extends beyond the rights of the persons concerned, and covers the assets and instruments necessary for the pursuit of a given economic activity.[177] The Court of Justice reached this conclusion by distinguishing between instruments (here, fishing vessels) that are 'not used to pursue an economic activity', or where the registration of that instrument in a public registry is requested by a 'person which is not established, and has no intention of becoming established, in the State concerned', and instruments which are used 'for pursuing an economic activity which involves a fixed establishment in the Member State concerned'.[178] In a similar vein, the ability to rent premises for business purposes were considered to be covered by Article 49 TFEU[179] as well as the possibility of having access to premises from which the occupation can be pursued, if necessary by borrowing the amount needed to purchase them, and the possibility of obtaining housing for the natural persons concerned.[180] In other cases, the Court of Justice held that the freedom of establishment is concerned not only with the specific rules on the pursuit of

[172] Para. 39, Case C-153/02 Neri
[173] Para. 60, Case C-313/01 Morgenbesser
[174] Title II General Programme
[175] Para. 16, 197/84 Steinhauser
[176] para. 120 case C-309/99 wouters, so that the restrictions imposed by the Treaties are not neturalised by the exercise of legal autonomy by professional associations or organisations not governed by public law. Enaceted by both public and private bodies, Para 28, Van Ameyde; para. 20, 246/80 Broekmeulen
[177] Supra n.
[178] paras. 21-22, 221/89 Factortame. See also C-246/89 Commission v UK
[179] Para. 16, 197/84 Steinhauser
[180] Para. 1563/86 Commission v Italy

occupational activities, but also the rules relating to the 'various general facilities which are of assistance in the pursuit of those activities'.[181]

[181] Para. 14, 63/86 Commission v Italy and para. 21, 305/87 Commission v Greece (right to purchase, exploit or transfer real and personal property and the right to obtain loans and have access to various forms of credit)

3 The restrictions on national polices and regulation

Delimiting choices and freezing action

In order to secure the opportunities offered to national economies and to individuals by the freedom of establishment in the Union, the Member States have imposed on themselves legal restrictions delimiting their choices in policy-making and regulation. These restrictions also have an impact of freezing Member State efforts to introduce changes to existing policies and regulation. Without implementing these restrictions, the rationale of the freedom of establishment would be jeopardized and the Member States – though unilateral action – would damage not only the EU policy developed in their interests, but as the interests of the other Member States protected by the Treaties. The concrete limitations imposed on the Member States are indicated both in EU legislation and in the jurisprudence of the EU Court of Justice. The restrictions are different in case of 'regulatory' fields and in case of taxation, which are the two main areas of national law and policy affected. The focus of Article 49 TFEU on taxation is more recent than that on the 'regulatory' fields associated with cross-border mobility.

3.1 The non-discrimination principle

Providing national treatment to nationals of other Member States and prohibiting 'as a restriction on freedom of establishment' discrimination on grounds on nationality are the core[182] requirements addressed to the Member States under Article 49 TFEU.[183] The jurisprudence has made it clear that these requirements do not establish a general obligation of equal treatment but contain a prohibition on discrimination on the basis of nationality.[184] In other words, Article 49 TFEU serves as a specific expression of the principle of equal treatment,[185] which principle is broader

[182] Para. 14, 270/83 Commission v France. See the interpretation of the no new restriction clause (ex Article 53 TEC) in Costa v ENEL holding that it prohibits the introduction of more severe rules for the establishment of non-nationals than those prescribed for nationals.

[183] para. 14, 270/83 Commission v France; 221/85 Commission v Belgium. For companies, para. 43, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation. Additionally, the General Programme and the directives issued in its implementation could provide a source of the overarching character of the principle.para. 23 136/78 Auer

[184] Para. 106, Case C-412/04, Commission v Italy

[185] A 'guarantee' that the general equal treatment principle of the TEU is applied Para. 27 Van Ameyde. Most notably paras 15-16 Reyners holding that the equal treatment requirement in Article49 TFEU implements the general principle in the special sphere of the right of establishment. See also para 17 136/78 Auer. See, however, para. 12, C-1/93 Halliburton arguing that the general non-discrimination principle 'applies independently only in situations (…) in regard to which the Treaty lays down no specific prohibition of discrimination', which excludes its application in cases where the equal treatment principle is given effect by a specific Treaty article. More precisely, in case the case falls under a special manifestation of the equal treatment principle, such as that under Article 49 TFEU, there is not need to rule on tthe interpretation of the general principle, para. 22, C-193/94 Skanavi.

in its scope than the prohibition on discrimination on grounds of nationality and which should be observed by the Member States 'even in the absence of discrimination on grounds of nationality.'[186] The obligation of non-discrimination within the EU is not only fundamental for realizing the market integration agenda of the Treaties, but it also expressed that equal compliance is expected from the Member States – which are of equal status in the Union – with their mutually binding obligations. Fundamentally, the national treatment obligation entails that while nationals of the host Member State come under the national rules in question, EU law is available to ensure that the nationals of other Member States are subjected to the same rules.[187] The assessment on the basis of the facts of the given case whether this obligation has been violated may be deferred to the national court.[188]

In *Factortame*, the Court of Justice held that while the non-discrimination requirement covers primarily measures which address the nationality or residence of natural persons and companies and does not extend, as a matter of scope, *per se* to the 'nationality' of assets or instruments used in pursuing economic activity, such as ships, this does not mean that that the Member States regulating these latter would be able to disregard the Treaty requirements concerning the treatment of natural persons or companies in that context.[189] In other words, the discriminatory effects of those measures need to be taken into account as prohibited under the non-discrimination requirement laid down in the Treaty. The judgment, thus, extended the scope of Article 49 TFEU to cover not only the persons and the activities pursued by them, but also the objects and other things used in carrying out economic activities across borders.

The principle of national treatment is made explicit in Article 49(2) TFEU stating that the taking up and the pursuing of activities as self-employed persons and the setting up and the managing of undertakings must be subject to the conditions laid down for 'own nationals by the law of the country where such establishment is effected.'[190] The particular manifestation, applied in connection with the establishment of undertakings, that the fact that the registered of a company is located in another Member State is not such as to provide an objective circumstance capable of

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[186] Para. 48, Case C-458/03 Parking Brixen

[187] para. 20, 136/78 Auer, which in the given case meant that before the expiry of the implementation period of a directive regulating the mutual recognition of certain qualifications, only the right of establishment must be exercised on the basis of the applicable national measures. para. 34 Case C-307/97. Saint-Gobain; Para. 13, 63/86 Commission v Italy, the 'benefit of national treatment'

[188] SUpra comp matters

[189] paras. 27-29, 221/89 Factortame See also C-246/89 Commission v UK

[190] See also Article 55 which states that national treatment must be offered to nationals of the other Member States as regard participation in the capital of companies or firms.

justifying discrimination.[191] Indeed, the jurisprudence has held that the location of the registered office of undertakings fulfils the same function under Article 49 TFEU as that by the nationality of natural persons.[192]

The non-discrimination requirement under Article 49 TFEU covers not only open discrimination by reason of nationality, or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result.[193] In specific circumstances, the prohibition of discrimination may preclude national provisions which vary the class of persons to whom EU rules apply from one Member State to another.[194] It does not cover, however, circumstances when the exclusion of undertakings to carry out a certain economic activity was 'not based on the criterion of nationality'.[195]

In the context of public service concessions, freedom of establishment – alongside the free movement of services – provides the principled basis of the prohibition of discrimination on grounds of nationality, which in the absence of specific EU legislative provisions governing concessions imposes the most important restriction of Member State activities in this domain.[196] The non-discrimination principle, together with the more general equal treatment principle, was interpreted to 'imply, in particular, a duty of transparency' for the Member States with a view of ensuring compliance with these principles in a more effective manner.[197] The general obligation of transparency thus established includes the requirement of a sufficient degree of advertising which enables the 'the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.'[198] In this regard, the national authorities (the concession-granting public authority) enjoy a considerable degree of discretion as they bear the task of evaluating, subject to review by the competence national courts, 'the appropriateness of the detailed arrangements' of the call for tender, and only a 'complete lack of any call for competition' in case of an award of a public service concession will lead to the violation of freedom of

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[191] Infra. And para. 14, Segers, in the contrary case the freedom of establishment would be deprived 'of all meaning'. The location where it conducts its business (e.g., solely in another Member State) is irrelevant Para. 16, 79/85 Segers, or that the company was fromed in the first Member State only for the purpose of establishing itself in a second Member State where its main, or indeed entire business is to be conducted, Para. 17 Centros

[192] Infra. FELHOZNI?

[193] para. 8 3/88 Commission v Italy, para, 11, Case C-254/97 Baxter para. 14, C-330/91 Commerzbank; para. 15, C-1/93 Halliburton

[194] para. 12, C-369/90 Micheletti

[195] Para. 29, van Ameyde, here, reserving the final decision as to the payment of damages to victims of accidents caused in the Member State in question by vehicles normally based in another Member State to a national bureau of insurance companies or to national insurance companies.

[196] Paras. 46-47, Case C-458/03 Parking Brixen, a 'more specifically applicable' rule. Paras. 20-24, Case C-260/04, Commission v Italy

[197] para. 49, Case C-458/03 Parking Brixen

[198] para. 49, Case C-458/03 Parking Brixen

establishment and 'the principles of equal treatment, non-discrimination and transparency.'[199] The Member States are not required, however, to make these requirements explicit when implementing in domestic legislation EU public procurement directives.[200]

The related requirements of non-discrimination and transparency as applied in the context of public service concessions are, however, not absolute. With the introduction of the in-house management (of public services) clause, offers the possibility to Member State authorities to avoid open and competitive tendering when granting public service concessions. According to the clause, the Member States are exempted from those requirements in case the control exercised over the concessionaire by the concession-granting public authority is similar to that which the authority exercises over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling authority.[201] The jurisprudence clarified the application of the clause in the following manner

When national legislation reproduces literally the wording of the clause, it 'theoretically complies' with EU law provided that is interpretation in individual cases is also consistent with it.[202]

The conditions must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation from those rules lies on the person seeking to rely on those circumstances.[203]

In unclear factual circumstances it is for the national court to determine whether the required control existed,[204] having regard, in particular to

- whether for the duration of the contract at issue the capital of the company involved was open, even in part, to private shareholders.[205]

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[199] Para. 50, Case C-458/03 Parking Brixen Para. 25, Case C-260/04, Commission v Italy. The lack of transparency, in case of a 'certain cross-border interest' constitutes a difference in treatment to the detriment of undertakings which might be interested in the contract but which are located in other Member States (indirect discrimination on the basis of nationality), Para. 66, Case C-412/04, Commission v Italy

[200] Para. 67, Case C-412/04, Commission v Italy (as a requirement of transparency and equal treatment in the context of public service concessions and calls for tender, para. 66.) See the discussion supra on the dynamics of EU harmonization and deregulation under freedom of establishment.

[201] Para. 62, Parking Brixen; para. 24, Case C-410/04 ANAV

[202] Para. 25, para. 24, Case C-410/04 ANAV

[203] Para. 63, Parking Birxen; para. 26, Case C-410/04 ANAV

[204] Para. 29, Case C-410/04 ANAV

[205] Para. 30, if yes, the award of the public service concession to a semi-public company without any call for competition violates EU law. The participation, even as a minority, of a private undertaking in the capital of a company in which the concession-granting public authority is also a participant excludes in any event the possibility of that public authority

The national treatment principle prohibits most commonly Member State measures and practices which place EU citizens at a disadvantage when they wish to exercise their right of free cross-border movement[206] and, thus, disadvantage them in law or in fact compared with the nationals of the Member State concerned or individuals who pursue all their activities in that Member State.[207] Often, such disadvantages may be applied in a non-discriminatory manner, in which case the will be covered by the general legal test under Article 49 TFEU.[208] In company law, the right to national treatment was interpreted to entail the particular freedom to choose the appropriate legal form in which to pursue activities in another Member State.[209] Generally, the Member States are not allowed to permitted to distinguish between different forms of establishment, even though that factual circumstance may have relevance for the national policy in question,[210] which is not affected by the fact that in some of these cases even non-discriminatory conditions determined in national law will be difficult to meet by nationals of another Member State.[211] In some instances, the jurisprudence would follow a strict interpretation under Article 49 TFEU of the national treatment requirement which requirement enables the Member States to demand compliance from individuals exercising their right of establishment with local rules.[212] It was held, for instance, that provided that the burden (here, payment of an advance in company registration) 'merely reflects' the actual administrative costs involved,[213] it does not place an undertaking from other Member States in a less favorable factual or legal situation in comparison with companies from the Member State in question.[214] Because deciding such cases requires the careful assessment of the relevant facts, it may be deferred to the national court to determine

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exercising over such a company a control similar to that which it exercises over its own departments, para. 31.

[206] Para. 47, Joined Cases C-393/99 and C-394/99 Hervein

[207] Para. 48, Joined Cases C-393/99 and C-394/99 Hervein; para. 13, C-168/91 Konstantinidis and paras. 12-13 C-101/94 Commission v Italy 'in comparison with the way in which a national of that Member State would be treated in the same circumstances';

[208] para. 19, Case C-255/97 Pfeiffer paras. 12-14, 143/87 Stanton See also, Joined cases 154 and 155/87 Wolf *para 21 136/78 Auer*

[209] Para. 15, Case C-253/03 CLT-UFA SA

[210] even though the housing needs of individuals which may retain their principal place of establishment in one Member State may be different

[211] Paras. 18-1963/86 Commission v Italy

[212] making registration, in the register of companies, of a branch of a limited company established in another Member State subject to the payment of an advance on the anticipated cost of the publication of the objects of the company as set out in its instrument of constitution

[213] Para. 38, Case C-453/04 innoventif

[214] Para. 39

whether the burden imposed was of such nature (here, the amount demanded corresponds to the anticipated administrative costs).[215]

The possibility for the Member States under the national treatment requirement to demand compliance with the relevant national rules, which as indicated earlier in connection with the applicability of the different fundamental freedoms may include a more limited restriction and, thus, a more limited deregulation obligation for the Member States,[216] has been interpreted as where access to or the exercise of a specific activity is subject to conditions laid down in law in the host Member State, 'a national of another Member State who wishes to exercise that activity must in principle comply with them.'[217] This has led to accepting restrictions as compatible with Article 49 TFEU, such as the exclusion from reimbursement from the national social security scheme of laboratories operated by a legal person whose members, partners or directors are not all natural persons authorized to carry out medical analyses,[218] or registration in a professional registry, which is a condition of practicing the profession in question, and the refusal to register by the professional body on disciplinary grounds, when that possibility was also available against nationals.[219] The requirement also entails, however, that in case the pursuance of a specific economic activity by nationals is not subject to any rules in the host Member State, a national of another Member State is entitled to establish itself and pursue that activity without meeting any legal conditions in that State.[220] Considering, however, the broad interpretation of the general legal test covering non-discriminatory restrictions on freedom of establishment, it is doubtful that the national treatment requirement interpreted in this manner would offer protection to national measures, which other than discrimination interfere with the right of establishment, from the Treaty prohibitions. In *Konstantinides*, the Court of Justice proceeding under multiple legal bases held that Article 49 TFEU prohibits direct discrimination on the basis of nationality 'resulting from national legislation, regulations and practices' and

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[215] Para. 41. , especially with regards the objects as set out in the instrument of constitution of the company applying for the registration of a branch. They cannot, however, be required to investigate whether, under the law of the Member State in which a company applying for registration of a branch is established, the objects of the company may be regarded as being fully defined by only some of the provisions under the heading 'Objects of the company' in that company's instrument of constitution, para. 42.

[216] Supra n. Under the national treatment requirement, the Member State enjoy a broader leeway regulating matters falling under freedom of establishment, such as imposing objectively justifiable restrictions on the taking up and pursuing of certain professions paras. 10-11, C-101/94 Commission v Italy

[217] Para. 36, Gebhard para. 11, C-101/94 Commission v Italy

[218] 221/85 Commission v Belgium, the national measure leaves open the possibility for nationals of other Member States that have the necessary qualifications to establish themselves in the Member State concerned, para. 11.

[219] para. 30, 292/86 Gullung

[220] Para. 34 Gebhard

'all national rules which are liable to place nationals of other Member States in a legal or factual situation which is less favorable than the situation, in the same circumstances, of a national of the Member State of establishment.'[221]
As will be discussed later, the non-discrimination principle does not impose an absolute requirement on the Member States as differentiated treatment in law and in fact can be introduced and maintained in case there is an objective difference in the situation of the persons involved. In this regard, not only the existence of objective differences relevant for the differentiated treatment capable of justifying that treatment, but also the existence of discriminatory treatment needs to be established.[222]
The 'General Programme' clearly focused on discriminatory restrictions.[223] Under Title III Point A, it identified the following discriminatory restrictions (concerning foreign nationals only)(self-employed)

Prohibitions on taking up or pursuit of an economic activity.

Making the taking up or pursuit of an economic activity subject to an authorization or to the issue of a document such as a foreign trader's permit.

Imposing additional conditions in respect of the granting of any authorization required for the taking up or pursuing on an economic activity.

Making the taking up or pursuit of an economic activity subject to a period of residence or training in the host country.

Making the taking up or pursuit of an economic activity more costly by through taxation or other financial burdens, such as a requirement that the person concerned must lodge a deposit or provide security in the host country.

Limiting or hindering, by making it more costly or more difficult, access to sources of supply or distribution outlets.

Prohibiting or hindering access to any vocational training which is necessary or useful for the pursuit of an activity as a self-employed person.

Prohibiting foreign national from becoming members of companies or firms, or restrict their rights as members, in particular as regards the functions which they may perform within the company or firm.

Limiting or impairing the freedom of personnel belonging to the main establishment in one of the Member States to take up managerial or supervisory posts in agencies, branches or subsidiaries in another

[221] paras. 12-13 C-101/94 Commission v Italy
[222] paras. 28-30, -141/99 AMID Para. 86 Case C156/98 Germany vo Commission
[223] Title III, Point A.

Member State.

Denying or restricting the right to participate in social security schemes, in particular sickness, accident, invalidity or old age insurance schemes, or the right to receive family allowances.

Granting less favorable treatment in the event of nationalization, expropriation or requisition.

Excluding, limiting or imposing conditions on the power to exercise rights normally attached to the pursuit of economic activity, where the economic activity concerned necessarily involves the exercise of such power, in particular the power

- to enter into contracts, in particular contracts for work, business, or agricultural tenancies, and contracts of employment, and to enjoy all rights arising under such contracts;
- to submit tender for or to act directly as a party or as a subcontractor in contracts with the State or with any other legal person governed by public law;
- to obtain licenses or authorizations issued by the State or by any other legal person governed by public law;
- to acquire, use or dispose of movable or immovable property or rights therein;
- to acquire, use or dispose of intellectual property and all rights deriving therefrom;
- to borrow, and in particular to have access to the various forms of credit;
- to receive aids granted by the State, whether direct or indirect;
- to be a party to legal or administrative proceedings;
- to join professional or trade organizations.

3.2 Article 49 TFEU and the legal test

The broad legal test developed under Article 49 TFEU confines Member State action and freezes Member State attempts at amending existing policies to a considerable extent. The restrictions following from the Treaties have been interpreted as representing obligations for the Member States to contribute to the realization of the aims of the Treaties by eliminating the obstacles of the freedom of establishment and introducing measures which

facilitate the effective exercise of the right of establishment by individuals.[224] As mentioned earlier, the judgment in *Thieffry* spoke clearly about the responsibility of Member State authorities and other relevant bodies (e.g., professional bodies) to give effect to EU law when they – in their own discretion – apply national laws and practices, or aim to enforce restrictions on the freedom of establishment.[225] Even though freedom of establishment, as laid down in Article 49 TFEU, demands that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, non-discriminatory measures hindering establishment in another Member State, as established in the jurisprudence, are also covered.[226] In its different formulas, it holds that Member State measures, even though they are applicable without discrimination on grounds of nationality, which are 'liable to hamper/hinder or render/make less attractive the exercise (…) of the freedom of establishment guaranteed by the Treaty', 'liable to prohibit, impede or render less attractive the exercise of the fundamental freedoms', 'likely to have a deterrent effect' on the exercise of the right conferred by Article 49 TFEU, or which 'render the exercise of the right of establishment more difficult', or which 'may have the effect of hindering nationals of other Member States in the exercise of their right of establishment' are prohibited.[227] Other formulas focus on market access by prohibiting national measures which compliance access to the domestic market by prescribing legal requirements which foreign-established undertakings have difficulty in fulfilling.[228] Again others would look at the possibility competing and competing more effectively in the domestic market with competitors traditionally established in the Member State concerned, which have a distinct competitive advantage by having greater business opportunities than incoming undertakings.[229]

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[224] Para 21 reyners Para. 26, C-79/01 Payroll Data Services
[225] Paras. 17-19 Thieffry.
[226] Para. 31, Case C-446/03 Marks & Spencer Paras 27-28 Case C-108/96 Mac Quen Para. 16 Daily Mail and para. 21 Case C-264/96 ICI; para. 37, Gebhard. This had already been provided in the 'General Programme' which aimed to eliminate not only covert but also disguised discrimination in the forms of legal requirements imposed on the right of establishment 'where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the taking up or pursuit of such activity by foreign nationals.'Paras. 13-14 Thieffry. See Title II Point B of the General Programme speaking about non-discriminatory restrictions the effect of which is 'exclusively or principally, to hinder the taking up or pursuit' of economic activity (as a a self-employed person) by foreign nationals.
[227] őara. 15, C-340/89 Vlassopoulou Para. 15, Case C-299/02 Commission v the Netherlands; para. 37, Gebhard; Para. 36, Case C-439/99 Commission v Italy Para. 38, Case C-294/00 Graebner Para. 36, Case C-436/00 X and Y Para. 32, Case C-324/00 Lankhorts-Hohorst
[228] Para. 32, Case C-493/99 Commission v Germany
[229] Para. 13 Case C-442/02 Caixa-Bank France

The case law[230] dealing with the right of establishment under EU association agreements spoke about national measures which 'do not make it impossible or excessively difficult' to exercise that right. The judgments also accepted that in the context of the actual movement of persons the Member States are not, in principle, precluded from establishing systems of prior controls so as to ensure national authorities empowered to grant a leave to enter and remain in that Member State are able to establish that the person concerned has genuine intentions to establish himself in the economy of that Member State. Member State authorities are entitled, in particular, to deny the exercise of the right of establishment by a person that made 'false representations to those authorities for the purpose of obtaining initial leave to enter that Member State or relating to the authorized duration of his stay there'. In this connection, they are also empowered to require the person concerned to submit, in due and proper form a new application for establishment.

Specific manifestations of the general legal test include the principle developed in the context of the mutual recognition of degrees and other qualifications that the right of establishment is hindered by national rules which 'fail to take account of learning, skills and qualifications already acquired by the person concerned in another Member State, so that the competent national authorities must measure whether such factors sufficiently demonstrate that missing learning and skills have been acquired.'[231] Hindrances may also follow from restrictions imposed on the taking up and the pursuing of economic activities in legal provisions, regulation, or administrative action in the general good, 'such as rules relating to organization, qualifications, professional ethics, supervision and liability'.[232] In the same vein, not only specific rules on the pursuit of occupational activities are prohibited, but also 'any measure which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as the result of the application of such a provision, or of administrative practices, hinders nationals of other Member States in their pursuit of activities as self-employed persons by treating nationals of other Member States differently from nationals of the country concerned'.[233] National law confining economic activity to a single location of establishment throughout the Union was defined as a specific and particularly problematic hindrance.[234] In the Court of Justice's interpretation, allowing such restrictions would come with the unacceptable cost – a cost which

[230] paras. 56, 85-86, C-63/99 Gloszczuk (paras. 90-92, Case C-235-99 Kondova, para. 83, Case C-257/99 Barkoci; para. 31, Case C-268/99 Jany

[231] Para. 62, Case C-313/01 Morgenbesser *Vlassopoulou*, paragraphs 15 and 20

[232] Para. 35 Gebhard, para 12 Thieffry

[233] para. 27 337/97 Meussen *Case C-111/91 Commission v Luxembourg [1993] ECR I-817, paragraph 17*

[234] Paras. 18-19 Klopp

contradicts the essence of the freedom of establishment – of an economic operator abandoning 'the establishment he already had.'[235]

As indicated already and will be discussed in detail below, the rule of law aspects of restrictions imposed on the Member States under Article 49 TFEU have been given a particular emphasis in the jurisprudence. The Court of Justice has held, with reference to its general jurisprudence, that the full application of EU law requires not only the bringing of national legislative into conformity with EU obligations, but also doing so 'by adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know the full extent of their rights and rely on them before the national courts.'[236] This obligation received a broad interpretation when the Court of Justice held that it has little relevance in this regard whether the provisions of EU law in question are directly effective and enable, therefore, individuals 'to rely on them, in judicial proceedings, as against a defaulting Member State.'[237] The requirements of precision, clarity and transparency of national legislation were given further weight when it was emphasized that they are 'also applicable where general principles of constitutional law, such as the general principle of equal treatment, are involved' and, in particular, where the provisions of EU law in question 'are intended to accord rights to national of other Member States, inasmuch as those nationals are not normally aware of such principles.'[238]

In the context of national gambling and betting regulation, the jurisprudence developed a consistent body of principles governing licensing obligations and the related system of administrative or policy authorizations and *ex ante* controls. The Court of Justice accepts, in general, the suitability of licensing to achieve the particular public interest objective.[239] In particular, the Member State concerned deciding on the number of licenses which are 'sufficient' for the national territory were seen as able to produce the intended restrictive effect on carrying out a particular economic activity, which, however, was declared as insufficient on its own to justify the potential restrictions of freedom of establishment.[240] The Member States must also ensure that the restrictions reflect a concern to bring about a genuine diminution in the access to the particular services offered and that the limitation of economic activities in the given sector are achieved in a 'consistent and systematic' manner.[241] This latter means that restrictive

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[235] Para. 18 Klopp.
[236] Para. 22, Case C-162/99 Commission v Italy. XREF LOYALTY
[237] Ibid.
[238] Para. 23, , Case C-162/99 Commission v Italy, here only by referring to rules of interpretation which are specific to national law could EU nationals determine the exact scope of the national measure and know the full extent of their rights.
[239] Infra n
[240] Para. 51, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica
[241] Para. 53, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica

licensing regimes may be unacceptable in case of a parallel national policy which expands, with the aim of increasing tax revenues, activity in the given sector, while also protecting existing licenses, and which is not supported by actual legal measures which limit the use of services by consumers and their availability in the market.[242] It was made clear that in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting.[243] The required systematic and coherent nature of the policy is more easily established when the licensing restrictions and other controls are introduced following the objective of combating criminal activities.[244] The restrictions must, however, be based on factual evidence supporting the pressing nature of the public interest objective and other evidence indicating that the Member State concerned have considered different policy responses before developing the licensing system.[245] Police/administrative authorizations, including *ex ante* controls, and ongoing supervision are readily accepted as serving the public interest objective indicated and being 'entirely commensurate' with those objectives.[246]

3.3 The *Centros*-rule

The judgment in *Centros* supplemented the general legal test by clarifying that while taking advantage of provisions of EU law improperly or fraudulently, or improperly circumventing their national legislation 'under cover of the rights created by the Treaty' fall outside the scope of Article 49 TFEU,[247] the use of EU law by undertakings to find the most beneficial legal environment for establishment (the least restrictive company law jurisdiction) is covered by the right of establishment.[248] The Court of Justice also held that the intent of the persons concerned to evade national

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[242] Para. 54. Para. 67 Case C-243/01 Gambelli Para. 68, Case C-243/01 Gambelli
[243] Para. 69. Case C-243/01 Gambelli
[244] Para. 55 Joined Cases C-338/04, C-359/04 and C-360/04 Placanica, 'it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming – and, as such, activities which are prohibited – to activities which are authorised and regulated' and 'in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques.'
[245] Paras. 56-58
[246] Para. 65, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica
[247] This must be established on the basis of objective evidence, para. 25. The act that the company concerned does something unusual, such as not conducting any business in the Member State of establishment, is not sufficient to prove the existence of abuse or fraudulent conduct, para. 29.
[248] Paras. 24 and 27, Case C-212/97 Centros

legislation, when it does not concern illegal abusive uses of the fundamental freedoms, is irrelevant from the perspective of the application of EU law.[249] According to the Court of Justice, this latter opportunity for individuals is not affected by the lack of complete harmonization by the EU in the given domain (here, company law).[250] This distinction requires that the Member States proceed carefully when addressing the cross-border establishment of undertakings which seems to jeopardize significant and relevant Member State interests. Principally, they may adopt measures to prevent the exercise of the right of establishment when that takes place for the purpose of 'improperly' of 'fraudulently' evading national law.[251] Improper and fraudulent uses of freedom of establishment provide the only legitimate derogations from that freedom within this particular context in case the compatibility of the national measure adopted is contested under Article 49 TFEU.[252]

The possibility to use freedom of establishment for the purposes of operating undertakings in the most favorable legal environment was based on the interpretation of freedom of establishment which identified its purpose in ensuring establishment of a company formed in one Member State in a second Member State 'where its main, or indeed entire, business is to be conducted.'[253] This central purpose of freedom of establishment of companies makes the reasons for choosing to be formed in a particular Member State, except when that takes place for illegal fraudulent purposes, is irrelevant from the perspective of EU law.[254] Accordingly, under EU law it is not considered to be an abuse of the fundamental freedom when the right of establishment is exercised for the sole purpose of enjoying the benefits of more favorable legislation even when the company formed in the first Member State conducts its activities entirely or mainly in the second Member State.[255] The ultimate justification was found in the national

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[249] Para. 18 Centros Thisfollows from the objectives pursed by the freedom of establishment, which have special relevance in the context of national provisions which regulate the establishment of companies (as opposed the carrying out of certain trades) (when it takes place through the setting up of branches that is inherent 'in the exercise, in a single market, of the freedom of establishment'), 25-26 Centros

[250] Para. 28. Centros

[251] Para. 98Inspire art centros 18 Para. 35, Case C-196/04 Cadbury Schweppes. The fact that a company established in a Member State establishes and capitalises companies in another Member State solely because of the more favourable tax regime applicable in that Member State does not constitute an abuse of freedom of establishment as the fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty, Para. 36, Case C-196/04 Cadbury Schweppes

[252] Para. 56, Case C-171/02 Commission v Portugal

[253] Para. 95, Case C-167/01 Inspire Art *Segers*, paragraph 16, and *Centros*, paragraph 17

[254] Para. 95, Case C-167/01 Inspire Art, Centros 18

[255] Para. 96, Case C-167/01 Inspire Art *Segers*, paragraph 16, and *Centros*, paragraph 18 Para. 37, Case C-196/04 Cadbury Schweppes

treatment requirement according to which companies established in one Member State are entitled to carry on their business in another Member State through a branch, and that the location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person.[256]

3.4 The *Vlassopoulou*-principle

In the context of the recognition of foreign degrees and other qualifications, where the Member States proceed even after harmonization under considerable discretion, the general legal test was supplemented by the following regulatory and administrative benchmarks. The benchmarks in *Vlassopoulou* were adopted before the passing of EU harmonization measures in this domain, and they are still applicable in circumstances not covered by the relevant directives.

The Member States

- must not ignore knowledge and qualifications acquired by the person concerned in another Member State (they must 'assure themselves, on an objective basis,' that the knowledge and qualifications certified by the foreign diplomas and certificates 'are, if not identical, at least equivalent to those certified by the national diploma[257]),[258]
    - as a result, they must take account of the equivalence of diplomas, certificates and other evidence of qualifications,[259] even if national legislation does not provide for that, or in the required extent,[260] and
    - if, necessary proceed to a comparison of the knowledge and qualifications[261] required by their national rules and those of the person concerned,[262]
        - that assessment of equivalence 'must be carried out exclusively in light of the level of knowledge and qualifications' which the holder of the diploma 'can be assumed to possess', 'having regard to the

[256] Para. 97, Inspire Art, *Segers*, paragraph 13, and *Centros*, paragraph 20
[257] Para. 17, Vlassopoulou
[258] Para. 38, Gebhard, *Case C-340/89 Vlassopoulou v Ministerium fuer Justiz, Bundes- und Europaangelegenheiten Baden-Wuerttemberg [1991] ECR I-2357, paragraph 15*
[259] Para. 38, Gebhard, Para 19 Thieffry; para. 16 Vlassopoulou
[260] Para. 25 Thieffry, recognizing not only for university purposes, but also as evidence of a professional qualification, especially when the university diploma is supplemented by a professional qualifying certificate obtained according to the legislation of the State of establishment.
[261] 'knowledge and abilities certified by those diplomas', para. 16, Vlassopoulou
[262] Para. 38, Gebhard; para. 16, Vlassopoulou

nature and duration of the studies and practical training to which the diploma relates',[263]

- in the course of that examination, Member State authorities may take into account 'objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity'.[264]

- must recognize the foreign diploma or certificate as equivalent, in case this comparative examination establishes that the knowledge and qualifications certified by the foreign diploma correspond to those required by national legislation.[265]

In case of partial correspondence, the Member State concerned 'is entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking',[266]

- this entails the obligation for the Member States ('the competent national authorities') to assess 'whether the knowledge acquired in the host Member State, either during a course of study or by way of practical experience, is sufficient in order to prove possession of the knowledge which is lacking'.[267]

In case the completion of a period of preparation or training for entry into the profession is required by the legislation of the host Member State, that Member State (its authorities) are obliged to determine 'whether professional experience acquired in the Member State of origin or in the host Member State may be regarded as satisfying that requirement in full or in part'.[268]

The Member States are obliged

- to carry out these examinations 'in accordance with a procedure which is in conformity with the requirements of Community law concerning the effective protection of the fundamental rights conferred by the Treaty on Community subjects',[269]

  - in particular, 'any decision taken must be capable of being made the subject of judicial proceedings in which its legality under Community law can be reviewed', and

  - 'the person concerned must be able to ascertain the reasons for the decisions taken in his regard'.

[263] Para. 17, Vlassopoulou; para. 13, Case 222/86 Heylens
[264] Para. 18, Vlassopoulou
[265] Para. 19 Vlassopoulou
[266] Para. 19, Vlassopoulou
[267] Para. 20, Vlassopoulou
[268] Para. 21 Vlassopoulou
[269] Para. 22 VLassopoulou; para. 17 Heylens

The application of these requirements reaches beyond the issue of recognizing academic qualifications and they must be interpreted in the context of enabling entry to a regulated profession.[270] Accordingly, the examinations must not be carried out under the aim of examining the academic equivalence of a foreign degree in relation to that normally required for domestic degree, but with the purpose of assessing 'the whole of the training, academic and professional, which that person is able to demonstrate.'[271] The competent national authorities are, thus, obliged to examine 'whether, and to what extent, the knowledge certified by the diploma granted in another Member State and the qualifications or professional experience obtained there, together with the experience obtained in the Member State in which the candidate seeks enrolment, must be regarded as satisfying, even partially, the conditions required for access to the activity concerned.'[272] In particular, the examination procedure must enable the national authorities

> to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma, and
>
> to assess equivalence exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess having regard to that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates.[273]

According to the Court of Justice, although the *Vlassopoulou*-principle had been introduced in cases where there were no EU harmonization or coordination measures in existence at the time, 'its legal ambit (legal effect) cannot be reduced' as a result of the adoption of such measures regulating the same matter.[274] This follows from the argument that the principle is the judicial expression a principle inherent in the fundamental freedoms of the Treaty.[275] The principle must also be applied when the relevant EU harmonization or coordination measures are not applicable as a matter of their scope.[276] In other words, where there are directives available for the mutual recognition of diplomas, those directives must be followed rendering

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[270] Paras. 63-64, Case C-313/01 Morgenbesser
[271] Paras. 65-66,
[272] Para. 67.
[273] Para. 68, Case C-313/01 Morgenbesser
[274] Para. 31. 238/98 Hocsman. These obligations do not cease to exist as a result of the adoption of directives on the mutual recognition of diplomas, para. 58, Case C-313/01 Morgenbesser
[275] Para. 25, Dreessen, paras. 24 and 31 Hocsman
[276] para. 55 Case C-313/01 Morgenbesser

their recognition under *Vlassopoulou* 'superfluous', but in situations not covered by such directives, the principle remains 'unquestionably' relevant.[277] The latter is supported by the fact that the objective of those directives is not to make the recognition of diplomas and qualifications more difficult in situations falling outside their scope, and 'nor may they have such an effect.'[278] Known errors in the relevant EU directives may also require the application of the principle complementing the erroneous legislative provisions.[279] In such instances, when the recognition of equivalence on the basis of the provisions of the relevant directive is excluded, mutual recognition must be offered on the basis of the *Vlassopoulou*-principle.[280]

A related body of principles is governed by rather similar considerations. According to the Court of Justice, while the EU measures governing the mutual recognition of degrees and other qualifications may leave considerable discretion to the national authorities, that discretion may only be exercised subject to constraints as they follow from the Treaty provisions so that their exercise does not undermine the achievement of the Treaty objectives.[281] For instance, in defining the conditions of taking up and pursuing professional activities and when defining the scope of the occupations affected, they are required to accept as sufficient evidence of the knowledge and the ability of the person concerned 'the fact that the activity in question has been pursued in another Member State.'[282] Furthermore, when Member State authorities grant authorization to pursue an occupational activity, they are entitled to certify whether the pursuit of that activity in another Member State was 'genuine and real and took place over a given number of consecutive years, that is to say, without any interruption other than those occluding in the ordinary course of life.'[283] Also, while the national authorities are bound by the declarations contained the certificate issued by the Member State of origin, as that certificate would otherwise be deprived of its effectiveness, they may take into account objective factors which indicate that the certificate produced contains manifest inaccuracies and, as a result, may approach the Member State of origin with requests for additional information.[284] They are, however, prevented from defining the conditions for taking up and pursuing an occupation or their scope in such a way that a certificate issued by the

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[277] Paras. 33-34m Hocsman, para. 37, Dreessen
[278] Para. 26, Dreessen.
[279] Para. 29, Dreessen, when the Commission recognizes that mistake ('it may be due to error that the type of diploma in question is not included amongst the qualifications covered' by the directive in question).
[280] Paras. 20-21, Case C-31/00 Dreessen
[281] Para. 34, de Castro Freitas
[282] Paras. 25-26, C-193/97 de Castro Freitas
[283] Para. 28, C-193/97 de Castro Freitas *Case 130/88 Van de Bijl v Staatssecretaris van Economische Zaken [1989] ECR 3039, paragraph 18*
[284] Paras. 29-30, de Castro Freitas; paras 22-24, Van de Bijl.

Member State of origin 'is rendered useless for the purposes of enabling the applicant to engage in the occupation' at issue.[285]

3.5 Discriminatory and non-discriminatory restrictions

As indicated earlier, Article 49 TFEU prohibits both discriminatory and non-discriminatory restrictions imposed in national law as capable of hindering freedom of establishment. The application of the legal test also produced another relevant distinction, that between regulatory measures and measure of fiscal policy (taxation). While regulatory measures, such as those governing the conditions of entry into a domestic market, are treated with the customary legal rigor as provide under the free movement provisions of the Treaties, fiscal measures introduced by the Member States – based mainly on considerations relating to the fiscal sovereignty of the Member states and to the lack of EU competences[286] – may be given a more favorable legal assessment. Claims submitted by the Member States concerning national tax autonomy and tax sovereignty will be taken into account and judicial scrutiny may only focus on national fiscal measures meeting the most fundamental legal benchmarks (e.g., non-discrimination, or benchmarks relating to good governance and good regulation). Double regulatory burdens on individuals in matters of taxation are not considered as harmful to free movement, the principle of mutual recognition is recognized only with regards tax advantages offered and not in connection with taxes imposed by the Member States, the discriminatory impact of double taxation in cross-border situations is generally overlooked, and there is no reflection on the necessity of judicially engineered legal solutions in the absence of legislative instruments adopted at the European level.[287] There are, however, instances when national regulatory measures – mainly because of the policy area affected and the manner in which their content is regulated – are given broad judicial reference by the EU Court of Justice.[288] There are restrictions, such as local residency requirements, which do not involve direct discrimination, but their effect is that they restrict establishment to nationals. It is evident that the non-discrimination principle with its core requirement of national treatment does not tolerate the Member States imposing a nationality requirement in the context of regulating the

[285] Para. 32, de Castro Freitas
[286] infra competences
[287] Snell (2011), 559-562. Infra competence
[288] See infra the analysis on Essent, and infra on Libert and VVO (prohibition on resident media companies investing in a media company established in another Member State and on providing that company with a bank guarantee, or on drawing up a business plan and giving legal advice to a media company to be set up in another Member State, where those activities are directed towards the establishment of a commercial television station and national law aims to maintain a non-commercial audio-visual sector).

pursuance of economic activity in their territory. Article 49 TFEU excludes the application of a nationality requirement, in particular, in the context of

Regulating entry into a profession.[289]

Determining the conditions of fulfilling certain professional positions.[290]

Determining the conditions of taking part competitions for the award of licenses to practice as a professional.[291]

Determining the conditions of setting up coaching establishment and private vocational training schools, and for giving private lessons at home.[292]

Determining the conditions of obtaining public funds or reduced-rate mortgage loans to build or renovate housing.[293]

Granting a large-family status for awarding special social benefits and allowance.[294]

Concluding legal acts in respect of immovable property situated in border regions.[295]

Establishing the conditions of tender for the allocation public property belonging to a municipality (renting premises for business purposes).[296]

The Treaties also prohibit Union or EEA nationality requirements being imposed by national legislation. In Case C-299/02 *Commission v the Netherlands*, the Union or EEA nationality requirement regarding the shareholders and directors of companies owning seagoing ships imposed when wishing to register ships in the Member State concerned were found to restrict freedom of establishment.[297] The same conclusion was reached in connection with the same requirement imposed on the natural persons responsible for the day-to-day management of the place of business from which the shipping business which is necessary for registration of a ship in

[289] Reyners; para. 40, C-114/97 Commission v Spain

[290] 168/85 Commission v Italy; para. 14 38/87 Commission v Greece
[291] 168/85 Commission v Italy
[292] 147/86 Commission v Greece
[293] 63/86 Commission v Italy
[294] C-185/96 Commission v Greece ECLI:EU:C:1998:516
[295] 305/87 Commission v Greece (restrictions on nationals of other Member States).
[296] Para. 16, 197/84 Steinhauser
[297] In the absence of a harmonised rule valid for the entire Community, a condition of Community or EEA nationality, like a condition of nationality of a specific Member State, may constitute an obstacle to freedom of establishment, para. 20, Case C-299/02 Commission v the Netherlands

the national registers is carried out in that State. The Court of Justice found that the nationality requirement is unsuitable to achieve the general interest objective raised, and it seems to be convinced that, in general, there are less restrictive alternative means available than imposing nationality requirements.[298]

Local residence requirements imposed on natural persons,[299] when it is established that it is discriminatory,[300] and making cross-border reciprocity as a condition of access to various occupations[301] are treated in the same way in law under Article 49 TFEU. As mentioned earlier, with regards undertakings, their registered office, central administration, or principal place of business serves as the 'connecting factor' with the legal system of a particular case,[302] as does nationality in the case of natural persons,[303] which entails that restrictions imposed in national laws and practices in this regard are considered on the same footing as nationality requirements.[304] On this basis, the following may be prohibited under Article 49 TFEU

Imposing a local residence requirement on directors and managers in a given sector.[305]

Imposing a local residence obligation on managers and staff.[306]

Imposing a local residence requirement (residence on and near agricultural land) for nationals of other Member States when participating in the formation of an undertaking.[307]

Imposing a local registered office requirement for transferable security deals outside of banks.[308]

Imposing a requirement that registered office(chambers) must be in one place which must be within the territorial jurisdiction of the

[298] XREF propi 299/02

[299] para. 28 337/97 Meussen *Case C-111/91 Commission v Luxembourg [1993] ECR I-817, paragraph 18* in the context of granting a social advantage. See also infra

[300] For instance, when it applies only to nationals of other Member States, Case C-263/99 Commission v Italy.

[301] 168/85 Commission v Italy (here also a condition of registration in a special register for foreign professionals) and C-58/90 Commission v Italy

[302] Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply different treatment merely by reason of its registered office being situated in another Member State would deprive Article 43 EC of all meaning, para. 43, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation

[303] Para. 13, 79/85 Segers para. 18, 270/83 Commission v France *Case 270/83 Commission v France [1986] ECR 273, paragraph 18, Case C-330/91 Commerzbank [1993] ECR I-4017, paragraph 13, and Case C-264/96 ICI [1998] I-4695, paragraph 20, para. 20 centros*

[304] 79/85 Segers, excluding from a national sickness insurance benefit scheme the director of a foreign company on the ground that the company in question was formed under the law of another Member State.

[305] C-114/97 Commission v Spain

[306] Para 31 C-355/98 Commission v Belgium

[307] para 9, Fearon

[308] C-101/94 Commission v Italy

national court within which the lawyer is registered (single location of practice requirement).[309]

Using local residence as the basis of differentiated tax treatment benefiting those that reside in the Member State concerned.[310]

Imposing a requirement of fiscal residence for tax purposes (in the context of the repayment of overpaid tax).[311]

Imposing a residence requirement on the directors of shipping companies owning seagoing ships registered in the Member State concerned, and on the natural persons responsible for the day-to-day management of the place of business from which the shipping business which is necessary for registration of a ship in the Member State concerned registers is carried out in that State.[312]

In the context of EU fisheries policy, Member State governments experimented with a variety of nationality, residency, domicile, and other territorial restrictions (e.g., local management requirement) with a view to protecting national fishing industries, which were all found to violate Article 49 TFEU. In case the registration of fishing (and other) vessels is regarded as establishment in the meaning of the Treaties, the Member States are prevented from

Imposing (domestic) nationality requirements on the crew of fishing vessels.[313]

Imposing residence and domicile requirements on company managers and on crew on vessels.[314]

Imposing a requirement of local management (domestic location of operation, direction, and of control),[315]

- which may only be problematic when it interferes with decisions concerning secondary establishment, or with arrangements

[309] Klopp, which excludes maintinain a registered office (chambers) in the Member State of origin.
[310] 37 C-107/94 Asscher
[311] para. 15, C-330/91 Commerzbank, 'is liable to work more particulary to the disadvantage of companies having their seat in other Member States' (most often to the disadvantage of companies which are resident for tax purposes outside the territory of the Member State in question).
[312] Case C-299/02 Commission v the Netherlands
[313] para. 23, C-279/89 Commission v UK
[314] para. 32, 221/89 Factortame and para. 42, -279/89 Commission v UK (nationals meet those requirement automatically, while nationals of other Member States would have to move their residence and domicile, in most cases). See, in case of the registration of aircraft used for economic activity by nationals of other Member States, Paras. 12-13 203/98 Commission v Belgium, the requirement of residence or having been established in the Member State concerned for at least one year.
[315] para. 35, 221/89 Factortame

where instructions come from a decision-taking center located in the Member State of principal establishment.

Imposing a nationality requirement by subjecting the right to register a vessel in the Member State concerned and to fly the national flag to the conditions that[316]

- a certain amount (more than half) of the shares of the company is owned by natural persons of the nationality of the Member State concerned,[317]
- a certain proportion of the capital of certain legal persons owning vessels is controlled by natural persons of the nationality of the Member State concerned,
- the actual control or management of such legal persons must be in the hands of natural persons of the nationality of the Member State concerned.

Imposing other territorial requirements by subjecting the right to register a vessel in the Member State concerned to the condition that it is owned in whole or in part by the government, a minister, a citizen of that Member State, or by a body corporate established under national law.[318]

Imposing other territorial requirements by subjecting the right to register a vessel in the Member State concerned to the condition that legal persons owning vessels must be established under a subject to national law and to have their principal place of business in that Member State.[319]

The assessment of territorial restrictions under Article 49 TFEU may raise a number of complications. In case it coincides with the actual concept of establishment under the Treaty, 'which implies a fixed establishment', a local management requirement concerning the place of operation, direction and control of an undertaking cannot be interpreted as contravening the right of establishment.[320] It will only raise problems when it interferes with decisions of secondary establishment or with arrangements where instructions come from a decision-taking center located in the Member State of principal establishment.[321] Domestic place of business requirements may be accepted as compatible with Article 49 TFEU when it is established that

[316] Para. 17, C-334/94 Commission v France C-62/96 Commission v Greece ECLI:EU:C:1997:565
[317] C-151/96 Commission v Ireland ECLI:EU:C:1997:294, in case of a *company, the shareholders and directors must be of that nationality*
[318] C-151/96 Commission v Ireland ECLI:EU:C:1997:294
[319] C-151/96 Commission v Ireland ECLI:EU:C:1997:294, which precludes registrationor management of a vessel in case of a secondary establishment such as an agency, branch or subsidiary.
[320] para. 34
[321] para. 35, 221/89 Factortame See also C-246/89 Commission v UK

nationals of another Member State or a company established in another Member State are not prevented from managing effectively a branch or a subsidiary in the Member State concerned[322] and it was not shown that the national rules in question would require an economic operator established in another Member State to transfer all its activities to the host Member State.[323] It was discussed under the *Centros*-rule, that the territorial location of the actual activities of the undertaking concerned does not enable the Member State concerned to restrict the freedom of establishment and that undertakings should, in principle, be free from demands by the Member States that they have to carry out at least some part of their business activities within the territory of a given State.[324] In the domain of national tax regulation, it was held that territoriality requirements (tax territoriality) expressed in a condition of having an 'economic link' with the Member State concerned[325] does not constitute a restriction on freedom of establishment provided that it does not entail a differentiated treatment of companies established in that Member State and in other Member States.[326] Conversely, discriminatory territorial limitations, such as subjecting the grant of a subsidy to the condition that the dwellings built or purchased must be situated in the Member State concerned, contravene Article 49 TFEU.[327]

3.5.1 Regulatory measures governing the requirements of entry into and the practicing of a profession

These are examples of regulatory requirements concerning entry into and the practicing of a profession which may be prohibited under Article 49 TFEU.

Prohibiting or restricting entry into a profession

Prohibiting altogether, regardless nationality and the Member State of establishment, the exercise of a profession recognized in another Member State.[328]

Refusing to allow the person concerned to practice on the ground that that person in established and authorized to practice in another Member State.[329]

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[322] Para. 59, Case C-496/01 Commission v France. in particular, when nationals of another Member State are not precluded from exercising the function of a director of that undertaking where they satisfy the requirements imposed by the Member State concernedPara. 60

[323] 61, so that the place of business in the host Member State would no longer be a secondary establishment but would become the only place of business of the company in question

[324] Para. 21, Case C-212/97 Centros and supra n.

[325] The requested tax relief to have an economic link with the income earned in the Member State concerned.

[326] *Case C-250/95 Futura*

[327] Case C-152/05 COmmision v Germany

[328] Para. 40, Graebner

Refusing to allow practicing a profession on the basis of national legal provisions without taking into account the circumstances of the person concerned which may have relevance in that regard.[330]

Refusing to allow practicing a profession on grounds that applicant has dual-citizenship (of another Member State and of a non-Member State) and that national law regard him to be a national of a non-member country;[331]

- providing in national law that citizenship of another Member State is recognized only when the person concerned has a habitual residence in that Member State.

Prohibiting the organization of training for a profession recognized in another Member State, but not in the Member State concerned, and prohibiting the advertising of such training opportunities.[332]

Requiring to be an ordinary member of professional body in the Member State concerned when that status is not available for non-nationals (no express recognition of the ability of non-nationals to register),[333]

- the availability of limited avenues for non-nationals to register as ordinary members (e.g., registration as honorary members) will be regarded as insufficient,
- the silence of national law on the ability of non-nationals to register which causes legal ambiguity and uncertainty,
- administrative practices alone are unable to rectify these hiatuses of legislation.

Requiring in national law for professionals to have a single practice without explicitly allowing that nationals of other Member States may maintain a practice in those Member States (single location of practice requirement).[334]

Requiring professionals to cancel their enrolment or registration in the professional body of another Member State for the purpose of being able to practice in the host Member State.[335]

Excluding the possibility of (precludes any possibility for the authorities of that State to allow) a partial taking-up of a regulated profession, restricted to the pursuit of one or more activities covered by that profession.[336]

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[329] C-106/91 Ramrath
[330] C-340/89 Vlassopoulou
[331] para. 11, C-369/90 Micheletti
[332] Para. 55, Graebner
[333] para. 7-9, 38/87 Commission v Greece
[334] para. 10, C-351/90 Commission v Luxembourg
[335] 96/85 Commission vFrance (medical professionals)
[336] Para. 31, Case C-330/03, CICCP

Subjecting the practicing of a profession, which is already authorized in another Member State, to requirements relating to permanent professional infrastructure, actual presence in the Member State concerned, and to supervision of compliance with the rules of professional conduct.[337]

Requiring that contributions are made to the social security scheme for self-employed persons of the host Member State by persons already working as self-employed persons in another Member State, where they have their habitual residence and are affiliated to a social security scheme.[338]

Not offering exemption from the payment of contributions to social security scheme for self-employed persons, where self-employment is a secondary occupation, to persons whose principal occupation is employment in another Member State, in particular when their contributions yield no return for the persons concerned.[339]

Requiring contributions to be made to the social security scheme for self-employed persons by persons already working as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social security scheme.[340]

Entering the name of the person concerned in a public registry in a spelling different from the phonetic transcription, which modifies and distorts its pronunciation.[341]

Refusing to recognize qualifications

Accepting only qualifications as defined by national legislation.[342]

Refusing to allow entering a profession (by a national) because of a lack of qualifications required in the host Member State and refusing the recognition of professional practice in another Member State by a national of the host State.[343]

Rejecting the recognition of qualifications on the ground that there is no convention of cross-border reciprocity between the Member States involved as required by national law.[344]

Refusal to enroll the holder of a the holder of a legal diploma obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the bar

[337] C-106/91 Ramrath
[338] Para. 13, C-53/95 Kemmler
[339] Para. 48, Joined Cases C-393/99 and C-394/99 Hervein
[340] Para. 49, Joined Cases C-393/99 and C-394/99 Hervein; paras. 12-13, Kemmler.
[341] C-168/91 Konstantinidis
[342] Thieffry, despite recognition of equivalence of foreign qualification and obtaining a further professional qualification in that Member State.
[343] Knoors
[344] Patrick

solely on the ground that it is not a legal diploma issued, confirmed or recognized as equivalent by a university of the first State.[345]

Excluding individuals with lesser qualifications to carry out professional activities which they are entitled to carry out in the Member State or origin.[346]

Requiring that the application for a recognition of a qualification issued in another Member State,

- is accompanied by the original diploma or a certified copy;[347]
- contains an official translation of all documents;[348]
- is accompanied by a certificate of nationality.[349]

Requiring the undertaking of additional training, which is also imposed on holders of professional qualifications issued in that Member State, but which is not permitted by the relevant EU directive on mutual recognition.[350]

Requiring the person concerned to pass an examination in order to be permitted to practice a profession when that person has obtained relevant qualifications in the Member State of origin.[351]

Subjecting foreign qualifications to an individual case-by-case assessment when the relevant directive provides the right to pursue the profession concerned solely on the basis of the qualification obtained in another Member State.[352]

Failing to establish a procedure for examining foreign qualifications for recognition, or to test the training and experience of person concerned as required by the Vlassopoulou requirements.[353]

3.5.2 Regulatory requirements governing economic activities in individual markets

These are examples of regulatory requirements governing economic activities in individual markets which may be prohibited under Article 49 TFEU.

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[345] Case C-313/01 Morgenbesser
[346] Case C-108/96 Mac Quen, recognition of equivalence of foreign qualification and obtaining a further professional qualification in the host Member State
[347] para. 37 *Case C-298/99 Commission v Italy,* the potential obstacles are: the risk of the original diploma being lost, the possible delay on the part of the Member State of origin in awarding that diploma, the additional steps and costs resulting from the procedures for certifying true copies of original diplomas.
[348] para. 45, *Case C-298/99 Commission v Italy*
[349] para. 45, *Case C-298/99 Commission v Italy*
[350] paras. 21-26, Broekmeulen, (general medicine v. specialised medicine).
[351] C-104/91 Borrell
[352] Para. 13, C-53/95 Kemmler
[353] paras. 13-14 C-375/92 Commission v Spain

Prohibiting the provision of payroll services to undertakings under a certain size by data processing centers which are not established and staffed solely by employment consultants or persons of equivalent status (exclusive establishment rights).[354]

Imposing the restriction that only in which all or a majority of shares are either directly or indirectly in public or State ownership may conclude public contracts with the Member State concerned.[355]

Imposing limitations on the freedom to fix scales of charges.[356]

Imposing a territorial limitation on licenses to pursue an economic activity, unless the person concerned confers authority on an authorized representative in order to pursue an economic activity in a province in which the operator does not have a license.[357]

Imposing the obligation to have premises in each national province, unless the person concerned confers authority on an authorized representative in order to pursue an economic activity in a province in which the operator does not have a license.[358]

Prohibiting and restricting activities in the national betting and gambling market,

- prohibiting, subject to criminal or administrative sanctions, the operation of electric, electromechanical and electronic games on all public or private premises apart from casinos;[359]
- prohibiting and subjecting to criminal penalties the organization through the internet of local agencies for betting services by an undertaking established in another Member State in violation of the right reserved to the State and the monopoly set up by the State to collect bets;[360]
- prohibiting the use of local intermediaries in facilitating the provision of betting services in relation to sporting events organized by a supplier established in a Member State other than that in which the intermediaries pursue their activity;[361]

[354] Para. 27, C-79/01 Payroll Data Services
[355] 3/88 Commission v Italy, for the development of data-processing systems for public authorities; C-272/91 Commission v Italy, for the development of the computarisation system of the national lottery
[356] deprives economic operators established in another Member State of the opportunity to compete more effectively, by offering charges lower than those in the scale of charges imposed, with the economic operators traditionally established in the Member State concerned, para. 72, Case C-134/05 Commission v Italy
[357] Case C-134/05 Commission v Italy
[358] Case C-134/05 Commission v Italy
[359] Case C-65/05 Commission v Greece
[360] Para. 46, Case C-243/01 Gambelli
[361] Para. 44, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica

- imposing generally formulated restrictions on the licensing and tendering for betting activities, which result in a lack of foreign operators among licensees;[362]

- prohibiting, subject to criminal penalties, the pursuit of activities in the betting and gaming sector without a license or police authorization issued by the State.[363]

Prohibiting a credit institution which is a subsidiary of a company from another Member State from remunerating sight accounts in euros opened by residents of the Member State concerned.[364]

Following administrative practices under which university degrees awarded by a university of one Member State are not recognized by another Member State when the courses of preparation for those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments.[365]

Imposing the prohibition by a professional body to form 'multi-disciplinary' partnerships with members of another profession.[366]

Subjecting the recognition of foreign driving licenses to conditions which hinder the exercise of the fundamental freedoms, as opposed to establishing requirements and controls in order to ensure that the requirements laid down for nationals are satisfied.[367]

Not permitting a qualified optician as a natural person to operate more than one optician's shop.[368]

Subjecting the establishment by a legal person of an optician's shop to the conditions that the establishing and operating license is granted to a recognized optician who is a natural person, the person holding the authorization to operate the shop must hold at least 50 per cent of the company's share capital and must participate at least to that extent in the profits and losses of the company, and the company must be in the form of a collective or limited partnership, and the optician in question may participate at most in one other company owning an optician's shop, subject to the condition that the authorization for the establishment and operation of that shop is in the name of another authorized optician.[369]

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[362] Paras. 47-48, Case C-243/01 Gambelli
[363] Para. 42, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica
[364] Case C-442/02 Caixa-Bank France, a serious obstacle to the pursuit of their activities via a subsidiary in the Member State concerned and to effective competition, affecting their access to the market (paras.12 and 14)
[365] Para. 43, Case C-153/02 Neri, deter students from attending courses and thus seriously hinder the pursuit of the economic activity in question
[366] Wouters
[367] Paras. 7-8 Choquet (e.g., a driving test which duplicates the test taken in another Member States, linguistic difficulties arising in the procedure conducted, or imposition of 'exorbitant charges' for completing the formalities)
[368] Para. 28, Case C-140/03 Commission v Greece
[369] Para. 29, Case C-140/03 Commission v Greece

Including a discriminatory condition in a tendering process (the obligation to employ long-term unemployed persons from the Member State concerned can only be satisfied by local tenderers and tenderers from other Member State would have difficulties complying with that condition).[370]

Requiring the lodging of a security with a local body for pursuing an economic activity.[371]

Requiring that members of staff to obtain a specific authorization in the host Member State.[372]

Imposing a restriction on the use of a particular trade name when in the Member State of establishment that trade name can be used lawfully.[373]

The retention by Member States of a degree on influence within undertakings that were initially public and subsequently privatized, where those undertakings are active in fields involving the provision of services in the public interest or strategic services (reserving special powers for the responsible minister after the privatization of a former national monopoly to enforce national economic and industrial policy objectives),[374]

- retaining the power to grant express approvals;
- retaining the power to appoint a minimum of one or several directors and an auditor;
- retaining veto rights over certain company decisions;
- retaining the power to oppose any transfer, use as security or change in the intended use of certain assets of an existing undertaking, or certain management decisions taken by that undertaking.[375]

Discriminating against employees of an agency of a company registered in another Member State in connection with social security protection.[376]

Making administrative appointments for trade-fair organizers subject to the involvement of public authorities or local bodies of some other kind, or subject to the inclusion among the founders or members of at least one local territorial institution, subject to the involvement of bodies made up of operators already in the territory concerned or representatives of such operators for the purposes of recognition and

[370] See paras. 28-30, 31/87 Beentjes. See also C-243/89 Commission v Denmark (requirement to use to the greatest possible extent national products and labour).
[371] Para. 41, C-514/03 Commission v Spain
[372] Para. 51, , C-514/03 Commission v Spain
[373] Case C-255/97 Pfeiffer, undermines uniform marketing practices developed for the EU level and requires them to adjust their practices to the laws of the different States
[374] *C-58/99 Commission v Italy, 503/99 Commission v Belgium*
[375] Para. 59, Case C-503/99 Commission v Belgium
[376] Para. 15, Case C-79/85 Segers.

approval of the organizer and granting public financing to the latter.[377]

Not accepting, under national law, the local branch of an undertaking established in another Member State as part of the given domestic industrial sector and, therefore, not providing certain legally recognized advantages as to employment relations, unless more than 50% of total staff working time is spent by workers on construction sites,[378]

- deprives foreign undertakings from the advantages of free movement by not allowing them to choose what kind of staff they employ in which Member State.[379]

Reserving the right to pursue certain tax advice and assistance activities (exclusive powers) to certain entities (here, so called Tax Advice Centres), and restricting the ability to form such entities to certain legal entities meeting strict conditions and to some of those entities with their registered office in the Member State concerned.[380]

Making subject the offering by pension institutions established in other Member States their services under the same tax advantages as applicable to those offered by pension institutions established in the Member State concerned to the condition that they must have a branch office or a permanent establishment in that Member State.[381]

3.5.3 Regulatory requirements governing the operation of companies

These are examples of regulatory requirements governing the operation of companies which may be prohibited under Article 49 TFEU.

Requiring that the economic operator is constituted as a legal person.[382]

Restricting, through discriminatory tax provisions, the choice of the legal form in which individuals may pursue their activities in another Member State.[383]

Imposing minimum share capital requirements on economic

[377] Paras 36-38, Case C-439/99 Commission v Italy
[378] Para. 30, Case C-493/99 Commission v Germany, without there being a need to establish the discriminatory effect on non-German established undertakings of the collective agreements applicable in that industrial sector.
[379] Para. 33, while employing administrative, technical and sales staff in the Member State concerned may be necessary for doing business in that State, the same does not hold true for construction staff that can be posted when necessary from other Member States.
[380] Para. 34 Case C-451/03 ADC Servizi
[381] Case C-150/04 Commission v Denmark
[382] Para. 42 Case C-171/02 Commission v Portugal, since it prevents Community operators that are natural persons from setting up a secondary establishment in the Member State concerned Para. 31, C-514/03 Commission v Spain
[383] Para. 11, Case C-253/03 CLT-UFA SA

operators.[384]

Imposing mandatorily, and not as some administrative requirement, local rules on minimum capital and directors' liability on foreign companies when they carry on their activities exclusively, or almost exclusively in the Member State concerned,[385] and imposing penalties in case of non-compliance with these obligations,[386]

- the regulatory autonomy in established in *Daily Mail* concerning the determination of the law applicable to a company does not apply as imposing local company law requirements on a foreign company operating in the Member State concerned is different from the transfer of seat to another Member State whilst retaining legal personality in the Member State of incorporation.[387]

Requiring that the economic operator employs a minimum number of persons,[388]

Differentiated legal (and tax)[389] treatment of domestic and cross-border company transformation operations (conversions),[390]

Differentiated treatment of cross-border company transformation operations in national procedures and remedies.[391]

3.5.4 Fiscal measures

These are examples of fiscal measures which may be prohibited under Article 49 TFEU (mainly concerning differentiated tax treatment).

Differentiated tax treatment in corporate taxation through

The refusal to grant tax benefits (the right of deduction of costs from taxable income, tax advantage on capital investment, repayment

[384] Para. 54, Case C-171/02 Commission v Portugal, it prevents an EU operator whose share capital is lower than the minimum amount required by national law from setting up a subsidiary or branch in the Member State concerned Para. 36, C-514/03 Commission v Spain
[385] Paras. 99-100, Case C-167/01 Inspire Art
[386] Para. 141
[387] 102-103
[388] Para. 48, C-514/03 Commission v Spain, more onerous for secondary establishments or subsidiaries.
[389] para. 37, National grid
[390] para. 36 VALE, para. 22, SEVIC
[391] Paras. 55-58, VALE (refusal to register the commercial register the company of the Member State of origin as the 'predecessor in law', refusal to take into account of documents/evidence obtained from the authorities of the Member State of origin in determining a question necessary for the authorities of the host Member State to take a decision.)

supplement on overpaid tax) to non-residents or to the local branches or agencies of non-residents.[392]

The refusal to grant tax benefits (the right to deduct from taxable profits losses incurred in another Member State by a subsidiary established in that State) to resident parent companies with non-resident subsidiaries;[393]

- the refusal to allow the deduction of losses incurred in another Member State by a subsidiary, which deprives the parent companies of a cash-flow advantage.[394]

The refusal to grant tax benefits (corporation tax credit) resident subsidiaries on ground that their parent company has its seat in another Member State;[395]

- the discriminatory tax treatment of international groups, aiming to optimize their tax burdens, on the basis of the tax residence of the central company.

The refusal to grant tax benefits (tax advantage on capital investment) to non-residents, when the holding of the taxpayer in those companies provides them a definitive influence over the company's decisions and allows them to determine its activities;[396]

- determining this fact may be left to the national court.[397]

The refusal to grant tax benefits to intra-group transfers depending on where the subsidiaries' seat is located.[398]

The refusal to grant tax benefits in relation to internal company reorganization activities to companies, established in a company form equivalent to that under domestic law) in an international group established under the law of another Member State.[399]

The refusal to grant tax benefits to companies in an international group when the majority of subsidiaries controlled by the holding company have their seat outside the Member State concerned, where the holding company's business consists wholly or mainly in the holding of shares in subsidiaries established in that Member State.[400]

The application of different tax rates on the profits of a resident branch established by a company which has its seat in another

[392] Case C-346/04 Coninj Para. 38, Case C-436/00 X and Y paras 15-16, 270/83 Commission v France para. 18, C-330/91 Commerzbank
[393] Paras. 33-34, Case C-446/03 Marks & Spencer para. 23, C-141/99 AMID (available to companies situtated exclusively in the Member State concerned.
[394] Case C-347/04 Rewe Zentralfinanz
[395] Paras. 27-28, Case C-324/00 Lankhorts-Hohorst para 38 Case C-307/97. Saint-Gobain
[396] Para. 36, Case C-436/00 X and Y
[397] Para. 37, Case C-436/00 X and Y
[398] Para. 28, X and Y C-200/98
[399] C-1/93 Halliburton (acquisition of immovable property)
[400] Paras. 22-23 Case C-264/96 ICI

Member State depending on whether the profits are distributed in full to the parent company.[401]

Providing under certain conditions for the imposition of a charge upon the parent company on the profits made by a controlled foreign company (subsidiaries established outside of the Member State concerned in which a resident company has a controlling holding).[402]

Making the carrying forward of previous losses by a taxpayer, which has a branch in the Member State concerned but is not resident there, subject to the conditions that the losses must be economically related to the income earned in the State and that the taxpayer must have kept and held in that State in respect of activities carried out there an account complying with the relevant national rules.[403]

Imposing a tax burden on taxpayers who hold rights over the profits of a company exceeding 25 per cent of such profits when transferring his tax residence outside the Member State concerned covering increases in value of company securities;[404]

- even if its payment may be suspended subject to the condition of setting up of guarantees.[405]

Differentiated tax treatment in other areas of taxation

Making the deduction of expenditure on research carried out in the Member State concerned from the turnover liable to a special levy on proprietary medicinal products;[406]

- the exceptional nature of the special levy and its limited application are irrelevant from this perspective.[407]

Making the possibility of enjoying tax relief for school fees dependent on the place where the school is situated.[408]

Refusing to allow the deduction of social security contribution from taxable income for nationals of other Member States that, although

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[401] Para. 11, Case C-253/03 CLT-UFA SA, also restricting the choice of the legal form in which to pursue economic activities.
[402] Para. 45, Case C-196/04 Cadbury Schweppes
[403] *Case C-250/95 Futura* (the differentiated treatment must, however, be established; in case of the keeping of account requirement, this is likely as the extra burden affects only companies with a seat in another Member State).
[404] Para. 38, Case C-9/02 Lasteyrie du Saillant
[405] Para. 47
[406] paras. 12-13 Case C-254/97 Baxter (it disadvantages undertakings which have their principal place of business in other Member States because they generally carry our their research activities outside the Member State concerned)
[407] para. 14
[408] Case C-318/05 Commission v Germany, the freedom of establishment of natural persons, but not of the private schools as it is not effected 'directly' and does not make it more difficult to establish private schools

they are resident in another Member State, receive all or almost all of their income in the Member State concerned.[409]

Imposing higher tax burdens on non-resident than on resident nationals on their income earned in Member State concerned when they pursue activities in another Member State, and imposing a 90 per cent threshold for worldwide income to be earned in the Member State concerned.[410]

Making the income of non-residents subject to a definitive tax at the uniform rate of 25 per cent deducted at source, whereas the income of residents is taxed according to a progressive table including a tax-free allowance;[411]

3.5.5 Specific rule of law hiatuses

The case law has identified a number of restrictions which arose from rule of law related hiatuses in national law and governance. These are examples of such restrictions which may be prohibited under Article 49 TFEU.

Failing to repeal national measures violating EU law,[412]

- despite the fact that with the help of EU law their application in national law can be avoided,
- because they 'give rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law.'

Failing to implement a directive through national legislation and national administrative practice which would be able to create a situation which is sufficiently precise, clear and transparent as to enable nationals of other Member States to discover their rights and to rely on them.'[413]

Relying, in the course of implementing a directive, on references to principles of law which are of general nature and are insufficient to

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[409] para. 22, C-80/94 Wielockx, *non-resident taxpayer who, as in the main proceedings, receives all or almost all of his income in the State where he works but who is not entitled to set up a pension reserve qualifying for deductions under the same tax conditions as a resident taxpayer*

[410] para. 37 C-107/94 Asscher, (the distinction is not based on nationality, but founded on residence, which is liable to act mainly to the detriment of nationals of other Member States, since non-residents are most frequently non-nationals; the 90% threshold is very likely to affect mostly foreign nationals)/

[411] Para. 47, Case C-234/01 Gerritse

[412] para. 11, 159/78 Commission v Italy

[413] Para. 28, 29/84 Comission v Germany, which is not affected by the fact that the national authorities provide information on national legal requirements and administrative practice to applicants.

ensure compliance with the precise and detailed provisions of that directive.[414]

Relying on the direct effect of Treaty provisions, instead of modifying the provisions of national legislation which violate EU law,[415]

- as that is 'only a minimum guarantee' and it is 'not sufficient itself to ensure the full and complete implementation of the Treaty',
- and it creates 'an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law'.

Implementing EU obligations through mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity.[416]

Relying on the possibility that national law will, in a particular case, provide power to the competent authority to grant exemptions from, or to dispense with a national requirement which violates EU law.[417]

As discussed elsewhere, in the context of granting public service concessions the requirement of equal treatment led to the development of a general, although not unlimited, requirement of transparency.[418] The degree of transparency required from the Member States depends on the ability of the concession process to ensure the equal treatment of potential tenderers, which question may be deferred to the national court to establish.[419] It follows from the case law that the complete exclusion of transparency (here, the failure to invite competing bids in the concession process) is contrary to EU law,[420] unless the conditions of the in-house provision clause are met.[421]

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[414] Para. 31, 29/84 Comission v Germany
[415] Para. 11, 168/85 Commission v Italy, Even more so when administrative circulars and directions clarifying the legal situation have not been issued, para. 12; and the incompatibility of national law with Treaty obligations 'can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended' making the use of administrative practices, such as the issuing of circulars and directions insufficient, para. 13. Individuals remain in a state of uncertainty, despite the direct effect of Treaty provisions, because the impugned national provisions have been maintained in force, para. 14.
[416] 38/87 Commission v Greece Para. 14 203/98 Commission v Belgium
[417] para. 38, 221/89 Factortame
[418] Para. 17, Case C-231/03 Coname, it has no real opportunity of expressing its interest in obtaining that concession (para. 18).
[419] Paras. 21-22, , Case C-231/03 Coname
[420] Case C-260/04, Commission v Italy
[421] Supra, and Case C-231/03 Coname

4 Immunities and other delimitations of EU restrictions

The restrictions following from EU law on national policies and regulation, mainly because the EU's competences are limited, are not absolute. The right of establishment is subject to lesser limitations than the free movement of capital where emergency measures may be implemented, or the political influence and power of the Member States may be relied upon to depart from common obligations.[422]

4.1 The principle of neutrality (regarding the regulation of ownership)

Incomplete immunity

Article 345 TFEU governing the impact of EU law on national property ownership regimes, in principle, enables the Member States to make the fundamental decisions regarding public and private ownership unfettered from interferences from EU obligations. Under this principle, the Member States are entitled – as a general rule – to decide on nationalizing or on privatizing undertakings or economic sectors.[423] Regarding immovable property, it has been held that the Member States are entitled to establish systems 'for the acquisition of immovable property which lays down measures specific to transactions relating to agricultural and forestry plots.'[424] However, according to the jurisprudence of the Court of Justice, these decisions of the Member States must comply with the fundamental rules of the Treaties including Article 49 TFEU[425] and the equal treatment principle as expressed in the provisions on the right of establishment.[426] The policy or other rationales of Member State decisions affecting property ownership may be taken into account as an overriding reason in the public interest capable of justifying interferences with Treaty rules.[427] As a result, Article 345 TFEU can hardly be considered as providing genuine legal immunity for the Member States from their EU obligations. The regulation of national ownership regimes by the Member States – which has an impact

[422] See FMC.
[423] 29-31, Joined Cases C-105/12 to C-107/12 Essent. For instance, establishing a 'system of compulsory acquisition by public bodies'para. 7 Feranon
[424] para. 24, Case C-452/01 Ospelt ECLI:EU:C:2003:493 referring to Case 182/83 Fearon [1984] ECR 3677, paragraph 7, and Konle, cited above, paragraphs 7 and 22
[425] 33-37, Joined Cases C-105/12 to C-107/12 Essent Para. 48 C-367/98 Commission v Portugal para. 44 C-483/99 Commission v France; para. 44, Case C-503/99 Commission v Belgium para. 67, Case C-463/00 Commission v Spain see Case C-171/08 Commission v Portugal, paragraph 64 and the case-law cited, and Commission v Poland, paragraph 44. Relating to national systems governing the acquisition of immovable property, para. 24, Case C-452/01 Ospelt ECLI:EU:C:2003:493 referring to paras. 28-31, Reisch
[426] para. 6 Fearon on the basis of the provisions of the Treaty and the General Programme concerning the right fo establishment and the acquisition of property.
[427] Para.53, Essent. This assessment can be deferred to the national court, para. 55.

on economic activity in the national and the European market – will be subjected to legal scrutiny under EU law and be rendered legitimate or illegitimate depending on its legal justifiability within usual framework of EU rules.

4.2 A *de minimis* rule?

The law under Article 49 TFEU does not recognize the availability of a d*e minimis* rule. Restrictions even of a limited scope or of a minor importance are prohibited by the Treaties.[428] In determining the scope of Article 49 TFEU, the Court of Justice held that it is sufficient that the national measure is 'of such a kind as to restrict the exercise of that right, having at the very least a dissuasive effect on taxpayers wishing to establish themselves in another Member State.'[429] In *Konstantinidis*, concerning the spelling of the name of the person concerned, the Court of Justice spoke about 'a degree of inconvenience as in fact to interfere' with the freedom to exercise the right of establishment.[430] In that case, the risk of potential clients confusing him with other persons was sufficient to establish that interference.[431] However, in the context of granting public service concessions the case law seems to have recognized some kind of a minimum threshold. The Court of Justice held that under certain circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in another Member State would have no interest in the concession at issue, which means that the effect of the restriction in on freedom of establishment is 'too uncertain and indirect to warrant the conclusion' that it may have been infringed.[432]

4.3 The not-for-profit nature of the activity

Because of their nature, and also because of the state of EU competences in the domain affected, Article 49 TFEU may not be applicable to non-for-profit activities carried out in the economic domain. Their exclusion from the scope of Treaty provisions is not without controversies, especially when the non-for-profit requirement is introduced through legislation in open and competitive markets, or by means of regulating the market created through the contracting out certain (public) services. Therefore, the assessment of this limitation under EU law on the obligations of the Member States must be carried out with care. According to the jurisprudence, provided that certain conditions are fulfilled, EU law does not restrain the Member States

[428] supra n.
[429] Para. 45, Case C-9/02 Lasteyrie du Saillant
[430] para. 15 C-168/91 Konstantinidis
[431] para. 16
[432] Para. 20, , Case C-231/03 Coname

from allowing only not-for-profit[433] private operators to participate in a particular segment of the national economy or the national welfare system.[434] As to the choices made within national discretion in this regard, which must be based on a logical and sound decision as a matter of domestic policy, EU law explicitly recognized – having regard to the state of EU legislative measures on this matter – that the Member States in the exercise of their retained powers in the social security domain may justifiably consider that a genuine social welfare system – 'with a view to attaining its objectives – 'necessarily implies' that a non-for-profit requirement condition can be enforced.[435]

The conditions for enjoying immunity from EU obligations are summarized in the table below.

The not-for-profit nature of the activity forms part of the national welfare system which seeks to promote and protect welfare objectives (e.g., public health) through the delivery (of social and welfare) public services.[436]

The national system in question must be a genuine social welfare system, which could entail that

- its implementation is entrusted to public authorities;
- it is based on the principle of solidarity;
    - which means that it prioritizes care for those without sufficient income or in a difficult social situation, over those who have sufficient financial means;[437]
- the quality of services is determined in advance as well as the compensation received (extent to which the costs of the services involved are reimbursed).[438]

As an ultimate, overarching condition, the introduction of a not-for-profit nature of activities must not discriminate on a cross-border

[433] In C-*70/95 Sodemare* the contracting out of certain social services enabled the service providers to be reimbursed by public authorities for the costs of providing social welfare services of a healthcare nature).
[434] Para. 22, C-*70/95 Sodemare.* This also follows from the jurisprudence which recognizes that EU law 'does not detract from the powers of the Member States to organize their social security systems, Para. 27 *C-70/95 Sodemare. See for that jurisprudence Case 238/82 Duphar and Others v Netherlands State [1984] ECR 523, paragraph 16, and Joined Cases C-159/91 and C-160/91 Poucet and Pistre v AGF and Cancava [1993] ECR I-637, paragraph 6*
[435] Paras. 31-32. (in the process of contracting out the delivery of such services to the market)
[436] Para. 28, especially, when it takes care of dependent persons with no carers from their own families
[437] Para. 29.
[438] Para. 30 (determining the quality of services in advance is an indication that they are provided in a genuine welfare system).

basis between profit-making companies.[439]

[439] Para. 33, in another reading, requiring a not-for-profit operation may not actually involve discrimination between profit-making companies. The differentiated treatment of profit-making and not-for-profit companies was justified on the basis of the conditions established in paras. 28-30.

5 Exemptions from Treaty obligations

Safeguarding national policies

The system of exemptions available in the Treaties, as developed and interpreted in the jurisprudence of the EU Court of Justice, enables the Member States to safeguard national policies and regulation from the prohibitions included in Article 49 TFEU. The exemptions which the Member States can rely upon are filtered and moderated by EU law accepting only those as legitimate which contribute in an adequately regulated and governed manner to establishing and maintaining a balanced and sustainable European arena for cross-border establishment. In case EU legislation was adopted to cover the particular matter (e.g., cross-border administrative cooperation), the possibilities for the Member States to raise the same or similar concerns in support of national measures or unilateral conduct contradicting Treaty prohibitions will necessarily be narrower.

Legal benchmarks

When the Member States aim to pursue policies within the framework of exemptions, they need to take into account a number of general and more concrete benchmarks developed in the jurisprudence. Primarily, they need to observe that the general principle governing the use of exemptions, which are different in the different contexts the freedom of establishment is applicable, is met subject to the qualifications and conditions affecting its application. The Member States must also ensure that the ground of exemption raised will be deemed as genuine and legitimate and that the national measure and its application are necessary and proportionate.

5.1 The general principle

As a general principle, restrictions on freedom of establishment must be justified either under the grounds mentioned in Article 52 TFEU[440] or on the basis of overriding reasons in the public interests as recognized by the jurisprudence of the EU Court of Justice.[441] According to the formula used in the jurisprudence 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is

[440] There is a line of case law which claims the discriminatory national povisions may only be justified under Article 52 TFEU Para. 36 Case C-451/03 ADC Servizi

[441] Para. 37 Gebhard ('imperative requirements in the general interest'). Para. 15, Case C-299/02 Commission v the Netherlands, freedom of establishment may, however, in the absence of Community harmonisation measures, be limited by national regulations justified by the reasons stated in the Treaties or by pressing reasons of general interest

necessary in order to attain that objective.'[442] The derogations apply in case of both discriminatory and non-discriminatory measures which interfere with freedom of establishment.[443] Article 52 recognizes the right of the Member States to

> apply provisions laid down by law, regulation or administrative action providing for special treatment for foreign national on grounds of public policy, public security or public health.

Under Article 51 TFEU, the Member States are allowed to exempt, having regard to local circumstances, activates connected 'with the exercise of official authority' from the obligations laid down in Article 49 TFEU.

The general principle is qualified by the general fundamental benchmarks that the Member States are required to observe the fundamental non-discrimination principle[444] and that they have to exercise their discretion in defining the public interest objectives they wish to promote in accordance with EU law.[445] The task of assessing whether the national measure satisfies the general and particular benchmarks as they follow from the jurisprudence may be deferred to the national courts subject to the clarifications given by the Court of Justice.[446]

Further benchmarks affecting the interpretation of the exemptions include the principles listed below.

Strict interpretation

> The exemptions 'must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect'.[447]

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[442] para. 37, Gebhard; para. 26, Mac Quen.

[443] Para. 28, Case C-108/96 Mac Quen

[444] Para. 37 Gebhard, para. 37 C-19/92 Kraus, para. 14 C-351/90 Commission v Luxembourg (pplies regardless of the nationality and Member State of establishment of the person concerned). Para. 70, Case C-243/01 Gambelli, must apply in the same way and under the same conditions to operators

[445] It is for the Member States to decide on the level at which they intend to ensure the protection of the objectives set out in Article 52 FTEU and of the general interest and also on the way in which that level must be attained. However, they can do so only within the limits set by the Treaty and, in particular, they must observe the principle of proportionality, which requires that the measures adopted be appropriate for ensuring attainment of the objective which they pursue and do not go beyond what is necessary for that purpose, para. 15, Case C-299/02 Commission v the Netherlands. Although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality, Para. 28, Case C-260/04, Commission v Italy para. 48, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica

[446] Para. 29, C-79/01 Payroll Data Services para. 66, Case C-243/01 Gambelli

[447] Para. 7, 147/86 Commission v Greece

The Union character of exemptions

In light of the EU law character of the exemptions allowed, it must be prevented that the effectiveness of the Treaty is undermined by unilateral provisions adopted by the Member States.[448]

Adequate definition

The exemptions raised must fall within the scope of the actual Treaty ground.[449]

The exemptions must be 'actually justified' by the public interest ground raised.[450]

The exemptions must be demonstrated 'in a detailed manner'.[451]

The exemptions must be relevant for (must relate to) the restriction concerned.[452]

The Member State must explain why the public interest ground is connected to restriction and how the restriction could ensure that the public interest ground is realized (here, summary statements in this regard are insufficient).[453]

The exemptions must be established on the basis of relevant facts which means that the practical problems listed must be directly connected to the restriction (here, legal person requirement and minimum share capital) and must be able to explain the restrictions placed on the freedom of establishment.[454]

Effectiveness

The Member States are allowed to ensure the 'efficacy' of a national restriction.[455]

Individualized application

In absence of an EU measure governing the area of their possible application, they 'must be appraised separately in respect of each Member State'.[456]

Targeted measures

The Member States cannot use general measures to exclude economic sectors from the scope of freedom of establishment, rather

[448] Ibid.
[449] Paa. 34 Case C-212/97 Centros
[450] para. 14 C-351/90 Commission v Luxembourg
[451] Para. 50, , C-514/03 Commission v Spain
[452] Para. 36, , Case C-493/99 Commission v Germany
[453] Para. 32 Case C-260/04, Commission v Italy
[454] Paras. 32 and 36, C-514/03 Commission v Spain
[455] Para. 62, Graebner
[456] Para. 8, 147/86 Commission v Greece

they must rely on measures adopted specifically to restrict cross-border movement provided under Article 49 TFEU.[457]

Excessive restrictions

The national measures must not render the provisions of EU law (the exercise of the right of establishment) 'wholly ineffective'[458] and they must not deprive the fundamental freedoms of 'all meaning'.[459]

The Member States must seek for less restrictive alternatives when departing from Article 49 TFEU.[460]

No obligation of comparability

The mere fact that one Member State imposes less strict rules than another Member State does not necessarily mean that the stricter rules are disproportionate and incompatible with EU law.[461]

- This is also a competence issue, as in the absence of relevant EU measures, each Member State may decide, in accordance with its understanding of the relevant public interest ground, whether to permit or prohibit the exercise of a certain activity/the exercise of an activity under certain qualifications, and to lay down, where appropriate, requirements relating to the conditions individuals may need to fulfil in this regard.[462]

The fact that national requirements are 'very different' from those in force in other Member States (lack of 'analogous requirements' which would permit the comparison of the respective legal rules) is irrelevant ('cannot affect the appraisal of the need for and proportionality of the provisions adopted').[463] This rule has its broadest basis in the jurisprudence regularly distinguishing between discriminatory legal treatment on the ground of nationality and disparities in national laws ('disparities in treatment which may result, between Member States, from differences existing between the laws of the various Member States').[464] Necessarily, the said 'disparities in treatment' must 'affect all persons subject to them in accordance with objective criteria and without regard to their nationality.'[465]

The cross-border dimension must be taken into account

The measures imposed in the Member State of origin are relevant as the 'obstacle may be justified only in so far as the public interest

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[457] Paras. 41-42, C-114/97 Commission v Spain
[458] para 18, 271/82 Auer
[459] para. 14, Segers
[460] Para. 47, , C117/97 Commission v Spain
[461] Para. 49, , C-514/03 Commission v Spain Para. 30, Case C-108/96 Mac Quen
[462] Para. 48.
[463] Para. 58, , C-514/03 Commission v Spain Para. 34, Case C-108/96 Mac Quen Para. 46 Graebner
[464] Supra n, and para. 17, Case C-177/94 Perfili (here, the national requirement that a victim of a criminal offence which wishes to bring suit as a civil party in criminal proceedings to grant his representative a special power of attorney, when that requirement does not exist in the home Member State).
[465] ibid.

relied on is not safeguarded by the rules to which the provider of the service is subject in the Member State in which he is established.'[466]

As to the use of the public policy and public security grounds, the jurisprudence has consistently held that 'recourse to this justification presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.'[467] This follows from the principle that public security as a derogation 'must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions.'[468] In another formulation, these grounds do not enable the exclusion of economic sectors using general measures from under the free movement obligations – 'from a point of view of access to employment', but they allow the Member States to restrict cross-border mobility or residence in their territory in the event of a direct threat or danger for these objectives.[469] This restrictive interpretation of the applicability of these grounds could entail, for example, that the restricted ability for national authorities to monitor effectively the activities of the economic operators concerned, even though they may be performing their activities under public contracts for a public body, will be insufficient to establish that level of threat.[470]

The case law also raised, already at this stage of the scrutiny, the obligation for the Member States to seek for the application of less restrictive alternative measures capable of achieving the public policy and public security objectives. In different cases, the Court of Justice held, for example, that

checks carried out and penalties imposed on the undertakings concerned are more likely to be accepted than imposing a residence requirement (on their directors),[471]

- penalties are not less effective than a territoriality-based requirement, such as local residence, as their payment 'may be secured by means of a guarantee to be provided in advance'.[472]

there are alternative means of protecting confidentiality (e.g., imposing secrecy obligations).[473]

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[466] Paras. 42-43, C-514/03 Commission v Spain. para. 29 C-106/91 Ramrath, 'in so far as that interest is not already safeguarded by the rules to which a Community national is subject in the Member State where he is established'
[467] 45-46 C117/97 Commission v Spain Para. 35, Bouchereau
[468] Para. 47, Case C-503/99 Commission v Belgium
[469] Paras. 41-42, C-114/97 Commission v Spain
[470] Para. 47, C117/97 Commission v Spain, here, private security firms
[471] Para. 28, especially, when it takes care of dependent persons with no carers from their own families
[472] ibid.

The quality of the regulatory framework may prove crucial in determining whether the restriction responds to a genuine and sufficiently serious threat to a fundamental interest of society. Many of the requirements followed here correspond to those applied under proportionality. The overall requirement is that the intervention takes place in the public interests and in compliance with the requirements of legal certainty.[474] The national measure will be acceptable when

it respects the decision-making autonomy of the undertaking concerned, and enables intervention only as a measure of opposition based on an initiative on the part of public authorities,

- in this regard, the lack of a requirement of prior approval by public authorities,
- and interventions by public authorities being bound to strict time-limits can further ensure that the autonomy of the undertaking concerned is respected.[475]

intervention is limited to certain decisions which have relevance from the perspective of the public interest, such as those concerning strategic assets of a company, including, for instance, energy supply networks, and 'to such specific management decisions relating to those assets as may be called in question in any given case.'[476]

intervention is limited to addressing threats capable of compromising the objectives on national policy (here, energy policy).[477]

intervention, as an obligation, is supported by a formal statement of reasons and may be subject to effective review by the courts.[478]

less restrictive alternatives, which with 'certainty' would have enabled similarly effective interventions were not available.[479]

Concerning the public health ground, the case law established that that objective may be able to 'directly justify' a Member State restriction only when the risk posed to public health has been demonstrated with sufficient certainty.[480] The Member State measure may also be based on risk-related considerations which do not relate directly to the risk posed by the activity

[473] para. 15, 3/88 Commission v Italy
[474] Para. 52, C-503/99 Commission v Belgium
[475] Para. 49, C-503/99 commission v Belgium
[476] Para. 50.
[477] 51
[478] 51
[479] 53, introducing more restrictive alternatives cannot be demanded.
[480] Para. 58, Graebner, the risk posed by a training has been shown by reference to its content.

concerned, such as the fact that the profession at issue is not recognized in the Member State concerned because its activates are reserved to the medical profession.[481] This latter follows from the requirement, which corresponds to certain of the benchmarks introduced above, that EU law must allow the Member States to apply that prohibition in a 'coherent and credible manner' and there is a need to ensure the 'efficacy' of the national measure when permitted under EU law.[482]

In the context of the discretion available to national authorities when implementing restrictions on public safety grounds, the case law has provided a number of important general observations as to the use of those powers. Firstly, the sole fact that the national authority has the power to supplement the legal framework regulating an economic activity at a particular time by subsequently making that activity subject to further conditions does not on its own constitute an obstacle to freedom of establishment.[483] In fact, national law enforcement authorities must be provided with some discretion to be able to asses situations on a case-by-case basis and they might be required to issue instructions to the economic operators concerned (here, license holders) which cannot be determined in advance.[484] Secondly, the violation of fundamental freedoms may only be established in case the legal uncertainty which follow from the circumstance that the national provision in question does not set out in detail the requirements to which a person may be subject affects access to the domestic market.[485] This must be established on the basis of evidence indicating that the exercise of discretion by the national authorities in these circumstances has impeded establishment in the Member State concerned.[486] Uncertainty as to the rights and obligations laid down in law cannot be established when it is clear what the measure in question ordered or that it does not impose any obligations as regards the exercise of the economic activities in question, some of which may be prohibited and others permitted under national law.[487]

The jurisprudence has also indicated a number of specific considerations which may influence the interpretation of the general principle. These are delineated below.

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[481] Para. 59, Graebner
[482] Para. 61.
[483] para. 39, Case C-134/05 Commission v Italy
[484] para. 35.
[485] para. 37
[486] pra. 38
[487] para. 85, Case C-134/05 Commission v Italy

Public ownership

Public ownership in itself cannot be regarded as an objective circumstance capable of justifying discrimination.[488]

- the ability of a public body (here, local council) to be able to exercise control over a concessionaire managing a public service may be accepted, but that circumstance (the control) must be established by reliance on factual evidence;[489]

- the particular 'structure' of local governments (i.e., the availability of resources, which may prevent the in-house provision of certain public services and require them to use other 'structures', such as setting up a private company with share capital ownership by a number of local councils, may be relevant, but that circumstance must not be contradicted by the nature of the 'structure' used.[490]

National particularities

National legal (constitutional) particularities may also be recognized, although indirectly, as available for protection as a derogation. The Court of Justice's treatment of the claim in *Commission v Greece* that under the national constitution only legislation may allow private individuals to pursue a particular economic activity and that in absence of such legislation everyone is prohibited from engaging in that economic activity suggests that in case the non-discrimination (national treatment) principle is respected the Member States remain at liberty to establish and follow a particular constitutional structure for economic regulation even under the scope of EU law.[491]

Connected advantages

Unfavorable tax treatment differentiating between domestic and cross-border transactions violating a fundamental freedom cannot be regarded as compatible with EU law because of the existence of other connected advantages, even when such advantages are assumed to exist;[492]

- in this regard, the extent of the disadvantages suffered and the fact whether they could have an effect on the imposition of other fiscal burdens are irrelevant as all forms of discrimination are prohibited irrespective of their limited nature;[493]

- in particular, the possibility that the undertakings concerned

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[488] Para. 23, , Case C-231/03 Coname
[489] Para. 24, , Case C-231/03 Coname
[490] Paras. 25-26 , Case C-231/03 Coname
[491] Paras. 12-13147/86 Commission v Greece

[492] paras. 39-40, national grid Para. 21, 270/83 Commission v France ECLI:EU:C:1986:37, they do not balance out the disadvantages suffered and they do not justify discriminatory treatment. para. 53 Case C-307/97. Saint-Gobain Advantages enjoyed elsewhere (because of the circumstances of the taxpayer concerned)
[493] Ibid.

could avoid the disadvantages suffered from the discriminatory treatment by means of establishing themselves in the Member State concerned in a legal form which is appropriate as a matter of national tax law is unavailable to justify discrimination in breach of EU law as it would contravene Article 49 TFEU which 'expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions.'[494]

The general state of the tax system

The overall advantageous nature of the domestic tax system as a matter of imposing burdens on companies with establishment abroad will not be able to the disadvantageous unequal treatment of such tax subject in individual cases.[495]

5.2 The legitimacy of the exemption

A varied scrutiny of exemptions

In the law on freedom of establishment, the legitimacy of exemptions claimed by the Member States is subjected to a varied degree of scrutiny by the Court of Justice.[496] The intensity and the detail of interference with this aspect of Member State decisions to pursue a particular public interest ground competing with the obligations laid down in Article 49 TFEU depends foremost on the nature of the ground raised. The highly technical nature of some of the grounds raised, especially those in connection with national fiscal (tax) policy warrants a close examination under EU law as well as grounds which may enable an overly extensive, possibly abusive interpretation of the possibilities allowed at the national level. Despite the explicit recognition of the general discretion available to the Member States to regulate the relevant matters,[497] the choices of the Member States are tested so as to ensure that the restrictions are imposed for the permitted objectives only, the permitted objectives are taken seriously by the Member States, and that the national measures in question will actually deliver the declared legitimate outcome.[498] Member State autonomy in these areas, where they recognizably enjoy the general competence to regulate and to develop policies, is thus confined by requirements expecting that national policies are adequately regulated and governed.

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[494] Para 22. 270/83 Commission v France
[495] para. 27, C-141/99 AMID
[496] Perhaps not as intensively as in case of the free movement of capital. They could be accepted as offered by the national measure in question, para. 10 Fearnon.
[497] Supra n kicsit feljebb az elozo pont elejen.
[498] It 'pursues a legitimate aim compatible with the Treaty' Para. 49, Case C-436/00 X and Y. The objective raised must be sufficiently targeted as otherwise it is unable to justify the restriction at issue, Para. 38 Centros. See also supra n. BCNHMAKRS

A generous list

In defining the objectives which could be legitimately pursued by Member State action, EU law has been generous. It has recognized a broad range of general and specific objectives and the general conditions they are expected to satisfy are not particularly strenuous. In principle, the Member States can rely on the objectives listed in Article 52 TFEU, the objectives relating to the operation of national tax systems, and other overriding reasons in the public interest.[499]

Taxation objectives

The objectives relating to the operation of national tax systems ensure that mobility associated with freedom of establishment does not unduly undermine the fiscal sovereignty and the taxation powers of the Member States. Even though the Treaties themselves do not expressly provide for it, the jurisprudence of the Court of Justice gradually recognized the exemption grounds concerning Member State taxation powers and tax systems as they follow from the law on the free movement of capital.[500] The main reason for this development was the inevitable overlap between the freedom of movement of taxpayers provided by Article 49 TFEU and the free movement of capital. Generally, the relevant cases dealing with national tax measures or bilateral double taxation conventions discuss the fundamental freedoms in parallel applying and interpreting the law in a similar manner. The following tax-related grounds have been recognized.

Preserving the coherence of the national tax system.[501]

Safeguarding the balanced allocation of powers of taxation between the Member States.[502]

Ensuring effective fiscal supervision.[503]

Combating tax avoidance and tax evasion (separately from effective supervision).[504]

General objectives

The following general public interests grounds have been examined in the jurisprudence of the EU Court of Justice.

Ensuring road safety.[505]

[499] Para. 43, C-114/97 Commission v Spain
[500] The early jurisprudence resfused to recongise grounds, such as the need to address tax avoidance, although the Court of Justice considered and then rejected as relevant the possibility that the national tax measure in question aimed at preventing companies registered in another Member State to optimise illegitimately their tax burdens Para. 25, 270/83 Commission v France
[501] Para. 29 Case C-264/96 ICI para. 56, , C-107/94 Asscher
[502] Inter alia,
[503] Inter alia, para. 18 Case C-254/97 Baxter Para. 31, *Case C-250/95 Futura.*.
[504] Inter alia, Para.26 Case C-264/96 ICI

Promoting local agricultural policy objectives,[506] such as

- increasing land holdings so as to make agricultural enterprises economically viable;
- preventing agricultural land speculation;
- ensuring that agricultural land belongs to those who work on it.

Effective supervision of markets and economic operators,

- effective supervision of economic activities;[507]
- effective supervision and sanctioning by financial services regulator;[508]
- preventing abusive practices on the market;[509]
- protecting effective tax inspections and fairness in business dealings;[510]
- exercising effective control and jurisdiction over ships flying the national flag;[511]
- effective control over the performance of public contracts in order to adapt the work to meet future and unforeseeable circumstances.[512]

Effective control of new entrants to a profession

- checking the background and the previous conduct of persons involved in an economic activity;[513]
- ensuring that professions practiced by those with sufficient qualifications.[514]

Consumer protection objectives

- consumer protection in general;[515]
- preventing the fragmentation of professions into various

[505] Choquet
[506] Fearnon
[507] para. 59 Case C-134/05 Commission v Italy
[508] para. 20, C-101/94 Commission v Italy
[509] Para. 35, , Case C-493/99 Commission v Germany
[510] Para. 131, Case C-167/01 Inspire Art
[511] Para. 21, Para. 15, Case C-299/02 Commission v the Netherlands
[512] para, 11, 3/88 Commission v Italy
[513] Paras. 32 C-355/98 Commission v Belgium
[514] para. ,38, *Case C-298/99 Commission v Italy*
[515] Case C-442/02 Caixa-Bank France, must at least ultimately present certain benefits to consumers (para. 21). Para. 27 Case C-260/04, Commission v Italy

activities which would then lead to a risk of confusion in the minds of the recipients of services, who might well be misled as to the scope of those qualifications;[516]

- protecting the safety of the recipients of the services in question and the remainder of the population.[517]

Protecting creditors.[518]

Protecting the interests of minority shareholders.[519]

Protecting the interests of employees.[520]

Protecting the population from economic activities.[521]

Ensuring the fairness of commercial transactions.[522]

Controlling the acceptability of guarantees requested (by another Member State) from financial service providers.[523]

Encouraging medium- and long-term savings by citizens.[524]

Social security related objectives

- ensuring the social protection of workers;[525]
- affording additional social protection;[526]
- providing additional social security cover to the persons concerned;[527]
- combatting fraud (combatting the abuse and ensuring the proper functioning of the national social security system).[528]

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[516] Para. 32, Case C-330/03, CICCP
[517] Para. 32, C-514/03 Commission v Spain
[518] Para. 131, Case C-167/01 Inspire Art Para. 43, Case C-171/02 Commission v Portugal
[519] para. 39 VALE para. 28 SEVIC Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 92
[520] para. 39 VALE para. 28 SEVIC Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 92
[521] Para. 32, C-514/03 Commission v Spain
[522] para. 39 VALE para. 28 SEVIC Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 132
[523] para. 25, C-80/94 Wielockx
[524] Case C-442/02 Caixa-Bank France
[525] STICK
[526] para. 15, 143/87 Stanton para. 13 C-53/95 Kemmler See also, Joined cases 154 and 155/87 Wolf

[527] Para. 49, Joined Cases C-393/99 and C-394/99 Hervein
[528] Para. 17, 79/85 Segers

Protecting workers' rights,[529]

- factual issues relating to the nature of the activity involved may need to be clarified before the legitimacy of the ground raised can be decided upon, which is for the national court to settle;[530]
- the responsibility for the work carried out bears relevance: if it rests with the employers the ground cannot be legitimately raised, if it rests with the data processing service provider, the ground raised may be legitimate. This depends on the nature of the activity: administrative work based on execution of instructions, not requiring special professional qualities.[531]

Ensuring the protection of industrial and commercial property,[532]

- including the protection against the risk of confusion as to a trade name and the corresponding protection of a proprietor of the trade name against that risk.[533]

Encouraging the building of dwellings in its territory in order to ensure an adequate supply of housing.[534]

Ensuring high standards of university education.[535]

Data protection objective

- having confidence in data processing contractor and the protection of confidential data.[536]

Fighting tax fraud and tax abuse.[537]

Gambling and betting related objectives

- preventing fraud and incitement to squander;[538]
- discouraging the development of clandestine activities for collecting and allocating bets;[539]
- the general need to preserve public order;[540]
- taking into account moral, religious and cultural factors, and the

[529] Paras. 30-31, C-79/01 Payroll Data Services
[530] Para. 33-34,
[531] 34-35
[532] para. 21 Case C-255/97 Pfeiffer
[533] para. 22 Case C-255/97 Pfeiffer
[534] para. 27, Case C-152/05 COmmision v Germany
[535] Para. 46, Case C-153/02 Neri
[536] para, 11, 3/88 Commission v Italy
[537] Para. 42, Case C-436/00 X and Y
[538] Para. 27 Case C-260/04, Commission v Italy Para. 63, Case C-243/01 Gambelli
[539] Para. 27 Case C-260/04, Commission v Italy
[540] Para. 27 Case C-260/04, Commission v Italy Para. 63, Case C-243/01 Gambelli

morally and financially harmful consequences for the individual and society associated with gaming and betting; [541]

- consumer protection.[542]

Combating improper recourses to freedom of establishment.[543]

Ensuring the required level of security for transport of valuables and dangerous objects and installation and maintenance of surveillance and alarm systems.[544]

Ensuring that the knowledge and experience of representatives of the business world who are not in competition with the operators in question and of the representatives of other relevant people are relied upon.[545]

The laying down and the ensuring of compliance with professional rules (rules governing entry to and the practicing of a profession), which is a matter which falls in absence of EU measures regulating the area within Member State competences,[546] involves as a general public interest ground a number of specific considerations 'worthy of protection' as declared by the Court of Justice.[547] These are the following.

The protection of professional integrity, experience and independence.[548]

The proper practice of professions (practice according to professional rules of conduct)[549] and the interests ('the general good')[550] safeguarded by professional rules,[551] specifically to regulate[552]

- the organization of a profession;

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[541] Para. 63, Case C-243/01 Gambelli
[542] Para. 63, Case C-243/01 Gambelli
[543] Para. 131, Case C-167/01 Inspire Art
[544] Para. 50, , C-514/03 Commission v Spain
[545] Para. 41, Case C-439/99 Commission v Italy
[546] para. 29, 292/86 Gullung para. 26 130/88 van de Bijl *see the judgments of 3 December 1974 in Case 33/74 van Binsbergen ((1974)) ECR 1299 and of 7 February 1979 in Case 115/78 Knoors ((1979)) ECR 399*
[547] para. 29, 292/86 Gullung
[548] Para. 35 C-106/91 Ramrath para. 30 C-106/91 Ramrath para. 97 case C-309/99 wouters
[549] And membership in a national professional body for the same purpose, Gebhard
[550] Para. 35 Gebhard, para 12 Thieffry
[551] para. 14 C-351/90 Commission v Luxembourg. in case of the legal profession*:* the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest and the duty to observe strict professional secrecy, para. 100, case C-309/99 wouters
[552] para. 97 case C-309/99 wouters Para. 35 Gebhard, para 12 Thieffry para. 10, C-101/94 Commission v Italy

- the required qualifications;
- professional ethics;[553]
- supervision and liability;[554]
- guarantees for consumers.

General interests specific to the operation of a certain profession, such as the due administration of justice,[555] or the effective and complete health protection of individuals and animals (overlap with general public health derogation ground).[556]

The restriction introduced must, however, be relevant for the public interest objective claimed to be achieved. The Court of Justice has held that territorial limitations (single establishment/single location of practice rule) may have little relevance and may not be necessary from the perspective of enforcing the type of professional rule in question (here, rules of professional ethics).[557]

Despite the Court of Justice's openness to recognizing numerous potential grounds for exemptions, the ability of the Member States to justify their measures and policies has been rather limited owing the Court of Justice's reluctance to accept the grounds raised as legitimate.[558] This may follow from the actual ground raised which in the EU context may be impossible to accept (e.g., the difficulties of cross-border administration when EU instruments are available to facilitate administrative cooperation among the Member States, the economic nature of the interest protected, or the reduction of state revenues). Often, the Member States are unable to satisfy the general and specific conditions laid down in the jurisprudence. However, this does not mean that the Member States would not be granted opportunities to regulate matters that are close to their interests. For example, the developments in the jurisprudence concerning the aim of guaranteeing a balanced allocation of taxation powers among the Member States allows the Member States to maintain bilateral tax agreements to

[553] 'moral and ethical principles', para 18, 271/82 Auer and para. 9 Rienks
[554] 'disciplinary control', para 18, 271/82 Auer and para. 9 Rienks
[555] Para. 20 Klopp para. 97 case C-309/99 wouters
[556] Para. 10, 96/85 Commission vFrance para. 13, C-351/90 Commission v Luxembourg, Para. 30, Case C-108/96 Mac Quen; which consideration must, however, be able to stand as a justification under EU law, para.11, 96/85 Commission vFrance (actually justifiable in view of the general interest, apply without discrimination, and are proportionate).
[557] Para.21, Klopp
[558] This is a general trend in the past couple of decades in the free movement jurisprudence with the Court of Justice regarding itself empowered to examine the substance of the justification, see C. Barnard, 'Derogations, justifications and the four freedoms: is State interest really protected?', in C. Barnard and O. Odudu, *The Outer Limits of European Law* (Hart, 2009), 273-305, 281.

determine the respective boundaries of their taxation powers and to ensure that economic double taxation is avoided.

The jurisprudence excludes specific grounds as being capable of justifying restrictions of freedom of establishment. This is in harmony with the general understanding of the law on freedom of establishment that that only such Member State conduct will be supported which contribute to maintaining a balanced and sustainable integrated European capital market. It is also in accordance with the general legal benchmarks of Member State conduct as introduced above.

In particular, the law will not accept 'grounds of purely economic nature'.[559] On this basis, the Court of Justice will reject justifications, such as 'the need to ensure continuity, financial stability and a proper return on past investments'.[560]

Principles or considerations which relate to a state or an arrangement which EU law is required to surpass will also be viewed unfavorably. The jurisprudence will reject claims concerning

> The principle of reciprocity among the Member States or the possible infringement of the Treaty by another Member State.[561]
>
> The lack of EU tax harmonization, and the particular nature of national tax systems and the differences between national tax systems, which also affect the double taxation agreements in place.[562]

The diminution of tax revenue,[563] including the need to protect the national tax base,[564] was refused as an overriding reason in the public interest in similar circumstances.[565] It was held to be a purely economic objective[566] which is not available to be raised as a justification even in a regulatory

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[559] The General Programme, when establishing the obligation of eliminating hindrances laid down in law, regulation, or administrative action to the entry and residence of nationals of other Member States, explicitly distinguished between the grounds listed in what is now Article 52 TFEU and limitations 'having an economic purpose', Title II, point A General Programme

[560] Para. 35, Case C-260/04, Commission v Italy

[561] para. 27, C-101/94 Commission v Italy

[562] Para. 24270/83 Commission v France, these, in the given case, were unable to justify tax discrimination.

[563] The Member States may try to distinguish this from the erosion of the national tax base which they regard as an objective with higher legitimacy under the EU framework, which attempts are normally rejected by the Court of Justice as the Member State fail to establish the difference between the two grounds, para. 42, Case C-168/01 Bosal ECLI:EU:C:2003:479.

[564] para. 50 Case C-307/97. Saint-Gobain, the Member State is unable to compensate for the reduction in revenue brought about by the grant of concessions by imposing tax burdens (while it can tax some incomes, it cannot tax the profits of the foreign company

[565] Para. 36, Case C-324/00 Lankhorts-Hohorst Para. 50 Case C-436/00 X and Y

[566] Para. 50 Case C-436/00 X and Y

context, such as that dealing with revenue collecting State monopolies, for example in betting and gambling.[567] The Court of Justice made it clear that the loss off receipts suffered by a Member State is a normal consequence of the individual deciding to move his tax residence using freedom of establishment to a Member State 'where the tax system is different and may be more advantageous for him'.[568] Generally, the loss of revenue or the erosion of the domestic tax base resulting from compliance with EU obligations never received much sympathy from the Court of Justice as, in principle, it would enable the Member States to claim an exemption anytime the correct application of EU law entails costs at the national level.[569]

The case law, reflecting on the dynamics between negative and positive integration in this domain, has recognized that the absence of EU legislation governing cross-border company transformation operations (both cross-border conversions and mergers), while they may indeed be 'useful', do not justify (discriminatory) restrictions on the freedom of establishment.[570] It was made clear that the availability of such measures cannot be made a precondition for the Member States to meet their Treaty obligations.[571] With this the jurisprudence rejected the claims that the Member States cannot be expected to accommodate these transactions and solve the specific cross-border problems, bearing in mind that they normally involve the application of several national legal systems.[572]

The principle of tax or fiscal territoriality has been accepted in the jurisprudence as a consideration applicable when examining the impact of Article 49 TFEU on Member State taxation powers. As established in the judgment in *Futura*, the Member States may rely on this principle in case the national measure in question does not entail any discrimination – both overt and covert. In particular, the domestic legal requirement of there being an economic link between losses/profits and national tax jurisdiction enabling the taxation of profits/losses in the jurisdiction in which they are incurred, which is regulated without discrimination, is acceptable under EU law.[573] In other words, national law can prevent the free movement of profits/losses provided that no discrimination takes places in the making and/or

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[567] Para. 61, Case C-243/01 Gambelli. It was held that the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted, para. 62.

[568] Para. 60 Case C-9/02 Lasteyrie du Saillant

[569] A.P. Dourado and R. da Palma Borges (eds.), *The Acte Clair in EC Direct Tax Law* (IBFD, 2008), 87-88.

[570] para. 38 VALE and para. 26 SEVIC

[571] ibid

[572] para. 24, Sevic

[573] See Supra n

application of the relevant rules.[574] In *Rewe Zentralfinanz*, following *Futura*, the principle that tax residence may provide the basis of differentiated tax treatment of resident parent companies and resident subsidiaries without giving rise to discrimination to the disadvantage of companies having non-resident subsidiaries was interpreted as the recognition in EU law of 'the need to take into account the limits on the Member States' powers of taxation.'[575] The Court of Justice noted, however, that the national measure in question must be considered as an implementation of the principle of territoriality (here, the measure did not concern competing tax jurisdictions between the Member States concerned, but the taxpayers being subjected to unlimited tax liability in the in the State in question).[576]

This does not mean, however, that Member State claims based on tax territoriality will in all circumstances be accepted by the Court of Justice.[577] While developing national tax regimes on the basis of this principle, which would confine the exercise of tax jurisdiction to the territory of the state concerned, falls within the competence of the Member States, they are prevented from relying on the fiscal territoriality principle in order to defend a discriminatory tax treatment of foreign sourced incomes. Often, the national measure would have no connection with the principle and the principle would only be invoked to cover up a breach of the equal treatment principle.[578] The jurisprudence also takes into account the fact that the allocation of tax jurisdiction among the Member States as well as the avoidance of double taxation among them are regulated by a network of international double taxation conventions and connected national measures.

In *Manninen*, in a free movement of capital context, the Court of Justice held that national tax legislation denying the equal treatment of foreign- and domestically-sourced incomes – through the equal provision of grant tax advantages – cannot be regarded as an emanation of the principle of territoriality, a principle which does not in fact preclude the granting of a tax advantage to foreign-sourced incomes.[579] The Court of Justice added that, in any event, the tax territoriality principle cannot be invoked to justify

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[574] Paras. 20-22. *Case C-250/95 Futura*

[575] Paras. 68-69, Case C-347/04 Rewe Zentralfinanz. See also paras. 39-41, Case C-168/01 Bosal contrasting the taxation of f a single company in the Member State of its principal establishment where it carried on business activities and the discriminatory taxation of companies depending on the place of establishment of their subsidiaries.

[576] ibid.

[577] The lack of a reference to territoriality in the directive applicable in the case may also support such a refusal, para. 41, Case C-168/01 Bosal.

[578] See Marks & Spence, infra n.

[579] Para. 38, Case C-319/02 Manninen. The national measure must be an application of that principle and discrimination in the taxation and in the granting of tax benefits of parent companies and subsidiaries established in different Member States does not qualify as such, para. 44, Case C-471/04 Keller.

discriminatory tax measures.[580] The same prohibition was expressed in the formula that the principle of tax territoriality cannot be relied upon when the objective comparability of the taxpayers has been established.[581] Nonetheless, as it follows from the principle laid down in *Futura* when the equal treatment of taxpayers is ensured national measures which do in fact conform with the fiscal principle of territoriality (e.g., taxing non-resident taxpayers on profits and losses arising from their activities in the Member State concerned while taxing resident taxpayers irrespective of where their activities have been carried out) may be accepted as legitimate.[582]

The administrative burdens following for the taxpayer from the imposition of a tax obligation concerning a cross-border transaction (here, cross-border transfer of seat), depending on the circumstances of the case, may have an impact on the legitimacy of the restriction imposed. On the one hand, when the administrative burden, which may be considerable, even excessive, is more harmful to freedom of establishment than another administrative arrangement (here, immediate or deferred recovery of tax on capital gains), may constitute a violation of Article 49 TFEU.[583] On the other, when the nature and extent of assets can be easily traced in a cross-border situation, the administrative burden imposed cannot be regarded as being unduly restrictive.[584] In this regard, the risk of non-recovery of tax must, however, be taken into account, which increases with the passage of time and which enables the Member States to introduce additional measure capable of interfering with the right of establishment.[585]

As regards the administrative burdens following for national authorities from the imposition of a tax obligation concerning a cross-border transaction, the law is much less permissive. Provided that the taxpayer concerned does not regard the administrative burden arising from a particular administrative arrangement as excessive, the burden borne by the national tax authorities 'cannot be regarded as excessive either.'[586] Also, the Member States may rely on the existing machinery for mutual assistance between national authorities, which are 'sufficient' to enable them to carry out the necessary

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[580] Para. 39, Case C-319/02 Manninen.
[581] Paras. 45-47, Case C-342/10 Commission v Finland.
[582] Paras. 20-22, Case C-250/95 Futura [1997] ECR I-2471 (under the freedom of establishment). The facts of the case and the national measure in question do have specific relevance in this regard as relying on Futura can be denied on account of distinguishing cases on their facts (i.e., primarily, whether the measure concerned tax territoriality or introduced tax differentiation with regards a certain cross-border element), paras. 38-40, Case C-168/01 Bosal.
[583] paras. 68-71 National grid
[584] para. 72.
[585] para. 74
[586] para. 77.

checks.[587] On this basis, their freedom to choose an immediate as opposed to a deferred recovery of taxes is restricted by EU law.

5.2.1 The legitimacy of the individual grounds of exemption

In the following, the conditions developed in the jurisprudence of the Court of Justice concerning the legitimacy of the individual grounds of exemption relied upon by the Member States are examined. In some instances, the close judicial scrutiny of this matter has resulted in further benchmarks and signposts which Member State policy making and regulation needs to take into account.

5.2.1.1 Objective comparability in taxation

This ground enables the Member States to introduce and maintain differentiation in the tax treatment of different taxpayers on the basis of objective differences in their circumstances.[588] The objective comparability of the situation of taxpayers renders their differentiated tax treatment a breach of the equal treatment principle and of the Treaty prohibition in Article 49 TFEU on discrimination on the basis of nationality.[589] The objective comparability of individuals and their circumstances will be accepted if as a matter of national tax law the factual circumstances in question will be regarded as similar (e.g., they are subject to the same tax).[590] The differences in the legal rules they are subjected to can be irrelevant (e.g., being subject to limited/unlimited tax liability) when their tax treatment affects the same income and assets.[591] On this basis, the Court of Justice's assessment will focus in whether the tax subjects concerned are in a similar factual situation as a matter of the applicable tax laws.[592]

In particular, the Member States are prevented from relying on the place of establishment or residence of the persons (taxpayers) concerned as a valid criterion when subjecting them to differentiated treatment in national tax law.[593] It must be noted, however, that this prohibition is not absolute and in certain instances residence may be a 'proper factor for distinction' in taxation.[594] In *Marks & Spencer*, the Court of Justice held that in this regard

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[587] para.
[588] As it follows from the definition of discrimination in EU law (' discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations', para. 17, 80/94 Wielockx).
[589] Para. 46, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation
[590] para. 47 Case C-307/97. Saint-Gobain para. 38, national grid
[591] para. 48 Case C-307/97. Saint-Gobain
[592] See Para. 56, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation
[593] Para. 37, Case C-446/03 Marks & Spencer; Para. 37, Case C-446/03 Marks & Spencer Paras. 33-34, Case C-347/04 Rewe Zentralfinanz (concerning resident and non-resident subsidiaries)
[594] Para. 37, Case C-446/03 Marks & Spencer 'it may constitute a factor that might justify' the differentiated tax treatment of resident and non-resident taxpayers.

that it must be determined 'in each specific situation' whether the differentiated tax treatment is based on 'relevant objective elements'.[595] This enabled the Court to recognize, in harmony with the general jurisprudence,[596] the principle of tax territoriality as a principled basis of differentiated tax treatment in national law treatment as enshrined in international tax law and EU law,[597] however, only subject to meeting the requirement that the objective comparability of the tax situations or tax subjects is determined appropriately.[598] In a particular case, this could entail extending 'unconditionally' a particular tax advantage to cover other tax subjects as well.[599]

As a general rule, the Court of Justice will reject the differentiated tax treatment in a 'rule of general nature' of resident and non-resident taxpayers and refuse justifications which state that the status of non-resident tax subjects enable the introduction of tax burdens different from resident tax subjects.[600] The most general basis of this jurisprudence can be found in the Treaties which under freedom of establishment regard branches and agencies as equivalent to domestic registered companies[601] and in the reasoning according to which accepting that there are objective factual differences between resident and non-resident companies would deprive the right of establishment of all meaning.[602] The earlier mentioned acceptance in *Marks & Spencer* that the place of establishment or residence of taxpayers may give rise to objective differences capable of supporting differentiated legal treatment is, nonetheless, recognized, but it is subjected to strict legal scrutiny, for instance, by demanding that the differentiated tax treatment of tax subjects must find its basis in actual objective differences.[603] The general offering of benefits to domestic tax subjects while excluding others from accessing those benefits will fall short of this requirement and national tax laws will be required to treat domestic and non-domestic establishment in the same way.[604]

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[595] Para. 38, Case C-446/03 Marks & Spencer

[596] Supra n.

[597] Taxing by the parent company's Member State resident companies on their worldwide profits and non-resident companies solely on the profits from their activities in that State

[598] the fact that it does not tax the profits of the non-resident subsidiaries of a parent company established on its territory does not in itself justify restricting group relief to losses incurred by resident companies, para. 40 Case C-446/03 Marks & Spencer

[599] Para. 41

[600] paras. 16-19, Case C-330/91 Commerzbank

[601] The standard reasoning is that the registered office of a company provides the 'connecting factor' with the legal system of the Member State concerned which is similar to the nationality of natural persons. In other words, discrimination on the basis of the residence of companies is equivalent under EU law to discrimination based on the nationality of legal persons. See the similar reasoning in para. 45, Schumacker, infra n.

[602] para. 18, 270/83 Commission v France

[603] para. 19.

[604] Para. 20

In the domain of direct taxation, the objective differences between the situations of resident and non-resident taxpayers, mainly 'from the point of view of the source of the income and the possibility of taking account of their ability to pay tax or their personal and family circumstances',[605] enable differentiated tax treatment without violating the non-discrimination principle.[606] The situation may be more complex when in the particular context (here, the necessity to seek tax advice) the taxpayers are in a comparable situation, for instance, as a matter of the tax burden and as a matter of the complexity of the national tax system.[607] Also, the objective differences on the basis of which the differentiated tax treatment is implemented must be adequately established. As held in *Wielockx*, a non-resident taxpayer 'who receives all or almost all of his income in the State where he works[608] is objectively in the same situation in so far as concerns income tax as a resident of that State who does the same work there.'[609] As a result, such non-resident taxpayers must be afforded the same tax advantages as resident taxpayers; otherwise the conditions ('personal and family situation') giving rise to the availability of the tax advantage will be taken into account neither by the tax authorities of the host State, nor of the State of origin.[610] This is particularly the case when the tax advantaged has a social purpose, when 'it is legitimate to reserve the grant of that advantage to persons who have received the greater part of their taxable income in the State of taxation, that is to say, as a general rule, residents.'[611] The situation is, however, different when the taxpayer does not receive all or almost all of his income in the host State and comparable benefits are available in the

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[605] para. 18, C-80/94 Wielockx. Wielockx confirmed in paras. 40-43, Case C-107/94 Asscher. The same principle is defined in *Schumacker* in clearer terms: it has relevance whether the income of the taxpayer is concentrated at this place of residence and the income gained in the host Member State is only part of his total income, and it also has relevance that the non-resident taxpayers personal ability to pay tax, 'determined by reference to his aggregate income and his personal and family circumstances,' is easuer to assess where his personal and financial interests are centred, 'which is general is the place where he has his usual abode.' (para. 43, Case C-234/01 Schumacker)

[606] para. 19, C-80/94 Wielockx. In Schumacker, there was a statement that residence as the main principle for the purpose of allocating powers of taxation between States in situations involving extraneous elements is accepted under OECD insturments, para. 45, Schumacker. The ruling in Coninj uses the term 'connecting factor' on which current international tax law is as a rule founded for the purpose of allocating powers of taxation between States, Para. 17, Case C-346/04 Coninj.

[607] Paras. 20-23 Case C-346/04 Coninj

[608] In Asscher and Schumacker 'all of almost all of his worldwide income' in the host State, whilst the income received int he State of residence 'is insufficient to allow his personal and family circumstances to be taken into account'.

[609] para. 20 ('both are taxed in that State alone and their taxable income is the same')

[610] para. 21. See also paras. 42-43, Case C-107/94 Asscher and pa4as. 36-38 and 49-50, Schumacker.

[611] Para. 48.

State of residence, which under international tax law must take into account the personal and family circumstances of the taxpayer.[612]
The jurisprudence has produced a number of benchmarks and signposts for national tax legislation and administrative practice. These are presented in detail in the next pages.

In case it is not established that the taxation problem (here, that certain non-residents may escape the progressive nature of the tax) actually exists and needs to be offset by a taxation measure (here, that the double taxation convention does not enable the taxpayer to avoid the tax),[613] puts both categories of taxpayers (resident and non-resident) in comparable situations with regard to the offsetting rule.[614]

When the national measure aims to ensure that the double taxation of taxpayers is avoided, it needs to be established on the basis of factual circumstances that double taxation would actually occur, for instance, by the national measure drawing distinctions between companies on the basis of their establishment or residence.[615] Establishing this factual circumstance would mean, ultimately, that their differentiated treatment in law is not permissible and that this discriminatory treatment cannot be exempted.

The different legal status and profile of the legal persons concerned excludes their objective comparability as a matter of EU law. In particular, legal persons governed by public law are not objectively comparable to and, therefore, they must not be subjected to differentiated treatment as compared with that of legal persons carrying out business in a specific field or performing tasks which should be encouraged by allowing the carrying out of that activity for profit.[616]

Objective comparability cannot be established when

- there is a 'fundamental difference' between the activities in question.[617] In the context of subjecting the distribution of profits by a subsidiary to its parent company and the transfer of profits within a company to differentiated tax treatment, it was held that
  - whereas the distribution of the profits of a subsidiary to its parent company presupposes the existence of a formal decision in that regard, the profits of a branch of a company are part of the assets of that company even in the absence of a formal decision to that effect,[618]
  - as opposed to the relationship between a branch of a company and that company, even if the profits distributed

[612] para. 44, Asscher.
[613] paras. 4748, C-107/94 Asscher
[614] para. 48, C-107/94 Asscher
[615] Paras. 26-29.???
[616] Para. 28, Case C-324/00 Lankhorts-Hohorst
[617] Para. 22, Case C-253/03 CLT-UFA SA
[618] Para. 23

by a subsidiary to its parent company were no longer part of the assets of that subsidiary, those profits could still be made available to that subsidiary by its parent company (here, in the form of share capital or a shareholder loan),[619] and the fact that profits distributed by a subsidiary to its parent company are no longer part of that subsidiary's assets does not establish a fundamental difference between them.[620]

Objective comparability cannot be established, as opposed to the application of Member State tax legislation to shareholders,

- as regards the application of national tax legislation to the company distributing the dividends when its shareholders reside in the Member State concerned and in other Member States, when the aim is to avoid double taxation (preventing or mitigating a series of charges to tax and of economic double taxation),[621]
    - in a contrary situation, when the Member States would be required to ensure that double taxation is avoided either by exempting profits from tax or by granting a tax advantage equal to the tax paid on the profits, the Member State concerned 'would be obliged to abandon its right to tax a profit generated through an economic activity on its territory,[622]
    - also, when imposing requirements on the Member States under EU law, it must be taken into account that it is usually the Member State in which the taxpayer (shareholder) is resident 'that is best placed' to determine its ability to pay tax, and that in case Directive 90/435/EC applies the responsibility must be determined on the basis of that measure,[623]
- it is, however, a different situation when a Member State, unilaterally or under a double taxation convention, imposes a charge to tax not only on residents but also on non-residents, as their positions become comparable,[624]
    - in such instances, the Member States are required to ensure[625] that, under procedures laid down in national law for the purposes of preventing or mitigating a series of liabilities to tax, that resident and non-resident shareholders are subject to the same tax treatment.[626]

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[619] Para. 24
[620] Para. 25
[621] Para. 57-58. Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation
[622] Para. 59
[623] Para. 60
[624] para. 68
[625] it is for the national court to determine whether this obiligation has been complied with, para. 71
[626] para. 70 (the risk of double taxation comes from the Member State concerned exercising on its own its taxing powers, irrespective of any taxation in another Member State).

5.2.1.2 Preserving the coherence of the tax system

Tax deferral

This ground ensures that the freedom of establishment does not undermine the integrity of national tax systems in the sense that the Member States are allowed to regulate tax advantages in a way that they are matched by a tax burden imposed.[627] As a matter of domestic (tax) policy, the Member States can decide to forgo a tax burden temporarily – in national law or in a double taxation convention – on the condition that the revenue will be collected at a later time. This arrangement can be put to jeopardy by the taxpayers exercising their right of movement under Article 49 TFEU and moving their taxable income to the tax jurisdiction of another Member State.[628] The Member States would, therefore, have an interest in denying the granting of tax advantages to situations and transactions with a potential cross-border element, or in making the revenue claim when the tax subject decides to make his exit for another tax jurisdiction.[629] The Member States are not entirely devoid of possibilities when addressing the impact of cross-border transactions (e.g., transfer of residence) on their power of taxation,[630] they must, however, devise frameworks which regulate the exercise of their taxation powers with a view to the possibility of cross-border movement of tax subjects.[631]

The requirement of a direct link

Because by using this ground, the Member States, often through discriminatory measures, essentially aim to prevent the loss of tax revenue, which as an individual exemption cannot be claimed legitimately under EU law,[632] the Court of Justice has interpreted this exemption narrowly[633] by

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[627] It follows from the idea that national tax systems aim to maintain a close relationship between the tax advantage granted at a particular time and a tax obligation imposed at another time.

[628] See paras. 71-73 Case C-150/04 Commission v Denmark concerning the transfer of residence between the time of payment of contributions to a pension scheme and the time of payment of the corresponding benefits.

[629] The Court of Justice made it clear that the cross-border element alone is insufficient for the Member States to impose restrictions on freedom of establishment, see paras. 71-73 Case C-150/04 Commission v Denmark

[630] International tax law, especially double taxation conventions hold as much responsibility for the loss of taxation powers as the possibility of cross-border movement, ibid, and see infra n.

[631] see paras. 71-73 Case C-150/04 Commission v Denmark ('It is only in the case where, before benefits fall to be paid, that taxpayer transferred his residence to a Member State other than the Member State concerned that it might encounter difficulties in taxing the benefits paid and where, therefore, the cohesion of the local tax system with regard to the taxation of private pensions would be adversely affected.')

[632] Infra n, and Para. 59, Case C-35/98 Verkooijen [2000] ECR I-4071;

[633] There needs to be a 'strict correlation' between the tax burden and the tax advantage, Para. 24 *:* C-80/94 Wielockx

demanding that a direct link must be established and preserved[634] between the tax advantage (e.g., tax credit, tax exemption, tax cap, tax shield, tax restitution, tax deduction) and a corresponding disadvantage offsetting that advantage by a particular tax levy.[635] The ground of ensuring fiscal coherence may not be relied upon to defend broader considerations of coherence in public finances as, for example, the Member States are precluded from using tax measures in reality to make up for the fact that a taxpayer is not insured with, and does not pay contributions to, its social security scheme.'[636] As to the existence of a direct link between the tax advantage and the tax subsequently imposed, the case law produced the following qualifications. Firstly, the tax advantage and disadvantage must be incurred under the same taxation framework and by the same person,[637] and secondly, the tax advantage must be actually offset by a particular levy on a particular income.[638] This latter condition has been interpreted as requiring that the measures at issue must in fact be applicable and the tax advantage must be equivalent to the tax burden, and also that the tax advantage must be immediately offered, as in the circumstances of the given case the subsequent availability of that advantage may disadvantage the tax subject involved in a cross-border transaction.[639]

Micro- v macro level tax equity

Generally, since after the strongly criticized judgment in *Bachmann*[640] which first recognized and then accepted tax coherence as a justification submitted by a Member State, the Court of Justice has been reluctant to grant an exemption under this ground.[641] The Member States would submit that fiscal coherence (cohesion) needs to be ensured at an individual or

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[634] In a more precise formulation, the direct link and the preservation of that link is necessary to safeguard the coherence of the national tax system , para. 42, Case C-324/00 Lankhorts-Hohorst

[635] Para. 52, Case C-436/00 X and Y Para. 29 Case C-264/96 ICI para. 56, , C-107/94 Asscher

[636] Para. 61, Asscher. This has a general basis in the clause laid down elsewhere in the jurisprudence (Case 276/81 Sociale Verzekeringsbank v Kuijpers [1982] ECR 3027, paragraph 14, Case 302/84 Ten Holder v Nieuwe Algemene Bedrijfsvereniging [1986] ECR 1821, paragraph 21, and Case 60/85 Luijten v Raad van Arbeid [1986] ECR 2365, paragraph 14) that the Member States are not entitled to determine the extent to which their own legislation or that of another Member State is applicable since they are under an obligation to comply with the provisions of Community law in force'.

[637] Para. 29, Case C-168/01 Bosal (parent companies and subsidiaries are not the same person as they are distinct legal persons, each being subject to a tax liability of its own, paras. 31-32)); Para. 24 *:* C-80/94 Wielockx; Para. 29 Case C-264/96 ICI

[638] para. 33, Bosal (not compensation, but simply overtaxation of tax subjects) (para. 35, the advantage and the disadvantage must actually relate to and follow each other, para. 35); para. 59, Asscher (no direct link between higher rate of tax on incomes of non-residents and the fact that no social security contributions are levied on their income), especially when social security in a cross-border situation is regulated by directly applicable EU legislation, para. 60; paras. 63-64, Case C-347/04 Rewe Zentralfinanz (not a compensation, but simply a disfavourable tax treatment of foreign subsidiaries).

[639] Paras. 66-67, Case C-347/04 Rewe Zentralfinanz

[640] Case C-204/90 Bachmann and Case C-300/90 Commission v Belgium

[641] Dourago and da Palma Borges (2008), 90; Barnard (2009), 291; Usher (2006), 202.

micro-level and the effects of bilateral tax treaties allowing the single taxation of incomes transferred to another Member State need to be compensated by restrictions imposed on individuals. Following *Wielockx*, the Court of Justice would reject these claims on the grounds that since overall fiscal coherence (and a revenue-balance at a macro-level) has been achieved through the use of bilateral tax treaties regulating on the basis of the reciprocity principle the allocation of tax jurisdiction among the Member States there is no need to exempt restrictive national measures aimed at individual on this grounds.[642] In such instances, alternative justifications must be found for the differentiated tax treatment which has its own difficulties as, firstly, the double taxation agreement is likely to address under the reciprocity clause the risk being addressed by the national measure,[643] and secondly, when the national measure aims essentially at protecting the national tax base, there are a multitude of less restrictive solutions available to address that risk.[644]

Strict intepretation

In any case, even when there is a possibility of establishing a direct link between the tax advantage and corresponding tax burden, the Member States will still find it impossible to convince the Court of Justice when situations or transactions with a cross-border dimension are subjected to differentiated (discriminatory) treatment,[645] for instance, in a simple case of overtaxation of foreign taxpayers or foreign-sourced incomes.[646] National measures aiming solely at enforcing the payment of tax, and not operating as a general measure ensuring incomes supported by tax advantages are adequately taxed, will also be rejected.[647] Similarly, national tax measures having the effect of increasing the disparity between the overall tax burden on the profits of domestic companies and on the profits of companies established in other Member States will not be accepted.[648] The Member States have a genuine chance to rely on this ground successfully when the national measure concerns a clear case of tax collection deferral.[649]

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[642] Patas. 24-26, Wielocks reversing Bachmann (regulating the reciprocity of rules in the Member States contracting under a double taxation convention is alone insufficient to establish that relationship, as it merely shifts fiscal cohesion 'to another level', para. 24); para. 53, Asscher.

[643] paras. 54-56 Asscher

[644] para. 58-59 Ascher (it may only be suitable when the transactions in question were likely to evade taxation by the Member State which granted the tax advantage, para. 58 Asscher with reference to Bachmann).

[645] See, for instance, paras. 37-40, Case C-493/09 Commission v Portugal, paras. 41-42, Case C-279/93 Schumacker; paras. 53-57, Case C-436/00 X and Y.

[646] Para. 30, Case C-168/01 Bosal.

[647] Paras. 64-65 Case C-324/00 Lankhorts-Hohorst

[648] Para. 38, Case C-315/02 Lenz.

[649] Dourado and da Palma Borges (2008), 91. Based on the examination of the objective pursued by the tax measure in question, para. 43, Case C-319/02 Manninen; para. 27, C-292/04 Meilicke. In paras. 43-46, Case C-319/02 Manninen the question was whether the tax credit was made available in order to ensure the coherence of the Finnish tax system or to

Without explicitly identifying the ground of exemption invoked, the jurisprudence has discussed matters concerning tax equity in the context of the Member States delimiting freedom of establishment. Concerning the claim that the lighter tax burden on non-resident, non-contributing taxpayers as compared with that on resident, contributing taxpayers should be levelled out, the Court of Justice made it clear that this advantage cannot be merely presumed[650] and that the advantage cannot follow from the Member State concerned acting it its tax autonomy[651] so as to legitimately pursue such an objective. Regarding this latter issue, the Court of Justice, within the framework allowed by Article 49 TFEU, argued national tax policy choice favoring certain taxpayers cannot be offset by introducing 'tax differentials' affecting those favored 'since that would amount to penalizing them' for the advantage given to them by the Member State concerned.[652]

5.2.1.3 Safeguarding the balanced allocation of tax jurisdiction among the Member States

Fair sharing of revenue

Under this ground, EU law ensures that freedom of establishment does not undermine the ability of the Member States to assume taxation powers and to safeguard their tax jurisdiction from the taxation powers of other Member States. It reflects the idea that in times of intensive cross-border economic activity and when the Member States are keen on extending their tax jurisdiction over incomes earned outside their territory the fair distribution of tax revenue among the Member States can only be secured when the Member States negotiate – in bilateral treaties on avoiding double taxation through the extra-territorial application of Member State tax powers – mutually agreed (reciprocal) concessions in respect of their exercising their respective taxation powers, in particular, with regards foreign-sourced incomes. These conflict of jurisdiction rules leading to a perceived equitable or fair sharing of cross-border tax revenue may be seen as directly conflicting with Article 49 TFEU and the related equal treatment principle which require an undifferentiated tax treatment of incomes irrespective of their source.[653]

In the definition provided in *Marks & Spencer*, the ground enables the Member States to address in national tax law financial transactions in their entirety[654] and to claim to exercise their own tax rules in respect of profits

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avoid the double taxation of incomes, which in any event was found to be achievable through the use of less restrictive means.

[650] para. 52, C-107/94 Assche

[651] paras. 51-53, C-107/94 Asscher

[652] paras. 51-53, C-107/94 Asscher

[653] Douardo and da Palma BNorges (2008). 107.

[654] Para. 44 Case C-446/03 Marks & Spencer , (profits and losses are two sides of the same coin and must be treated symmetrically in the same tax system).

and losses generated by the economic activities of tax subject exercising their freedom of establishment.[655] The Member States may thus refuse to offer tax subject the option to have their losses taken into account in the Member State in which they are established or in another Member State having regard to the fact that in such case the taxable basis would be increased in the first State and reduced in the second.[656] Nevertheless, under this derogation the Member States cannot introduce restrictions in freedom of establishment with a view to preventing the reduction of national tax revenues[657] or to reclaiming 'taxation powers lost when economic operators decided to carry on economic activities in another Member State.'[658] As declared by the Court of Justice, this ground may only be accepted in very limited circumstances, the one being that investigated in *Marks & Spencer* where in conjunction with two other grounds of exemption the Member State concerned was allowed to deal with profits and losses from a single business transaction under national tax law.[659]

The Member States need to be aware that the treatment of this ground under EU law may lead to different results depending on whether a bilateral tax treaty regulating the allocation of tax powers and the avoidance of double taxation is involved or not. The *Marks & Spencer* case law is quite distinct from the jurisprudence dealing with what can be lawfully regulated in bilateral tax treaties under EU law. In *Marks & Spencer,* it was recognized that the unfettered choice for taxpayers to choose jurisdictions to have their losses or profits taken into account, specifically, that losses are taken into account in high-taxation jurisdictions and profits in low-taxation jurisdictions, 'could seriously undermine a balanced allocation of the power to impose taxes between the Member States since the tax based would be increased in one of the States in question, and reduced in the other, by the amount of the losses or profits transferred.'[660] In such circumstances, the Member State of residence, which could be granting tax advantages to the taxpayer concerned, 'would be forced to renounce its right (…) to tax its income in favor, possibly,' of another Member State.[661] In essence, taxpayers cannot rely on Article 63 TFEU to have access to the most beneficial tax

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[655] Para. 45 Case C-446/03 Marks & Spencer, upheld in para. 42, Rewe Zentralfinanz
[656] Para. 46, Case C-446/03 Marks & Spencer
[657] Para. 44 Case C-446/03 Marks & Spencer
[658] Para. 43, Case C-347/04 Rewe Zentralfinanz (for example, the systematic refusing to grant a tax advantage to a resident parent company, on the ground that that company has developed a cross-border economic activity which does not have the immediate result of generating tax revenues for that State).
[659] Para. 41, Case C-347/04 Rewe Zentralfinanz
[660] Para. 46, Case C-464/03 Marks&Spencers ECLI:EU:C:2005:763; para. 62, Case C-311/08 SGI.
[661] Ibid.

arrangements for them and damage, as a result, the taxation possibilities of the Member States concerned.[662]

Following the general developments of the jurisprudence concerning the legal control under EU law of double taxation agreements concluded by the Member States,[663] the case law under Article 49 TFEU confirmed that bilateral tax agreements are subject to the national treatment principle requiring the equal treatment of resident and non-resident tax subjects.[664] In other words, following the principle of national treatment the advantages of those treaties must be available on the same conditions not only to undertakings in the Member State concerned, but also to undertakings resident in other Member States.[665] In particular, their reciprocity clauses and the mechanisms offered under those mechanisms in taxation are required to comply with the Treaty requirement of non-discrimination.[666]

In case the principle of fiscal territoriality is interpreted as robustly as in National Grid, the Member States can be allowed under EU law to exercise their powers of taxation concerning incomes which arose within their ambit of powers of taxation before the exercise of the right of establishment by the taxpayer (here, cross-border company transformation operation).[667] The temporality of Member State tax powers is key here as the right to charge taxes in income is acknowledged only in connection with the period when the taxpayer was resident for tax purposes in the national territory until the taxpayer leaves the country.[668] According to the Court of Justice, this possibility is necessary so as to prevent situations capable of jeopardizing the rights of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory.[669] In this regard, it is irrelevant that the tax is charged on unrealized incomes (capital gains) as the Member States are entitled – within their tax autonomy – to tax economic value generated by an unrealized capital gain in their territory even if the gain has not yet actually been realized.[670]

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[662] See the same construction in connection with tax avoidance.

[663] See FMC report, especially Commission v France (avoir fiscal) and Bachmann,

[664] para. 58 Case C-307/97. Saint-Gobain (with a third State) ('the national treatment requirement is not called into question by an unilateral extension by a Member State of the bilateral treaty to cover non-resident companies', para. 89).

[665] *Saint-Gobain, paragraph 59*

[666] para. 89 Case C-307/97. Saint-Gobain (the balance established in them as a matter of national taxation powers and the reciprocal arrangements of these treaties is subject to review under the Treaties).

[667] para. 46, National Grid see, to that effect, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 59

[668] para. 46, natioal grid, seepara. 46 N

[669] para. 46, national grid; *Marks & Spencer*, paragraph 46; *Oy AA*, paragraph 54; and Case C-311/08 *SGI* [2010] ECR I-487, paragraph 60

[670] para. 49, National Grid. (It was held that Article 49 TFEU does not preclude legislation of a Member State under which the amount of tax on unrealised capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in

5.2.1.3.1 Market-opening agreements with third States

The jurisprudence on bilateral tax treaties also found its way into the case law dealing with the compatibility with Article 49 TFEU and with the non-discrimination obligation of bilateral agreements concluded by the Member States on other matters with third States. The Open Skies judgments, based on the principle that bilateral (double taxation) agreements which fall under the scope of Article 49 TFEU must provide national treatment to the undertakings of the other Member State or third State involved,[671] found the incompatibility with freedom of establishment of treaty clauses which allow the access to the market of the third State of undertakings established in the contracting Member State (and not of other Member States) and which enable the third State to use the instruments available to expel undertakings established in other Member States from that market.[672] In this regard, the Court of Justice rejected the claim that discriminatory treatment would follow from the conduct of the third-State exercising its powers, and held, instead, that the treaty clauses themselves as concluded between the Member State concerned and the third State are capable of infringing the right of establishment.[673]

The Open Skies judgments also made an important contribution to the existing jurisprudence. The Court of Justice, distinguishing this case law from that relating to bilateral tax agreements with third States, declared that in the latter it focused on the issue whether a tax advantage could be extended unilaterally by the contracting Member State to undertakings established in the third State without infringing the provisions of the bilateral treaty concerning the rights and obligations of that State and that in the Open Skies cases it ruled upon the compatibility of provisions of a bilateral agreement without being obliged to take into account that establishing the infringement will compromise the rights of the third-State involved as laid down in those provisions.[674] It added that under EU law it is irrelevant that such clauses are traditionally incorporated into such bilateral agreements

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value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another Member State, ceases to obtain profits taxable in the former Member State. It makes no difference that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there. (para. 64)).

[671] Ref to SaintGobain 58-59

[672] paras. 47-49, 466/98 Commission v UK; paras. 128-130, *C-467/98 Commission v Denmark; paras. 119-121, C-468/98 Commission v Sweden; paras 124-126, C-469/98 Commission v Finland; paras. 137-139,* C-471/98 Commission v Belgium; paras. 128-131, -472/98 Commission v Luxembourg; paras. 138-140, C-475/98 Commission v Austria; paras. 150-152, *C-476/98 Commission v Germany*

[673] para. 51, 466/98 Commission v UK; para. 132, *C-467/98 Commission v Denmark; para. 123, C-468/98 Commission v Sweden;para. 128, C-469/98 Commission v Finland; para. 141,* C-471/98 Commission v Belgium; para. 134,C -472/98 Commission v Luxembourg; para. 142, C-475/98 Commission v Austria; para. 154, *C-476/98 Commission v Germany*

[674] para. 54, 466/98 Commission v UK

and that their aim is to preserve the rights of a third-State to grant access to its market only on the basis of reciprocity.[675]

5.2.1.4 Ensuring effective fiscal supervision

Equal treatment and cooperation

Under this ground, the Member States aim to claim that with freedom of establishment in cross-border situations it is more difficult to obtain information for the purpose of conducting tax proceedings and to enforce tax obligations. As a consequence, cross-border establishment – departing from the non-discrimination requirement – should be treated differently from purely domestic situations. Because such claims challenge one of the fundamental principles of freedom of establishment and because the alleged difficulties can be evaded by the Member States through the use of cross-border administrative arrangements, this justification is practically never allowed.[676] While the jurisprudence recognizes, in principle, the difficulties of the Member States and accepts that they are entitled to obtain information necessary for the adequate application of tax laws,[677] the Member States are constantly reminded that instead of imposing restrictions on freedom of establishment, mainly, by subjecting cross-border situations and transactions to unfavorable differentiated tax treatment, they should rely on the available EU and international (OECD)[678] measures on mutual assistance in taxation matters or to allow the taxpayers to produce the necessary information themselves. They may also adopt instead national measures which enable the clear and precise ascertainment of tax burdens.[679]

The EU legal measures available

In principle, in absence of supranational frameworks for cross-border administrative cooperation, the Member States would be able to introduce and maintain administrative and other arrangements for the supervision of compliance with their tax obligations in situations affected by freedom of establishment.[680] With the Mutual Assistance Directive (ex Directive 77/799/EEC, Directive 2011/16/EU), the UCITS Directive (ex Directive 85/611/EEC, ex Directive 2005/55/EC, Directive 2009/65/EC) and other measures (Directive 2003/41/EC) in place, it is rather difficult for the Member States to maintain that a national derogation from EU obligations is necessary so as to ensure that cross-border establishment and effective cross-border fiscal supervision are both ensured in the Single Market. The same observations apply in connection with capital movements between

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[675] para. 134, *C-467/98 Commission v Denmark; para. 130, C-469/98 Commission v Finland; para. 134* -472/98 Commission v Luxembourg
[676] Dourado and da Palma Borges (2008), 113.
[677] See Case C-250/95 Futura.
[678] OECD Convention on mutual administrative assistance in tax matters
[679] 18 Case C-254/97 Baxter Para. 31, *Case C-250/95 Futura,*
[680] Para. 56, Case C-347/04 Rewe Zentralfinanz

third States and the EU Member States where international instruments may be available to address cross-border fiscal supervision issues.

The lack of an EU legislative framework may have the opposite impact on the ability of Member States to act with a view to ensuring effective fiscal supervision. In *Futura*, the Court of Justice having regard to the standing of EU law at that time and to the lack of harmonization measures relating to the determination of the basis of assessment of direct taxes, accepted that the only way the objective pursued by the Member State concerned can be achieved is empowering in law the national authorities to carry out the necessary checks on the basis of the relevant national tax rules.[681]

In this framework, the Member States are prevented from defending under this ground, and, as a consequence, they are unable to introduce and maintain the administrative and other arrangements listed below.

The national tax authority checking whether the legal forms of entities constituted under the law of other Member States are equivalent to those recognized in national law,[682]

- the availability of EU tax legislation to address cross-border information exchanges makes the exercise of Member State powers illegitimate.[683]

Denying non-resident taxpayers the opportunity to submit evidence in order to clarify their tax status and their tax burdens.[684]

Under this ground, in complex cross-border taxation arrangements (e.g., capital movements between parent companies and subsidiaries for the purpose of tax optimization) the Member States are entitled to apply measures which enable establishing whether a tax advantage should be provided (ascertaining 'clearly and precisely' the amount of deductible charges).[685] They may also demand from tax subjects evidence which they consider necessary in order to determine whether the tax advantage should be provided,[686] especially when the parent company is in a position to demand 'all the necessary documents' from its subsidiaries.[687] This, however, does not mean that the Member States would be able to resort to

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[681] Paras, 32-33 *Case C-250/95 Futura*The Treaty provision on a degree of coordination of the rules relating to the annual accounts of certain companies and firms were not found relevant as those rules do not affect the assessment of tax obligations and do not provide sufficient guarantees, paras. 34-35.
[682] para. 22, C-1/93 Halliburton
[683] para. 22
[684] INFRA
[685] Para. 55, Case C-347/04 Rewe Zentralfinanz
[686] Para. 57, Case C-347/04 Rewe Zentralfinanz
[687] Para. 58,

differentiated tax treatment according to whether the tax subject is established in the Member State concerned or in another Member State.[688]

5.2.1.5 Combatting tax avoidance and tax evasion

Specific and targeted measures

This ground, which is linked to the previous ground of ensuring effective fiscal supervision,[689] enables the Member States to defend measures aimed specifically at preventing and combatting illegal tax avoidance and tax evasion practices in cross-border situations. Through accepting the justifiability of Member State restrictions, economic operators are prevented from using freedom of establishment to engage in practices of tax avoidance or tax evasion (especially, to use significant disparities between the basis of assessment or rates of tax applied in the different Member States so as to avoid the tax normally due in the resident Member State).[690] It is notoriously difficult to secure derogation under this ground as the Member States are expected to produce specifically targeted measures which are suitable to achieve this particular aim.[691] The national measure in question must have the specific purpose of preventing wholly artificial arrangements, set up to circumvent domestic tax law, from attracting benefits, and it cannot be a measure applying generally certain tax situations which may or may not lead to tax avoidance.[692] This approach follows from the fact that this ground may be difficult to distinguish from objectives deemed illegitimate under EU law, such as pursuing the general economic and fiscal interests of the Member State concerned or avoiding the diminution of domestic tax revenue.

According to long-standing case law, the fact of establishment in another Member State, or the transfer of tax residence to another Member State alone does not enable the Member States to make assumptions in law that tax evasion or tax fraud has been committed.[693] Such possibility would contradict the purpose of freedom of establishment, and it is likely to be without any real justification considering that the tax subject will be subject

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[688] Para. 55, Case C-347/04 Rewe Zentralfinanz

[689] As the grounds may overlap, the same legal test of specifically designed national measures can be applied under both grounds, Para. 60, Case C-436/00 X and Y Para. 50, Case C-9/02 Lasteyrie du Saillant

[690] paras. 47-48, Case C-446/03 Marks & Spencer (using losses twice in an international group to avoid taxation). Contrast with paras. 47-48, Case C-347/04 Rewe Zentralfinanz

[691] Para. 26 Case C-264/96 ICI; Paras. 58-59, Case C-196/04 Cadbury Schweppes, the measure 'makes it possible to thwart' illegal practices

[692] Para. 26 Case C-264/96 ICI applies generally to all situations where subsidiaries are established in another MS, and tax avoidance is not an inevitable element as establishment abroad entails falling under the tax jurisdiction of another Member State. Para. 52 Case C-347/04 Rewe Zentralfinanz

[693] Para. 62, Case C-436/00 X and Y Para. 50, Case C-196/04 Cadbury Schweppes Para. 51. Case C-9/02 Lasteyrie du Saillant; Para. 58, Case C-150/04 Commission v Denmark (investment in a foreign pension scheme)

to the tax jurisdiction of the new Member State.[694] The Member States must also be prepared to prove that the transaction concerned included abusive elements and that the transaction was not based on genuine and valid circumstances.[695] The existence of 'significant and continuing losses' incurred by foreign subsidiaries in a particular sector will be insufficient to establish that purely artificial arrangements designed to enable tax avoidance are in place.[696]

The failure of the Member State concerned to meet the requirement of relying on specifically targeted measures also indicates that the restriction imposed is excessive.[697] The overly general nature of the national restriction will inevitably lead to demands for achieving the objective by means of less restrictive and better targeted or specified measures, which relate 'specifically to the risk' inherent in the cross-border transaction involved.[698] Such assessments may involve elements which are normally examined under the proportionality test, such as the restrictive nature of the penalties applied, or the strict formal and material conditions applicable.[699]

The case law distinguishes between wholly artificial arrangements designed to circumvent the national tax system and lesser forms of tax avoidance with a lower degree of artificiality.[700] Purely artificial arrangements are arrangements which are 'devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory'.[701] The conditions of national measures capable of being justified under the ground of combatting tax avoidance and tax evasion were developed in connection with these latter tax arrangements: the anti-avoidance (-evasion) measure must be suitable and specifically targeted.[702] In the Court of Justice's interpretation, specifically targeted means that the measure must not regulate in general any situation that may arise in a taxation scenario[703] (they may not be as widely formulated so that they cover situations which do not involve tax avoidance).[704] In particular, the measure must enable 'the amount owed by taxpayers to be ascertained clearly and precisely.'[705] National measures which are not specifically designed to address purely artificial arrangements (e.g., general prohibitions in tax law (on offsetting losses)) may, however, be justified in case they fall

[694] Para. 52 Case C-347/04 Rewe Zentralfinanz
[695] para. 38, Case C-324/00 Lankhorts-Hohorst
[696] Para. 51. Case C-347/04 Rewe Zentralfinanz
[697] Para. 52. Case C-9/02 Lasteyrie du Saillant
[698] Para. 54 Case C-9/02 Lasteyrie du Saillant
[699] Para. 56
[700] Paras. 47-48, Case C-464/03 Marks&Spencers
[701] Para. 66, Case C-311/08 SGI.
[702] Para. 65, ibid; para. 61, Case C-322/11, K.
[703] para. 62, Case C-322/11 K.
[704] Paras. 15-16, Case C-175/88 Biehl ECLI:EU:C:1990:186.
[705] Para. 35, ibid.

under this justification and the ground concerning the balanced allocation of tax powers between the Member States.[706]

There is a clear connection – suggesting practices of good regulation and administration – between the requirements that the Member States must avoid making general presumptions that certain transactions will lead to tax avoidance and that the Member States must address tax avoidance in the form of 'purely artificial contrivances, the aim of which is to circumvent tax law' by specifically targeted measures.[707] This, as well as the presence of the individual conditions in the jurisprudence, follows from the general requirement that restrictions on freedom of establishment must satisfy the requirements of necessity and proportionality.

Regarding the ability of the Member States to address the taxation arrangements of international company groups aiming to optimize their tax burdens, the jurisprudence has provided a number of important benchmarks. In *Marks & Spencer*, the Court of Justice accepted that the Member States may indeed prevent taxpayers to use the differences among national tax system to avoid tax burdens in the circumstance when they aim to use losses twice under different national tax legislation.[708] This situation was distinguished from that in *Cadbury Schweppes* where the Member State concerned was prevented from offsetting the tax advantage gained by exercising the right of establishment in a low taxation Member State by a less favorable tax treatment of the parent company as that intervention was declared to pursue the aim of preventing the reduction of tax revenue.[709] As to the question whether the transaction in question constituted a wholly artificial arrangement 'which does not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory', the Court of Justice decided, on the basis of the jurisprudence developed in *Centros*, to prepare the analysis of the derogation raised by focusing on the objectives of freedom of establishment and their relationship with the national instrument in question.[710] Having defined the objective of freedom of establishment as ensuring integration in the host Member State,[711] the judgment continued with holding that the national measure must be adequately targeted at the illegal practices in question[712] and arguing, in particular, that in order to establish that there is

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[706] Para. 66, Case C-311/08 SGI. Para. 56, Case C-196/04 Cadbury Schweppes

[707] See paras. 50-53, C-347/04 Rewe Zentralfinanz; paras. 35-38, C-433/04 Comission v Belgium.

[708] Supra n.

[709] Para. 49, Case C-196/04 Cadbury Schweppes (an artificial transfer by a resident company of profits from the Member State in which they were made to a low-tax State by means of the establishment of a subsidiary in that State).

[710] Para. 52. Case C-196/04 Cadbury Schweppes

[711] paras. 53-54,

[712] Paras. 61-63, Case C-196/04 Cadbury Schweppes

an artificial arrangement prepared to enable tax avoidance 'there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment (…) has not been achieved.'[713] In this regard, it has particular relevance whether the exercise of freedom of establishment 'reflects economic reality' meaning that establishment in the host Member State is initiated with an intention to carry on genuine economic activities in that State.[714] This needs to be established on the basis of 'objective factors' which are ascertainable with regard to the extent the company in the host Member State 'physically exists in terms of premises, staff and equipment'.[715] Conversely, establishing a 'letterbox' or a 'front' subsidiary in the host Member State indicates that a wholly artificial arrangement might have been put in place in the meaning of Article 49 TFEU.[716] Nevertheless, this alone is insufficient to establish that the companies involved engaged in tax avoidance and Member State authorities must provide an opportunity to the taxpayer concerned, 'which is best placed for that purpose' to produce evidence that the company in question is actually established and its activates are genuine.[717] Also, the national authorities must resort to the EU instruments available for collaboration and information exchange to ensure that the necessary information is obtained from the Member State concerned,[718] and they must rely on the double taxation agreement in force between the Member States concerned.[719] Ultimately, it is for the national court to established whether on the basis of a 'motive test' the differentiated tax treatment is compatible with EU law, despite absence of objective evidence such as to indicate the existence of a wholly artificial arrangement enabling the avoidance of national taxation.[720]

In the context of investigating tax fraud and abuse in cross-border taxation arrangements, the case law has reached back to the *Centros* principle concerning the abusive uses of freedom of establishment. It held, in particular, that 'the national courts may, case by case, take account - on the basis of objective evidence - of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, but they must nevertheless assess such conduct in the light of the objectives

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[713] Para. 64,
[714] paras. 65-66
[715] Para. 67.
[716] Para. 68
[717] Paras. 69-70
[718] Para. 71
[719] Para. 71
[720] Para. 72. Case C-196/04 Cadbury Schweppes

pursued by those provisions'.[721] In this regard, it observed that general and categorical prohibitions in national legislation do not enable the national courts making such a case-by-case analysis having regard to the particular features of each case.[722] The national measure will be looked upon more favorably when it related to the exercise of the right of establishment as a consequence of which, it cannot, in itself, constitute an abuse of the freedom of establishment.[723]

5.2.1.6 The exercise of official authority

This Treaty-based exemption enables the Member States to maintain nationality requirements in a considerably large segment of the national economy. As a result, similar to the jurisprudence on the public policy and public security grounds, Member States relying on this exemption are confronted with a narrow interpretation of the ground from the Court of Justice.[724] It held that the exemption 'cannot be given a scope which would exceed the objective for which' it was inserted into the Treaties,[725] and that it must be interpreted in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect.[726] On this basis, the exclusions may relate to activities and functions which actually imply the exercise of official authority, and whole professions may only be excluded when the entire activity is dedicated to the exercise of official authority, or if the part that is dedicated to the exercise of public authority is inseparable from the rest. The law, however, recognizes the competences of the Member States in this regard as the exemption is for each Member State to regulate, subject to meeting obligations under Article 49 TFEU, in the context of establishing rules for the organization and practice of professions.[727]

For Member States to rely on this ground legitimately, their measures and actions must fulfil benchmarks that are similar to those which follow from the principle of proportionality. In particular, they must be adequately targeted which means that they must be limited to those activities 'which, taken on their own, constitute a direct and specific connexion with the exercise of official authority.'[728] Furthermore, as stated earlier in case it is possible to

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[721] Para. 42, Case C-436/00 X and Y
[722] Para. 43.
[723] Para. 44.
[724] 'Although it is for each Member State to determine the role of, and the responsibilities attaching to, official authority', in light of the general interpretative approach on the derogations, this alone does not entail that the derogation concerning the exercise of official authority could be invoked successfully, para. 9147/86 Commission v Greece
[725] Para. 43, Reyners
[726] Para. 34, Case C-114/97 Commission v SPain
[727] Para. 49, Reyners
[728] Para 45 Reyners. EU law may, however, interfere by interpreting matters, such as that the *concept of employment in the public service does not encompass employment by a*

separate these activities from the professional activity 'taken as a whole', the exclusion of non-nationals must be limited to the functions which actually involve the exercise of official authority.[729] An entire profession may only be excluded when the functions involving the exercise of official authority 'were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.'[730] The requirement of relying on less restrictive alternative measures may also form part of the assessment of the legitimacy of raising this ground.[731]

The 'direct and specific connection' clause[732] in the test laid down in the jurisprudence provides perhaps its most crucial element. The Court of Justice has held that

- activities of technical nature (here, design, programming and operation of data-processing systems);[733]
- activities that 'does not involve any transfer of responsibility' for the various activities inherent in the public task at issue, or a 'transfer of public functions' to the person concerned;[734]
- activities which leave the exercise of public powers and the discretion inherent in their exercise intact (here, judicial power and discretion inherent within judicial authority;[735]
- activities that 'are not directly and specifically connected with the exercise of official authority', but prepare for or facilitate the accomplishment of the tasks for which the public authority in question is responsible;[736]
- activities which are carried out on the basis of relations governed by private law, do not entail by law the genuine exercise of official authority, but merely contribute to achieving a public interest objective (here, public security, and which are clearly distinguished in legislation from those carried out by services exercising official authority;[737]

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private natural or legal person, whatever the duties of the employee, Case C-283/99 Commission v Italy.*para 25*

[729] Paras. 44 and 47 Reyners

[730] Para 46 Reyners

[731] Para. 10, 147/86 Commission v Greece, the national authorities in question 'have at their disposal appropriate means for ensuring (…) the protection of interests entrusted to them, without there being any need to restrict the freedom of establishment for that purpose'.

[732] the activities exercised 'entail direct and specific participation in the exercise of official authority' as specified in national law, para. 9, C-42/92 Thijssen

[733] para. 13, 3/88 Commission v Italy para. 8-11, C-272/91 Commission v Italy

[734] para. 8-11, C-272/91 Commission v Italy

[735] paras 52-53 Reyners. See also para. 7, C-306/89 Commission v Greece

[736] Para. 47-48, Case C-451/03 ADC Servizi

[737] Paras. 36-38, 97 Commission v Spain CLI:EU:C:1998:519, private security firms. Cofirmed in C-355/98 Commission v Belgium

may not be accepted as having that connection with the exercise of official authority.[738]

In case of certain positions linked to the exercise of public powers, the establishment of a direct and specific connection requires a careful examination of the competences and roles associated with the position. In *Thijssen*, concerning the position of insurance commissioner (internal auditor) in Belgium, the Court of Justice took into account, on the one hand, that the commissioner is approved by national regulatory authority which exercises official authority, oversees the lawfulness of the operation of insurance companies and audits their finances, makes a report to the regulatory authority on these matters, and also has veto powers on certain business decisions. On the other, the commissioner is appointed freely by the insurance company, remunerated by that company, enjoys the confidence of both the insurance company and regulators, the reporting powers are not connected with the exercise of official authority, and its veto powers are limited and they do not bind the regulator which takes the final decisions and measures. On this basis, the Court of Justice concluded that the functions of the commissioner are only auxiliary and preparatory in connection with the functions exercised by the national regulator and, thus, have no direct and specific connection with the exercise of official authority[739]

5.2.1.7 Abusing freedom of establishment

As it follows from the *Centros* principle, the Member States may have a legitimate interests in preventing certain of their nationals from attempting wrongly/improperly or fraudulently to evade, 'by means of facilities created under the Treaty', the application of their national legislation.[740] As in case of *Marks & Spencer* and *Cadbury Schweppes*, this is distinguished in the case law from the Member States aiming to prevent individuals exercising their right to establishment in order to find more favorable regulatory and taxation conditions for the economic activities pursued by them, which restrictions the Member States, as a principle, unable to justify under a derogation.[741] The availability of EU legislation determining the conditions of how rights under EU law may be exercised (e.g., determining for the purpose of establishing training and qualifications the periods during which the given

[738] The powers the members of the given profession do not have, but may assume to be entitled to exercise are irrelevant (private security guards and their practice of 'arresting' individuals), para. 21, Case C-283/99 Commission v Italy
[739] paras. 19-22, C-42/92 Thijssen
[740] Par. 25 Knoors; para. 14 61/89 Bouchoucha centros 24. 136 Inpsire art

[741] para. 26 Centros; para. 13, Inspire Art

activity must have been pursued) may alone exclude the risk of such an abuse.[742] The Court of Justice made it clear that it is open for the Council to remove the causes of any abuses of law by arranging for harmonization.[743]

[742] Para. 26 Knoors
[743] Para. 27 Knoors

5.3 The necessity/proportionality of the restriction

Member State exemptions from Article 49 TFEU need to be necessary and proportionate.[744] In instances, where the legitimacy of the ground raised, such as those relating to national fiscal (tax) policy, is subjected to an intensive scrutiny under EU law, this element of the legal test may receive less emphasis. Often, the examination of legitimacy would cover questions which relate to the necessity of the restriction. In other cases, mainly involving regulatory measures addressing the mobility of individuals under freedom of establishment,[745] the legal examination of the interference as a whole is geared towards establishing its necessity and proportionality. The relevant jurisprudence of the Court of Justice has produced a number of benchmarks and signposts for Member State policy making and regulation. Some of these interfere with Member State decision-making intensively, especially when the availability of less restrictive alternative means is examined.[746] Even in this latter case, the restrictive impact arising from EU law for national governments can be more limited when the national measure in question is adequately targeted, precisely regulated and the discretion made available to the executive is duly delimited.[747] In some instances, the ultimate assessment of the matter will be deferred to the national level allowing the national court proceeding in the case to assess and determine the proportionality of the interference in light of the circumstances of the case.[748]

The intensity of the scrutiny and the weight of the benchmarks and signposts imposed can be significantly diminished in case the ground raised by the Member State concerned involves matters, which because of obligations arising under the subsidiarity principle and the requirement of respecting diversity within the Union, are considered to fall within Member State competences. For instance, in *Auer* the Court of Justice accepted rather readily the proportionality of requirements of registration with and membership in a professional organization or body as those were introduced in national competences with the intention of ensuring 'the observance of moral and ethical principles and disciplinary control of the activity of professionals'.[749] However, as it follows from the general principle

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[744] They must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it, para. 37 Gebhard. para. 26, C-101/94 Commission v Italy, the restriction at issue must be indispensable for achieving the aims in question and must be justifiable from the point of view of those aims. para. 32, C-106/91 Ramrath, they are 'objectively necessary'

[745] Example for tax??

[746] In particular??

[747] para. 40, VALE; para. 30, Sevic

[748] Pl.

[749] para 18, 271/82 Auer

discussed earlier,[750] the judgment reminded the Member State concerned that the minimum benchmark of observing the fundamental principles of EU law and the requirement of non-discrimination must be fulfilled.[751] The limited nature of the EU judicial scrutiny may also follow from the particular principles applied, such as those of the requirement of equivalence and effectiveness of national procedures and remedies, where the impact of EU law on national legal arrangements is constrained intentionally by the autonomy enjoyed by the Member States in this regard.[752]

The legal benchmarks and signposts confining Member State action are presented in the next pages.

There were instruments available in EU law to ensure that the aim pursued by the Member State concerned is achieved

The Member State cannot rely on the difficulties of collecting information in a cross-border situation in order to justify a restriction, when EU measures are available to ensure mutual assistance and cooperation in cross-border taxation matters (Directive 77/799/EEC),[753] when there are EU measures offering substantive protection,[754] EU measures designed to achieve the public interest aim (protection of creditors: EU company law directives),[755] or EU measures enabling cross-border debt recovery and execution of foreign judgments within the Union;[756]

- the fact that it does not impose an obligation on the tax authorities of Member States to collaborate cannot justify restrictions as there is nothing to prevent the national authorities from demanding from the person involved any proof considered necessary and imposing the restriction only when such proof is not forthcoming;[757]

- the difficulties connected with the exchange of information under Directive 77/799, insofar as it does not permit the effective verification of compliance with the legal provisions in question cannot justify restrictions.[758]

There were other instruments available (e.g., a bilateral assistance

[750] supra com pamtter
[751] para 19, 271/82 Auer and Para 9, Rienks, here, cannot be penalized for non-registration when registration was refused in violation of the Treaties
[752] paras. 55-57 and 59-60 VALE, it does not exclude the consideration of factors normally associated with the necessity/proportionality test, such as the impact of the restriction on the person concerned, the failure of the Member State to explain the restriction, or the general nature of the restriction which made it impossible for the person concerned to take part in the procedure.
[753] para. 26, C-80/94 Wielockx; Para. 33 C-355/98 Commission v Belgium (also a less restrictive instrument) Para. 41. *Case C-250/95 Futura* Para. 56, Case C-347/04 Rewe Zentralfinanz Para. 52, Case C-150/04 Commission v Denmark
[754] Para. 36, Centros
[755] Para. 135, Case C-167/01 Inspire Art
[756] Para. 43, C-514/03 Commission v Spain
[757] Para. 54, , Case C-150/04 Commission v Denmark
[758] Paras. 55

agreement, powers available to the regulator (to compare national and foreign rules), cooperation between national authorities) to ensure that the aim pursued by the Member State concerned is achieved[759]

The national regulator is empowered to carry out the necessary examinations in order to determine whether the guarantees required from financial service providers by other Member States are acceptable for the host Member State;[760]

National law puts local authorities in a position to check whether contributions have actually been paid by a taxpayer to an institution established in another Member State, and individuals are obliged to inform tax authorities of investments made abroad;[761]

The measures applicable in the Member State of registration, of which potential creditors are informed, enable achieving achieve the public interest aim (protection of creditors).[762]

The Member State have competence to regulate the matter (professional rules) by using diverse means capable of ensuring that the public interest objective (the proper practice of professions) is achieved (overlap with less restrictive measures available)

- which makes the use of territorial limitations (single establishment/location of practice rule) unacceptable.[763]

The freedom of movement enables that the public interest objective is realized.[764]

There were less restrictive measures available to the Member State concerned to achieve the aim pursued,[765]

Action and measures at the national level:

- instead of prohibition, it can actually be established that the different national methods ensure equivalent protection overall, despite the differences between them;[766]
- the objective may be achieved by measures adopted and action followed by the other Member State involved,[767]
    - instead of imposing criminal penalties to combat fraud, it

[759] para. 25, C-80/94 Wielockx (fiscal cohesion).
[760] para. 16, C-101/94 Commission v Italy
[761] Para. 53, Case C-150/04 Commission v Denmark
[762] Para. 135, Case C-167/01 Inspire Art
[763] Para. 21 Klopp
[764] para. 27, Case C-152/05 COmmision v Germany 'In point of fact, the objective of satisfying demand for housing is just as easily attained if the person liable in Germany to unlimited taxation of income chooses to establish his residence in another Member State rather than in Germany'
[765] 108 case C-309/99 wouters, there is absolutely no other way in the domestic regulatory environment to achieve the result, even though such prohibitions in other Member States are not followed.
[766] para. 17, C-101/94 Commission v Italy
[767] Para. 38 Centros here, in the context of cross-border establishment of companies)

may be sufficient that the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, which may be for the national court to assess;[768]

- the objective may be achieved by means of cooperation between national authorities.[769]

The use of market-friendly solutions:

- instead of prohibition, the necessary guarantees for creditors can be obtained;[770]
- creditors can be protected by means other than imposing a requirement of being established as a legal person;[771]
- creditors can be protected by means other than imposing minimum share capital requirements, such as setting up an guarantee or taking out an insurance contract;[772]
- creditors can be protected by means other than company law restrictions, such as lodging security or taking out insurance, individually or cumulatively;[773]
- instead of prohibition, consumers may be given a choice between different services enabling the economic operator to compete in the market with the means deemed suitable by him;[774]
- instead of prohibiting the separation of an activity from the rest of the activities covered by the profession in question in the host Member State, the fear of potential harm to the recipients of services and to consumers may be addressed by less restrictive means, such as the obligation to use the professional title of origin or the academic title both in the language in which it was awarded and in the official language of the host Member State;[775]
- instead of limiting the establishment and the operation of specialized shops (here, optician),
    - the presence of qualified, salaried staff or associates in each shop can be required;
    - rules can be developed concerning civil liability for the

[768] 73, Case C-243/01 Gambelli
[769] Para. 33 C-355/98 Commission v Belgium
[770] Par. 37 centros
[771] Para. 43, Case C-171/02 Commission v Portugal
[772] Para. 55, Case C-171/02 Commission v Portugal
[773] Para. 37, C-514/03 Commission v Spain
[774] Para. 22, Case C-442/02 Caixa-Bank France
[775] Para. 38

actions of others;

- or a requirement of professional indemnity insurance can be introduced;[776]

Alternative administrative arrangements:

- instead of restriction, an obligation can be imposed on taxpayers to provide documentary evidence when applying for a deduction or exemption,[777]
  - those documents will be available as a normal course of events, and can be used at later stages;[778]
- the tax authorities are entitled to demand from the parent company the necessary evidence concerning the operation of its subsidiaries;[779]
  - such a possibility is especially useful in a situation when the parent company is in a position to demand all the necessary documents directly from its foreign subsidiaries, and
  - the difficulties in determining the financial and the taxation of foreign subsidiaries are irrelevant;[780]
- taxpayers should not be excluded *a priori* from providing relevant documentary evidence so as to enable the tax authorities of the Member State concerned to impose a tax burden to ascertain, clearly and precisely, the nature and genuineness of the facts claimed by the taxpayer;[781]
  - taxpayers should be allowed to provide clear and precise evidence, without resorting to the means provided in national law, to the national tax authority, instead of keeping an account in that Member State, especially when domestic tax rules are rather law on the accounting of domestic economic activities;[782]
  - the national measure must not prevent taxpayers 'absolutely' from submitting evidence as to their tax status and burdens.[783]

Alternative administrative supervision arrangements:

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[776] Para. 35, Case C-140/03 Commission v Greece
[777] Para. 56 Case C-150/04 Commission v Denmark
[778] Para. 57, applications for tax deductions or exemptions, and the documentary evidence provided at that time
[779] Para. 57, Case C-347/04 Rewe Zentralfinanz
[780] Para. 58,
[781] para. 20
[782] Para. 37-40 *Case C-250/95 Futura*
[783] para. 19 Case C-254/97 Baxter (here, that the expenditure relevant for national tax law has actually been incurred in another MS)

- instead of a requirement of having local representatives, so that a link is maintained with the actual owner, it is sufficient to provide that the management of the ship must be carried out from a place of business in the Member State concerned by a person with powers of representation;[784]

- instead of a requirement of nationality, considering that the possibility for a State to exercise its jurisdiction over a person depends primarily on the practical accessibility of the person concerned and not on his nationality (or residence),[785] it is sufficient to provide that that the management of the ship must be carried out from a place of business in the Member State concerned by a person with powers of representation;[786]

- instead of imposing a place of residence requirement on the managers of companies, checks can be carried out or penalties can be imposed;[787]

- the registered office requirement is the only means of ensuring effective supervision and sanctioning by financial services regulator,[788]

    - although there may be a number of less restrictive alternatives, such as[789]

        - agreeing to be subject to checks,

        - agreeing to supply documents and information to ensure that they satisfy national requirements,

        - supplying documents and information relating specifically to their activities in the Member State concerned,

        - local legal provisions concerning the provision of financial guarantees can be enforced in case the solvency of operators is doubted,

        - concluding cooperation agreements regarding the supervision of markets;

- instead of preventing foreign companies active in the regulated markets of other Member States from obtaining licenses in the interest of controlling criminal and fraudulent activities, it may be suitable to introduce means for checking the accounts and activities of such companies, which may be for the national court to determine.[790]

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[784] Para. 25 Case C-299/02 Commission v the Netherlands
[785] Para. 36, Case C-299/02 Commission v the Netherlands
[786] Para. 36, Case C-299/02 Commission v the Netherlands
[787] Para. 34
[788] para. 20, C-101/94 Commission v Italy
[789] paras. 21-24 C-101/94 Commission v Italy
[790] 74-75, Case C-243/01 Gambelli

Alternative quality arrangements:

- instead of absolute territorial limitations (a single location of practice rule), minimum attendance rules or rules of replacement may be sufficient;[791]

- confidential data can be protected, other than restricting contracting with State or public-owned companies, by imposing duty of secrecy on staff of the companies concerned and by threatening its breach by criminal sanctions.[792]

The measure was excessive

It raised 'obstacles to access to the profession' which went beyond what is necessary.[793]

It was generally overly restrictive.[794]

It imposed excessive burdens on nationals of another Member State.[795]

It imposed a mandatory scale of charges (which must actually exist)[796] and it used a specific and unconditional prohibition of derogation from the mandatory scale,[797]

- it may be assessed differently when the scale of charges was based on an indication contained in a non-binding instrument and was described as a recommendation, which simply requests that objective and uniform parameters are set for the charges by economic operators.[798]

Not accepting declarations obtained from one territorial authority before another territorial authority,[799]

- this finds support in the general principles concerning national systems of prior authorization holding that they must be based on objective criteria which are non-discriminatory and known in advance by the persons concerned.[800]

The supervision carried out by public authorities was 'by no means dependent' on the restriction imposed.[801]

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[791] para. 22 -351/90 Commission v Luxembourg
[792] para, 11, 3/88 Commission v Italy
[793] para. 14 C-351/90 Commission v Luxembourg
[794] para. 40 VALE; para. 30, Sevic
[795] See Chouqet paras 7-8
[796] para. 75
[797] para. 74, Case C-134/05 Commission v Italy
[798] ibid.
[799] paas. 61-62, Case C-134/05 Commission v Italy
[800] para. 63
[801] para. 65, Case C-134/05 Commission v Italy

Imposing blanket prohibitions concerning an economic activity.[802]

Imposing penalties in breach of EU law which would render the provisions of EU law (the exercise of the right of establishment) 'wholly ineffective'.[803]

Imposing criminal penalties when the economic operator had no way of being able to obtain the licenses or police authorization required under national legislation because, contrary to EU law, the Member State concerned made the grant of police authorizations subject to possession of a license and, at the time of the last tender procedure in the case which is the subject of the main proceedings, had refused to award licenses to companies quoted on the regulated markets.[804]

The application of police/administrative authorizations (*ex ante* controls) and ongoing supervision, in the specific case when the obtaining of the license, which is the condition of securing a police authorization, was unlawfully excluded by national authorities,[805]

- the lack of a police authorization cannot, in any case, be a valid ground for national procedures in respect of persons who were unable to obtain authorizations because the grant of an authorization presupposed the award of a license, which, contrary to EU law, those persons were unable to obtain.[806]

Exclusion from participation in tendering procedures (for gambling and betting licenses)

- even if the exclusion from tender procedures is applied without distinction to all companies quoted on the regulated markets which could be interested in those licenses – regardless of whether they are established in Italy or in another Member State – in so far as the lack of foreign operators among the licensees is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for companies quoted on the regulated markets of other Member States to obtain licenses,[807]

- blanket exclusions are nearly undefendable as there are less restrictive alternatives, such as the possibility of gathering information concerning their representatives or their main shareholders,[808]

- in the absence of a procedure for the award of licenses which is open to operators who have been unlawfully barred from any possibility of obtaining a license under the last tender procedure,

[802] Para. 23, Case C-442/02 Caixa-Bank France
[803] para 18, 271/82 Auer
[804] Para. 70, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica
[805] Paras. 66-67 Joined Cases C-338/04, C-359/04 and C-360/04 Placanica
[806] Para. 67 Joined Cases C-338/04, C-359/04 and C-360/04 Placanica
[807] Para. 48, Gambelli; para. 60, Joined Cases C-338/04, C-359/04 and C-360/04 Placanica
[808] Para. 62

the lack of a license cannot be a ground for the application of sanctions to such operators,[809]

- national measures and procedures available or introduced to remedy the violation of rights may lead to a different outcome under EU law, in particular where markets were barred from economic operators.[810]

Precluding any examination by the national authorities and, consequently, any possibility of recognition of degrees awarded in circumstances like those in the main proceedings.[811]

Precluding any other form of evidence which might establish with the same degree of certainty the existence of the diploma in question, such as a certified statement or recognition of the applicant's diploma by the authorities, or professional organizations of the Member State of origin.[812]

The fact that EU law itself lays down the same condition in secondary law does not change the circumstance that 'while conditions of Community or EEA nationality might be accepted in the context of a harmonized Community scheme, they cannot be established unilaterally by the Member States in their national rules'.[813]

The general application of administrative authorization procedure in the host Member State to foreign undertakings is not in itself contrary to EU law as, in the event of establishment in another Member State, an undertaking is in principle required to meet the same conditions as apply to nationals of the host Member State; the failure to provide for in those procedures the possibility of taking into account the requirements already met by individual members of the staff of those undertakings in their Member State of origin is, however, unacceptable.[814]

Imposing a criminal penalty (potentially excessive) for an activity which uses the internet to connect to locally intermediaries, when involvement in the economic activity in question (betting and gaming) is encouraged in the context of games organized by licensed national bodies, but for national court to examine.[815]

The national measure was too absolute and too general in nature,[816]

- it is not essential that specialists (in special medical care) practice from a given location on a continuous basis, especially

[809] Para. 63.
[810] Para. 63,
[811] Para. 49, Case C-153/02 Neri
[812] para. 39, *Case C-298/99 Commission v Italy*
[813] Para. 24 Case C-299/02 Commission v the Netherlands
[814] Para. 57, C-514/03 Commission v Spain
[815] 72, Case C-243/01 Gambelli
[816] Para. 14, 96/85 Commission vFrance para. 19, C-351/90 Commission v Luxembourg

when the treatment has been given (single location of practice requirement);[817]

- it is not essential in light of 'recent developments in the medical profession' even in general medical care that patients have access always to the same general practitioner;[818]

- it is essential for general or even specialist medical practitioners and veterinary surgeons to be close to patient or client all the time.[819]

The national tax measure went beyond 'what is necessary to attain the essential part of the objectives pursued',

- the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and

- there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.[820]

- Rejects the possibility of less restrictive alternatives as 'such measures in any event require harmonization rules adopted by the Community legislature',[821] and calls attention to the Member States to the possibility of alternative means on the basis of their competence: to adopt or to maintain in force rules having the specific purpose of precluding from a tax benefit wholly artificial arrangements whose purpose is to circumvent or escape national tax law.[822]

The measure was inappropriate (can be interpreted both as excessive and unsuitable)[823]

The complete exclusion of director of a company formed under the law of another Member State from the national sickness benefit scheme.[824]

The national rule referring to a majority of subsidiaries when only one non-resident subsidiary is enough to create the risk of tax avoidance.[825]

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[817] Para. 13, 96/85 Commission vFrance
[818] ibid
[819] para. 22 C-351/90 Commission v Luxembourg
[820] Para. 55, Case C-446/03 Marks & Spencer
[821] Para. 58,
[822] Para. 57.
[823] the measure in question must be able to achieve the objective claimed (offer additional social security para. 15, 143/87 Stanton para. 13 C-53/95 Kemmler
[824] Par. 17 79/85 Segers

The benchmark established for the condition imposed in national legislation is counterproductive as the need for protection (of the public interest ground raised) just increases with undertakings falling above the benchmark.[826]

Territorial limitation of licenses or a requirement of residence in the territories for which a license issued cannot *a priori* be considered as inappropriate for achieving the objective of effective supervision of the economic activity at issue.[827]

The measure is appropriate when it is justified by or it corresponds to factual circumstances.[828]

Member State action will be appropriate when national authorities distinguish between different situations which may arise under the national regulatory framework,[829]

- national authorities and courts must proceed in the different situations with a different level of care so as to avoid their intervention to be classified as disproportionate,[830]
- on this basis, it is for the national authorities to determine whether the professional activities which the person concerned wishes to pursued should be separated from the rest of the activities covered by the corresponding profession in that State, subject to the criteria of assessment whether the activity in question 'may be pursued, independently or autonomously, in the Member State where the professional qualification in question was obtained.'[831]

The measure was unnecessary (overlap with excessive)

The State has sufficient legal powers at its disposal to address future and unforeseeable events and to ensure compliance with general interest objectives, and, thus, there was no need to restrict contracting to carry out a certain activity to State- or public-owned companies.[832]

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[825] Para. 27
[826] Para. 37.
[827] para. 59 Case C-134/05 Commission v Italy
[828] Paras. 39-40 Case C-451/03 ADC Servizi, simple activities which do not require specific professional qualifications cannot be limited solely to persons holding a particular professional qualification
[829] Para. 33, Case C-330/03, CICCP (when the authorities of a Member State are presented with an application for recognition of a professional qualification awarded in another Member State and when the difference in content of the education or training or in the activities covered by the profession in question in the two States prevents full and immediate recognition).
[830] Paras. 34-36
[831] Para. 37.
[832] para, 11, 3/88 Commission v Italy

The obligation to provide an official translation of all documents and the obligation to provide a certificate of nationality (plainly unnecessary).[833]

Territorial limitation (single location of practice requirement) unnecessary from the perspective of enforcing rules of professional ethics.[834]

It must at least be reasonably necessary in the context of the case: it ensures that professional rules can be maintained.[835]

Compliance with national professional rules it is not 'objectively necessary' when the activity can be carried out by a professional (here, auditor), while established and authorized to practice in another Member State, is temporarily in the service of an natural or legal person authorized to practice as an auditor by the authorities of the Member State in which that audit is carried out,[836]

- compliance with the national rules is ensured that the professional practices under contract with the locally established person.

National measures may be necessary when required under international obligations, but that must be established.[837]

The measure must be suitable to achieve its aim

Nationality and residence requirements may be unsuitable to achieve the declared aims,

- it is 'difficult to imagine' how the structure of the share capital or the boards of directors of the ship owning companies or the nationality of the local representative may affect the exercise of effective control of the ship by the flag State. They are not material to the exercise of control powers, including the adoption of measures, such as the inspection of the ship, the registration of the details concerning it, verification of the qualification and the working conditions of the crew, and also the opening and conduct of an inquiry in the event of an accident or navigation incident on the high seas;[838]

- it is 'difficult to understand' how the nationality and residence of the director of a shipping company which owns the ship is capable of affecting the exercise of effective control over the ship by the flag State.[839]

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[833] para. 45, *Case C-298/99 Commission v Italy, in the context of recognizing foreign qualifications.*
[834] Para. 21 Klopp
[835] para. 107 case C-309/99 wouters
[836] Para. 36, C-106/91 Ramrath concerning the requirement of actual presence and having local infrastructure
[837] Para. 23, Case C-299/02 Commission v the Netherlands
[838] Para. 21, Para. 15, Case C-299/02 Commission v the Netherlands
[839] Para. 33, Case C-299/02 Commission v the Netherlands

The risk (in another Member State) will materialize irrespective of the restriction imposed by the Member State concerned.[840]

It is unable to ensure, for instance, by virtue of guarantees of particular professional abilities, that the activities will be carried out according to the general interest objective (protection of recipient of services).[841]

The measure affects only nationals and not other consumers of the economic activity at issue.[842]

Absolute territorial limitations (single location of practice requirement) will not guarantee permanent availability when professional is travelling, practices part-time, or belongs to ground practice.[843]

The factual circumstance (here, the risk of confusion) addressed by the national measure must actually exist.[844]

The measure will not be able to ensure that income is actually taxed supported by the fact that transactions involving similar risk were not subjected to the differentiated tax treatment.[845]

Indirect overlap with competence issues and deference to Member State competences: the Member State restricting to a group of professionals with specific qualifications to carry out medical activities is a suitable means of achieving the objective of safeguarding public health.[846]

Concerning the point raised earlier[847] that the 'efficacy' of the national restriction must be ensured,

- overly broad prohibitions may not be accepted (i.e., not all forms of the activity offered may necessarily prejudice the efficacy of the national restriction);[848]
- the prohibition must focus on the activities which pose a relevant risk.[849]

The measure and its application must adhere to rule of law requirements[850]

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[840] Pra. 35 Centros
[841] Para. 41 Case C-451/03 ADC Servizi
[842] Para. 47 Case C-153/02 Neri
[843] para. 22 -351/90 Commission v Luxembourg
[844] para. 23, Case C-255/97 Pfeiffer
[845] Para. 63, , Case C-436/00 X and Y
[846] Para. 43, Graebner.
[847] Supra n
[848] Para. 64, Graebner
[849] Para. 65, Greaebner, which may create confusion in the minds of the public as to whether the activity in which the training is provided may be exercised as a profession in the territory of the Member State in which the training takes place
[850] supra

The possibility that national law provides power to the competent authority to grant exemptions from, or to dispense with a requirement which violates EU law will not justify the national measure in question.[851]

Concerning the principle that the Member States may lawfully regulate different standards of protection (here, high standard based on a risk assessment approach), it was emphasized that those standards, which are 'liable to change with the passage of time, particularly as a result of technical and scientific progress' must remain valid in a later time in their application so as to meet the requirements relating to freedom of establishment and the demands of legal certainty.[852]

Restrictions which fail to meet the general legal principles governing Member State conduct, for instance, the non-discrimination principle will not satisfy the necessity/proportionality test.[853]

The law will regard restrictions disproportionate when

- the measures 'were liable to create discrimination against' individuals established in other Member States;[854]
- they exclude nationals from another Member State, even if they live close to the border, from having secondary establishments within the territory of the Member State concerned;[855]
- derogations from a territorial limitation (single location of practice rule) are not available to nationals of other Member States;[856]
    - in harmony with the general principles relating to rule of law problems in the implementation of EU obligations,[857] the possibility of extending the derogations in administrative discretion to non-nationals will be insufficient.[858]

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[851] para. 38, 221/89 Factortame
[852] Paras. 35-37, Case C-108/96 Mac Quen, the assessment may be deferred to the national court and reference can be made to developments in other jurisdictions. Para. 49, Graebner, 'as a result of the progress made with respect to knowledge of methods used in this activit and their effects on health'.
[853] para. 10 Fearon, the non-disriminatory imposition of particular restrictions (here, residence requirement) pursuing legitimate aims concerning agricultural land ownership may be sufficient to meet the proportionality requirement. The national measure in question must apply to all persons and undertakings pursuing those activities in the territory of the State in question, para. 29 C-106/91 Ramrath
[854] para. 14 C-351/90 Commission v Luxembourg,
[855] Para. 12, 96/85 Commission vFrance (here, on groudns of concerns for the continuity of medical care) in addition found excessive nature of restriction
[856] para. 15, C-351/90 Commission v Luxembourg
[857] Supra n.
[858] Paras. 17-18, ibid, the legal measure does not state this explicity, the 'observance of the principle of equlity of treatment cannot depend on the unilateral will of national authroirities, and the legal situation is ambiguous and uncertain.

The assessment of the proportionality and necessity of the restriction may be deferred to the national court,[859] or to the national authorities.[860]

[859] Para. 66, Graebner
[860] Para. 33, Case C-260/04, Commission v Italy