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# **THE SCOPE OF THE FREEDOM TO PROVIDE SERVICES: PROHIBITED RESTRICTIONS**

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## **THE SCOPE OF THE FREEDOM TO PROVIDE SERVICES: PROHIBITED RESTRICTIONS<sup>2</sup>**

The freedom to provide services is one of the four fundamental freedoms of the European Union (EU) internal market. Interstate trade in services is impeded by different obstacles consisting of the high level national regulation. The objective of this paper is to reveal the nature of prohibited restrictive national measures. The research is based on the analysis of the Treaty of Rome (now the Treaty on the functioning of the European Union), secondary EU law, the evolution of EU case-law, and a range of doctrinal views. It is argued that the definition of prohibited restrictions is the most complex aspect of the case-law on services. The research compares the concept of the restrictions that are to be abolished within the scope of the freedom to provide services and of other freedoms. This study also investigates the correlation between EU and World Trade Organization (WTO) legal mechanisms in the sphere of the provision of services.

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On the one hand, international trade in services is a relatively recent development in international economic relations and the service sector is rapidly developing. The last one is also considered as a source of innovation and an important factor for industrialization. Trade in services comprises the largest part of the modern economy. Consequently, the significance of services for the world economy is steadily growing and has reached a high level. On the other hand, services are extremely diverse, have their special nature, and this is reflected in the way they are regulated including a large number of difficulties. Therefore, the diverse legal mechanisms in the service sector have led to a rise in research interest.

The law of the European Union (EU) is one of the most detailed in the respect to the liberalization of trade in services. The field of services is an essential area in the economic and industrial development of the EU. The objective of the completing of the internal market is not only to ensure the development of the service sector but most of all to guarantee the accessibility of services which are cheaper, more suitable and more efficient.

For most of the history of the EU (originally the European Economic Community and then the European Community), its central policy has been the creation of an internal market (formerly the common market) which aims to integrate the national markets of the Member States into a single European market in which goods, persons, services, and capital can freely circulate. It does this by removing the regulatory barriers to trade between States. The free movement of goods, the free movement of persons, the free movement of services, and the free movement of capital represent the principal basis of the EU economic integration law. The study of these four freedoms lets us see in practice the relevant mechanisms of EU law and reveals the role of EU institutions and bodies in the formation of EU law.

The freedom to provide services, or the freedom of movement of services, is one of the fundamental freedoms of the EU internal market. According to the provisions of the Treaty on the functioning of the European Union (TFEU)<sup>3</sup> restrictions of the freedom to provide services in the EU shall be eliminated. Several factors make the creation of a single market for services difficult. Problems realizing the freedom to provide services are mainly related to insufficient legal regulation of services, service diversity, the special nature of services in comparison with the objects of other freedoms, and the conflict of interests of Member States. When the original Treaty establishing the European Economic Community (EEC)<sup>4</sup> was drafted, services were

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<sup>3</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union // Official Journal C 115, 09.5.2008; C83/01, 30.03.2010.

<sup>4</sup> Treaty establishing the European Economic Community (1957). // Справ.-правовая система Eur-Lex. [Электронный ресурс]. URL: [http://eur-lex.europa.eu/en/treaties/dat/11957E/tif/TRAITES\\_1957\\_CEE\\_1\\_EN\\_0001.tif](http://eur-lex.europa.eu/en/treaties/dat/11957E/tif/TRAITES_1957_CEE_1_EN_0001.tif)

considered relatively unimportant.<sup>5</sup> The legal regulation of trade in services had a lot of inconveniences and was evolving very slowly. The Court of Justice played and continues to play one of the key roles in the evolution of EU law concerning the freedom to provide services.

Interstate trade in services is often hindered by Member States regulatory differences and, in particular, the high level of national regulation. Member States frequently restrict cross border provision of services by taking measures discriminating against providers of other member-states. EU law has taken a special approach to breaking down these barriers.

The main objective of this article is to define the scope of the freedom to provide services by revealing the nature of prohibited restrictive national measures. It will explore whether the scope of the freedom to provide services was different during the evolution of EU legal regulation. It will focus on the notions of direct discrimination, indirect discrimination, and other restrictions which are liable to hinder or make less attractive the activities of a provider of services established in another Member State where it lawfully provides similar services. This study will also examine the notion of double burden or regulation and its correlation with discriminatory and non-discriminatory restrictive measures.

The Treaty (now TFEU) provides for the elimination of restrictions on the freedom to provide services in the EU.<sup>6</sup> The main content of the freedom to provide services is fixed in Article 56 TFEU (formerly Article 49 Treaty establishing the European Community (TEC)<sup>7</sup>, Article 59 EEC). According to this article “restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a

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<sup>5</sup> It can be illustrated in particular by the definition of services in Article 60 EEC (now Article 57 TFEU). Services are partly defined in a negative way: “Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.” It also shows that the provision of services cannot be defined easily. The case-law of the Court of Justice reveals some of the difficulties in defining the concept of services.

No legal definition is provided in the General agreement on trade in services (GATS) of WTO, one of members of which is the EU (formerly European Communities) and its Member States. It also does not stipulate precise objectives as such. Under Article 1 (3b) “services” include any service in any sector except services supplied in the exercise of governmental authority. But GATS contains a Services classification list and a concept of “trade in services” which is essentially determined by four modes of supply of a service. These modes are somewhat different from those following from the EU law. It can be explained by peculiarities of the EU as such and the structure of internal market including four freedoms the scope of which have to be separated.

<sup>6</sup> Progressive liberalization and transparency constitutes the conditions which must be kept to reach the objective of GATS - the expansion of trade in services as a means of promoting the economic growth of all trading partners and the development of developing countries by establishing a multilateral framework of principles and rules for trade in services. The Agreement recognizes the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given the asymmetries existing with respect to the degree of development of service regulations in different countries, the particular need of developing countries to exercise this right. This is rather actual for the EU as Article V of the GATS. According this Article GATS shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement: has substantial sectoral coverage, and provides for the absence or elimination of substantially all discrimination. The last must be done through the elimination of existing discriminatory measures, and/or the prohibition of new or more discriminatory measures.

<sup>7</sup> Treaty establishing the European Community (consolidated text) // Official Journal C 325, 24.12.2002.

Member State other than that of the person for whom the services are intended”.<sup>8</sup> Article 59 TFEU (formerly Article 52 TEC) in its first paragraph provides that in order to achieve the liberalization of a specific service, the European Parliament and the Council, acting in accordance with ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives. Under Article 60 TFEU (formerly Article 53 TEC) the Member States shall endeavour to undertake the liberalization of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit.

The provision of Article 56 TFEU is intended to prohibit all restrictions which put foreign providers at a disadvantage in comparison with nationals or residents of the host State (where services are provided). But the nature and types of such restrictions are not clarified in the Treaty as referring to the scope of other freedoms. Thus, Article 56 TFEU contains no apparent criteria to determine the notion of a barrier impeding the realization of the freedom to provide services. Article 57 TFEU (formerly 50 TEC) in paragraph 3 refers to the discrimination criterion. It is stipulated that the service provider may temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

It is important to point out that *the principle of non-discrimination*, as one of key principles of the economic liberalization process, is embodied in TFEU. Article 18 TFEU (formerly 12 TEC) provides that within the scope of the application of the Treaties,<sup>9</sup> and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.<sup>10</sup> This provision certainly must be also observed in the field of interstate trade in services. Consequently, the freedom to provide services, as with other freedoms of the EU internal market, implies the prohibition of discriminative regulations of Member States on the ground of nationality.

Firstly, it is necessary to pay closer attention to the judgment of the Court of Justice in *Van Binsbergen (1974)*<sup>11</sup> case. The central part of the Court’s ruling was in the direct effect<sup>12</sup> of

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<sup>8</sup> According to Article 61 (formerly 54 TEC) as long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.

<sup>9</sup> Treaty on the functioning of the European Union and Treaty on European Union (Consolidated version of the Treaty on European Union // Official Journal C 115/13, 9.5.2008)

<sup>10</sup> And under paragraph 2 of this Article the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

<sup>11</sup> Case 33-74 Van Binsbergen [1974] ECR 1299.

<sup>12</sup> Under the direct effect Articles 56 and 57 TFEU (formerly 49 and 50 TEC, 59 and 60 EEC) may therefore be relied on before national courts.

EEC Treaty (now TFEU) provisions concerning the freedom to provide services and the scope of this freedom. The Court ruled that the first paragraph of Article 59 EEC (now 56 TFEU) and the third paragraph of Article 60 EEC (now 57 TFEU) must be interpreted as meaning that the national law of a Member State cannot, by imposing a requirement as to habitual residence within that State, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable. According to the Court the restrictions to be eliminated under Articles 59 and 60 EEC (now 56 and 57 TFEU) include all requirements imposed on a service provider by reason in particular of his nationality or the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service. The significance of this statement is the prohibition not only of discrimination based on nationality (*direct or overt discrimination*) but also on place of residence (*indirect or covert discrimination*). The Court has extended the scope of principle of non-discrimination to cases of so-called discrimination in substance, or *factual discrimination*. The notion of discrimination on the basis of nationality has been widened to cases in which nationals from other Member States have been covertly discriminated against, using a criterion other than nationality to put those nationals at a disadvantage. The term indirect discrimination can be explained as illustrating the situation when a Member State's regulation of the service market, although applying equally to domestic and imported services, may in fact be more burdensome for services imported from other Member States.

In *Van Binsbergen* the Court concluded that not only are measures established by State prohibited, but also rules of private character, which have the objective to regulate the provision of services.<sup>13</sup>

There remains the problem of how to interpret the notion of *indirect discrimination*. Which national regulations can be determined as indirect discrimination, and where and to what extent could a particular measure of a Member State be justified?

In the *Van Wesemael* (1979)<sup>14</sup> case the Court confirmed its approach, ruling that the essential requirements of Article 59 EEC (now 56 TFEU) abolish all discrimination against the person providing the service by reason of his nationality or the fact he is established in a Member State other than that in which the service is to be provided. This case was about licensing requirements for employment agencies which were indiscriminately applied irrespective of

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<sup>13</sup> The evolution of EU law / edited by Paul Craig and Grainne de Burca. OXFORD UNIVERSITY PRESS, 1999. P. 399.

<sup>14</sup> Joined cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35.

nationality or establishment. This is a case of *double burden* regulation<sup>15</sup> for providers established in another Member State. The Court's view on the question was based on an expanded notion of prohibited restrictions. This approach was also taken by the Court in judging the *Debauve* (1980)<sup>16</sup> case on the broadcasting of television signals. The Court was asked to rule on whether a prohibition to transmit advertising in television programmes is covered by Articles 59 and 60 EEC (now 56 and 57 TFEU) even if the prohibition is applied indiscriminately. Furthermore, it was concluded that the natural relief of the ground and of built-up areas and the technical features of the broadcasting systems used undoubtedly lead to differences in regards to the reception of television signals in view of the correlation between the location of broadcasting stations and television receivers. These differences could not be classified as discrimination according the meaning of the Treaty.<sup>17</sup> It is possible to regard as discrimination only the differences in treatment arising from human activity and, especially, from measures taken by public authorities.

In *Seco* (1982)<sup>18</sup> the double burden occurred when the obligation to pay the employer's share of social security contributions imposed on persons providing services on a temporary basis within the national territory is extended to employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same period of employment. The legislation of the host State is more burdensome for employers established in another Member State than for national providers. On the one hand the regulation is equally applicable to national and foreign employers, but on other hand, in effect, it has a discriminative nature because the foreign employers already pay such contributions in the Member State of their establishment (the home State). In this judgment the scope of the prohibited by Article 59 EEC (now 56 TFEU) restrictions was formulated in the same way as in *Van Wesemael*: Article 59 and the third paragraph of Article 60 EEC entails the abolition of all discrimination against the person providing the service by reason of his nationality or the fact he is established in a Member State other than that in which the service is to be provided. The most important characteristic of this case is that the Court came to conclusion that these Articles prohibit not only overt discrimination based on the nationality of the person providing the service, but also all forms of covert discrimination which, although based

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<sup>15</sup> The internal market requires not only the abolition of discrimination but also that, even lacking harmonization, only one set of rules should apply to those covered by the free movement provisions. Once a service has been lawfully provided it should be able to move freely around the EU.

<sup>16</sup> Case 52/79 *Debauve* [1980] ECR 833.

<sup>17</sup> Case 52/79 *Debauve*, paragraph 21.

<sup>18</sup> Joined cases 62 and 63/81 *Seco* [1982] ECR 223

on criteria which appear to be neutral, in practice lead to the same result.<sup>19</sup> Cases of double regulation are considered as covert (indirect) discrimination. Consequently, it is possible to assume that in *Van Wesemael*, the Court also implies the concept of covert discrimination. Wulf-Henning Roth argues that this was an issue of non-discrimination on the basis of nationality or establishment.<sup>20</sup> But it is not clear which kind of non-discrimination he is talking about (factual or formal).

The nature of restrictions in the form of double regulation is not absolutely clear due to contradictory doctrinal views and Court judgments. For example, Piet Eeckhout classifies unnecessary duplication of licensing requirements as a case of factual discrimination (indirect or covert).<sup>21</sup> Advocate General Gulmann in his opinion concerning the *Case C-275/92 Schindler* (1994)<sup>22</sup> concluded that in its judgments in *Van Wesemael* and in *Webb* (1981)<sup>23</sup> the Court had held that the rules on services can also limit the possibility for Member States to apply non-discriminatory rules to foreign services. He pointed out that double burden regulation is a non-discriminatory measure. But in a referred judgment there is no term “non-discriminatory” regulation or measure, it is therefore his own point of view and not a position of the Court in the cited case. The Advocate General argued that the Court had always stressed in its case-law that the Treaty rules on services primarily prohibit overt and covert discrimination against foreign services but it had further stated that the prohibition can also affect restrictions other than those stemming from discriminatory rules. The same opinion is held by Paul Demaret<sup>24</sup> concerning the *Webb* judgment. It is interesting to note that the Court’s judgment in *Webb* in the service sector has approximately the same significance as *Cassis de Dijon*<sup>25</sup> in the goods sector. In *Gouda* (1991)<sup>26</sup> and *Mediawet II* (1991)<sup>27</sup> the Court differentiates between discrimination on the basis of nationality or establishment and restrictions that follow from double regulation by Member States.

On the basis of a comparative analysis of these different Court judgments and the approaches of scholars of European law it is clear that there is no apparent assessment for the

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<sup>19</sup> The term “covert discrimination” is directly mentioned in this judgment.

<sup>20</sup> Roth, Wulf-Henning. Case C-76/90, Manfred Sager v. Dennemeyer and Co. Ltd., Judgment of 25 July 1991 // Common market law review. 1993. Volume 30. № 1. P. 150.

<sup>21</sup> Eeckhout Piet. The European internal market and international trade: a legal analysis // European Community Law Series. Oxford: Clarendon Press, 1994. P. 14-15.

<sup>22</sup> Opinion of Mr Advocate General Gulmann delivered on 16 December 1993. Case C-275/92 Schindler [1994] ECR I-01039.

<sup>23</sup> Case 279/80 Webb [1981] ECR 3305.

<sup>24</sup> Demaret Paul. Mondialisation et accès aux marchés. L'accès au marché des services réglementés: la libéralisation du commerce des services dans le cadre du Traité CE // Revue Internationale de Droit Economique. Numéro spécial: Mondialisation et droit économique. 2002. 2-3. P. 268.

<sup>25</sup> Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) [1979] ECR 649.

<sup>26</sup> Case C-288/89 Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media [1991] ECR I-4007.

<sup>27</sup> Case C-353/89 Mediawet II [1991] ECR I-4069.



requirement against foreign providers to follow rules of the host state (equally applicable to national and foreign economic operators) which is onerous for them because they were liable under similar rules in the State of their establishment. This situation can be seen as an example of indirect discrimination or of a non-discriminatory measure. It depends on the circumstances and differs from case to case.

In *Commission v. Germany* (1986)<sup>28</sup> the Court ruled in the framework of its former approach that Articles 59 and 60 EEC (now 56 and 57 TFEU) demanded the removal not only of all discrimination against a person providing services by reason of the fact he is established in another Member State, but also all restrictions on his freedom to provide services imposed by reason of the fact that he is established in another Member State.

A pivotal role for the definition of the scope of the freedom to provide services was played by the judgment in case *C-76/90 Säger v. Dennemeyer* (1991)<sup>29</sup> on patent renewal services. The Court concluded that Article 59 of the EEC Treaty (now 56 TFEU) “requires not only the elimination of all discrimination against a person providing services on the grounds of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable *to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services” (emphasis mine). A constituent condition of Article 56 TFEU is that the person providing services should be lawfully offering similar services in the State of his establishment. Under the Court’s approach a Member State cannot make the provision of services in its territory subject to compliance with all the conditions required for the establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.

In its practice the Court has moved away from the concept of discrimination as regards to the assessment of restrictions inherent in regulation applying equally to domestic and imported services. The notion of “measures liable to prohibit or otherwise impede the activities of a provider of services” was introduced by the Court. This statement was applied in a large number of successive Court judgments. For example, cases *C-43/93 Vander Elst* (1994), *C-272/94 Guiot* (1996), *C-3/95 Sandker* (1996), *C-222/95 Parodi* (1997), *C-58/98 Corsten* (2000).<sup>30</sup>

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<sup>28</sup> Case 205/84 *Commission v. Germany* [1986] ECR 3755.

<sup>29</sup> Case C-76/90 *Säger v. Dennemeyer* [1991] ECR I-4221.

<sup>30</sup> Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905 paragraph 10; Case C-3/95 *Sandker* [1996] ECR I-6511 paragraph 25; Case C-222/95 *Parodi* [1997] ECR I-3899 paragraph 18; Case C-58/98 *Corsten* [2000] ECR I-0000, paragraph 33.

In *Säger* the Court did not examine the issue of the discriminatory character of the measure when assessing the applicability of Article 59 EEC (now 56 TFEU). It only dealt with that question when defining the possibility of the justification of restrictive measures.

According to some doctrinal views, compared to the “*Dassonville formula*”<sup>31</sup> from the goods sector, the test used in *Säger* is much narrower.<sup>32</sup> One of explanations is that it does not refer to regulations affecting “directly or indirectly, actually or potentially” cross-border trade. But this statement is disputed because in particular “any discrimination” from *Säger* implies these types of restrictions. Another explanation is that *Säger* precludes similar services that are provided by the same person in his home State, and in the trade of goods the relevant freedom applies to goods which are lawfully not only produced, but also commercialized in the home State.<sup>33</sup>

The Advocate General in his opinion on *Säger* stressed that the test formulated in this judgment is more restrictive than the test used in the *Dassonville* (1974) case concerning the free movement of goods. Ultimately, he did not attach any importance to the discriminatory criterion and focused his study on whether the restriction could be objectively justified (by one of the justifications from the article 56 EEC (now Article 52 TFEU)<sup>34</sup> or the imperative requirements of general interest<sup>35</sup>). This approach can be considered as disputable. He tried to determine a level of correspondence between the Court’s approach concerning the interpretation of Article 30 EEC (now 34 TFEU) on the free movement of goods after the *Keck*<sup>36</sup> modification and Article 59 EEC (now 56 TFEU) on the free movement of services. Moreover, he proposed to apply a test similar to that elaborated in the case-law concerning the free movement of goods.

From conclusions made by the Court in *Säger* it follows that discrimination is not an unconditional requirement of Article 56 TFEU, and it prohibits not only direct and indirect discrimination, but also restrictions of a non-discriminatory character. But it is often difficult to draw a line between these categories. It is controversial to classify national regulations as accounting for discrimination or non-discrimination.

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<sup>31</sup> Case 8-74 *Dassonville* [1974] ECR 837.

<sup>32</sup> Case C-275/92, *Her Majesty’s customs and Excise v. Gerhart and Jorg Schindler* [1994] ECR I-1039 // Common market law review. 1995. Volume 32. № 3. P. 847.

<sup>33</sup> See Case 15/79 *Groenveld* [1979] ECR 3409.

<sup>34</sup> Article 52 TFEU: “The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”

<sup>35</sup> For the first time this notion was elaborated by the Court in *Cassis de Dijon* judgment on the free movement of goods. The imperative requirements of the general interest include consumer protection, professional rules intended to protect recipients of the service, protection of intellectual property, the conservation of the national historic and artistic heritage, the protection of workers, turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country etc.

<sup>36</sup> Case C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-06097.

Another Court judgment to discuss is *Case 55/94 Gebhard* (1995)<sup>37</sup>. The importance of this case lies in the fact that the Court of Justice defines the relative scope of Articles 52 and 59 EEC (now 49 and 56 TFEU). Julian Lonbay, Senior Lecturer and Director GDL programme of the Birmingham Law School of the University of Birmingham, finds it significant that 13 judges participated in this case and he described it as evolutionary if not revolutionary.<sup>38</sup>

One of the key questions was: what are the criteria to be applied in assessing whether activities are of a temporary nature? The aim of this question was to define the scope of the freedom to provide services and the right of establishment. The temporary character of service activity derives from paragraph 3 of Article 57 TFEU (formerly 50 TEC, 60 EEC) and relevant EU case-law: the rules on freedom to provide services cover at least where the provider moves in order to provide his services; the situation in which a person moves from one Member State to another, not for the purposes of establishment there, but in order to pursue his activity there on a temporary basis. But ones wonder which activity could be recognized as being on a temporary basis. According to the Advocate General there was no single criterion for determining the distinction between the provision of services from the right of establishment. He reviewed the case-law and on this basis revealed two main criteria: a temporal criterion and a geographic criterion. He concluded that there had to be a matrix of indices such as the location of principal centres of activity of the provider, the place where he had his principal residence, the amount of time he spent in each Member States where he exercised his activity etc. The Court of Justice considered that the temporary nature of the activities had to be determined in the light not only of its duration, but also regularity, periodicity and continuity. It also underlined that the provider of services within the meaning of the Treaty may equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure was necessary for the purposes of performing the services in question. Therefore an office does not necessarily indicate a permanent presence. This case confirms the residual nature of the services articles and provides “temporary character” as the key test for distinguishing between services and establishment.<sup>39</sup> As is also seen from the Article 56 TFEU the provider and recipient must be established in different Member States. This statement demonstrates the key distinction between services and establishment.

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<sup>37</sup> Case C-55/94 Gebhard [1995] ECR I-4165.

Mr Gebhard was a German lawyer working in Italy; he used the title *avvocato* without having previously enrolled at the local bar as required by Italian law. When other lawyers complained about the improper use of the title, Mr Gebhard argued that the Italian rule was incompatible with Articles 43 and 49 TEC (now 49 and 56 TFEU).

<sup>38</sup> Lonbay Julian. *Case 55/94 Reinhard Gebhard v. Consiglio dell'ordine degli Avvocati e Procuratori di Milano*, Judgment of 30 November 1995, [1995] ECR I-4165. Full Court // Common market law review. 1996. Volume 33. № 5. P. 1073.

<sup>39</sup> Lonbay Julian. *Case 55/94 Reinhard Gebhard v. Consiglio dell'ordine degli Avvocati e Procuratori di Milano*, Judgment of 30 November 1995, [1995] ECR I-4165. Full Court // Common market law review. 1996. Volume 33. № 5. P. 1081.

This judgment also clarifies the extent to which Article 59 and 60 EEC (now 56 and 57 TFEU) can limit the rights of Member States to impose rules on nationals of Member States who are established in another Member State wishing to provide services within their territory. The Court stated that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions”. They must: firstly, be applied in a non-discriminatory manner; secondly, be justified by imperative requirements in the general interest; thirdly, be suitable for securing the attainment of the objective which they pursue; and, fourthly, not go beyond what is necessary in order to attain it”. Thus, the Court accepted as a justification of non-discriminatory restrictions imperative requirements of the general interest.

In *Gebhard* the Court found that all national measures “liable to hinder or make less attractive the exercise of fundamental freedoms” are to be seen as restrictions on movement, in doctrine there is a view that this formulation is more open than in the *Arblade* (1999)<sup>40</sup> judgment.<sup>41</sup> In *Gebhard* a broad scope to Article 49 TEC (now 56 TFEU) is suggested, in which the comparison between domestic or foreign is irrelevant, the only question being whether some hindrance to service provision can be argued. In *Arblade* the Court took the same approach as in *Säger*. Thus, in respect to the cited doctrinal view it is possible to compare the *Gebhard* judgment and the *Säger* judgment and to conclude that the scope of the freedom to provide services in *Gebhard* is larger. This view was also reflected, for example, in *Case C-384/93 Alpine Investments* (1995)<sup>42</sup>.

In *Alpine Investments* case a Dutch law prohibited Dutch companies from cold-calling customers, even those in other Member States where cold-calling was not prohibited. The Court extended the reach of Article 59 EEC (now 56 TFEU) to non-discriminatory regulations restricting the access of the service provider to the market of another Member State. It was stressed that Article 59 EEC (now 56 TFEU) “covers not only restrictions laid down by the State of destination, but also those laid down by the State of origin, even if they are generally applicable measures, are not discriminatory and neither their object nor their effect is to put the national market at an advantage over providers of services from other Member States”. A prohibition against telephoning potential clients in another Member State without their prior consent is presumed to be able to constitute a restriction on the freedom to provide services since it deprives the operators concerned of a rapid and direct technique for marketing and contacting

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<sup>40</sup> Joined cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453.

<sup>41</sup> European Union law. Cases and materials / Damian Chalmers, Gareth Davies and Giorgio Monti. Second edition. Cambridge University Press, 2010. P. 793.

<sup>42</sup> Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

clients. The prohibition of financial intermediaries established in the Member State from contacting potential clients in another Member State by telephone without their prior consent to offer them services linked to investment in commodities futures was recognized as a restriction on the freedom to provide services. However, the Court ruled that the restriction was justified by the imperative reason of public interest in maintaining the reputation of the national financial sector.

The use of the expression “restriction of market access” is explained by P. Oliver and W-H. Roth as the extra-territorial application of marketing rules by the State of origin which carries with it the potential danger of a dual burden which should give rise to strict scrutiny.<sup>43</sup> It is important to pay attention to the following: the provider of services established in another Member State should be in a position to compete in the State of destination on the same terms as service providers established in that State.

In the doctrine somewhat different approaches are taken in the respect of this case. On the one hand, it is regarded as a case of unequal impact and, on the other hand, as of equally applicable measures. According to D. Chalmers, G. Davies and G. Monti it is arguable that a restriction on cold-calling has a greater effect on contact with distant clients than local ones, so that case *Alpine Investments* is really about a measure of unequal effect.<sup>44</sup> However, the Court did not address this, and this judgment is often cited as support for the view that Article 56 TFEU applies even to equal impact measures. Moreover there is a third point of view: in Catherine Barnard’s research *Alpine Investments* and *Schindler* are cited as examples of judgments concerning non-discriminatory restrictions.<sup>45</sup> At the same time it is argued that there is a certain form or element of discrimination. It is appropriate to note that research often reveals unequal effects even where rules are apparently neutral.

In a recent judgment the Court took a more precise and more limited approach to the scope of Article 56 TFEU. In the *Mobistar* (2005)<sup>46</sup> judgment, which was about a tax on telecom masts and pylons, necessary for the transmission of phone calls, it was stated (in paragraph 31) that measures, the only effect of which is to create additional costs in respect of the service in question, and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article 59 of the EEC Treaty (now

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<sup>43</sup> Oliver Peter, Roth Wulf-Henning. The internal market and the four freedoms // Common market law review. 2004. Volume 41. № 2. P. 418.

<sup>44</sup> European Union law. Cases and materials / Damian Chalmers, Gareth Davies and Giorgio Monti. Second edition. Cambridge University Press, 2010. P. 793.

<sup>45</sup> See: Barnard Catherine. The substantive law of the EU. The four freedoms. Second edition. Oxford University Press, 2007.

<sup>46</sup> Joined cases C-544/03 and C-545/03 *Mobistar* [2005] ECR I-07723.

56 TFEU).<sup>47</sup> This conclusion contrasts with the extended concept of a prohibited restriction in *Alpine Investments* and *Gebhard*. The Court pointed out that the mere imposition of an equally applicable cost is not a restriction on services. In another judgment it was explained by the fact that such costs do not impede or make less attractive the provision of services.<sup>48</sup>

The distinction made between the Court's approach in *Mobistar / Viacom* and *Alpine Investments* (concerning the prohibition of a sales technique, restricting access to the market of another Member State) is vulnerable to criticism because costs may impede entry to the market in the same way as regulation does. Restriction in the form of a marketing technique often raises the costs of contacting customers. In this regard the distinction between restricting access to the market and cost burdens is somewhat artificial.<sup>49</sup>

In *Case C-518/06 Commission v Italian Republic* (2009) the object of the Court's assessment was a national rule prohibiting motor insurers from rejecting a client. The Court ruled that the obligation, imposed by the law of a Member State, to provide coverage for third-party motor vehicle liability insurance, incumbent on insurance undertakings, including those which have their head office in another Member State, but which pursue their business in the first Member State, restricts the freedom of establishment and the freedom to provide services enshrined in Articles 43 TEC and 49 TEC (now 49 and 56 TFEU). Inasmuch as it involves changes and costs for those undertakings, the obligation to contract renders access to the market of that Member State less attractive and, if they obtain access to that market, reduces the ability of the undertakings concerned to compete effectively, from the outset, against undertakings traditionally established there. It means that an insurance company established outside Italy would be impeded in offering insurance services in Italy by the acceptance obligation. Thus, such a company will be disadvantaged in relation to those based in Italy, whose business model<sup>50</sup> already takes into account the Italian laws. It seems that under the Court ruling equally applicable laws requiring in practice foreign providers to adapt their business models will tend to be exclusionary and not compatible with the Article 56 TFEU requirement.

As W.-H. Roth stresses the Italian rule did not concern only marketing or advertising, but required an amendment to the terms of insurance contracts on sale.<sup>51</sup> It is analogous with the goods rule pursuant *Cassis de Dijon* judgment. The Court qualified the requirement imposed on

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<sup>47</sup> The Court has already held that Article 59 EEC (now 56 TFEU) precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 30).

<sup>48</sup> Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL* [2005] ECR I-01167

<sup>49</sup> See additionally: Hatzopoulos V. Annotation of *Alpine Investments*. (1995) 29 *Common Market Law Review*. 1427.

<sup>50</sup> A business model may, for example, include the way a service is sold or advertised.

<sup>51</sup> Roth W.-H. The European Court of Justice's case law on freedom to provide services: is Keck relevant. In Andenas M. and Roth W.-H. (eds.). *Services and free movement in EU law*. Oxford University Press, 2002.

the provider, adapting his service to domestic rules is a restriction in the sense of Article 56 TFEU. Indeed the Court judgment went further, consistent with *Alpine Investments*, a need to change a business model is also a restriction on trade. The doctrine says that a service provider should be able to do business throughout the EU in the same way, and with the same products, as he provides in his home state, unless there is a very good reason justifying derogation from this rule.<sup>52</sup> Nevertheless, the *Commission v Italian Republic* judgment has not substantively changed the law, but has presented a practical analysis of Article 56 TFEU.

In this case it was in particular underlined that the term ‘restriction’ within the meaning of Articles 43 TEC (on the right of establishment) and 49 TEC (now 49 and 56 TFEU) covers *all measures which prohibit, impede or render less attractive* the freedom of establishment or the freedom to provide services. The Court highlighted the following: rules of a Member State do not constitute a restriction within the meaning of the Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable rules to providers of similar services established in their territory.<sup>53</sup> By contrast, the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade (now within the Union).<sup>54</sup>

As a result the scope of the freedom to provide services is expanding more and more. It seems important that in this definition of restriction, discriminatory measures are not distinctly mentioned. The Court takes an approach according to which the notion of an obstacle to the free provision of services is very extended. This fact increases the importance of the justification of restrictions. Restrictions on the freedom to provide services can be justified by reliance on Article 52 TFEU (formerly 46 TEC, 56 EEC) and Article 62 TFEU (formerly 55 TEC, 66 EEC) and to the imperative requirements of general interest, elaborated in Court case-law. Consequently, an increasing number of rules are subject to the *necessity* and *proportionality* assessment.

It is necessary to look at Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market,<sup>55</sup> which was proposed by the

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<sup>52</sup> European Union law. Cases and materials / Damian Chalmers, Gareth Davies and Giorgio Monti. Second edition. Cambridge University Press, 2010. P. 797.

<sup>53</sup> See, to that effect:

Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 27.

Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45.

<sup>54</sup> See, to that effect:

Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 35 and 38.

Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 12.

<sup>55</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market // Official Journal L 376, 27.12.2006, p. 36–68

European Commission to overcome existing regulatory barriers to trade in services. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services. The key Article of the Directive is Article 16 titled “Freedom to provide services”. It provides that Member States shall respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory. Any requirements towards access to or exercise of a service activity in their territory must be imposed respecting principles of non-discrimination, necessity, and proportionality. The non-discrimination principle is defined as that under which the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established. Article 16 (paragraph 2) contains a list of requirements (restricting the freedom to provide services in the case of a provider established in another Member State) which cannot be imposed by the host Member States. These restrictions are, for example: an obligation for the provider to have an establishment in their territory; an obligation for the provider to obtain authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of EU law; a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question; the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed etc.

As noted above, the term “non-discriminatory” poses some difficulty. For example, could national measures representing indirect discrimination be justified by imperative requirements of the general interest and what are these measures? What is the nature of indirect discrimination: is it a discriminatory measure or non-discriminatory measure; is there any difference between indirect discrimination and non-discriminatory restrictions?

For example, Thomas Ackermann shows that it is difficult to draw a line between direct and indirect discrimination as well as between indirect discrimination and restrictions in a wider sense.<sup>56</sup> Christa Tobler, on the basis of case-law analysis concludes that “there appears to be no clear dividing line in terms of the effect of the prohibited measures nor in terms of the

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<sup>56</sup> Ackermann Thomas. Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law // Common Market Law Review. Dec 2006. Vol. 43, Iss. 6; pg. 1780, 3 pgs.



possibilities of justification”.<sup>57</sup> She also argues that there is only a very vague dividing line between indirect discrimination and restrictions in a wider sense.<sup>58</sup> This seems to refer to the analogue point of view that the concept of non-discriminatory measures is not determined accurately and the distinction between discriminatory and non-discriminatory measures is often obscure.<sup>59</sup> The question constitutes in the scope of discrimination: for example, double regulation is considered as the case of discrimination in the form of indirect discrimination or of non-discrimination.

A somewhat different approach is taken by Eleanor Spaventa on the basis of a rigorous investigation of case-law evolution.<sup>60</sup> In the line with her research conclusions three main theories have been put forward in relation to the scope of the free movement provisions: the discrimination theory, the double burden theory and the market access theory. Supporters of the discrimination theory argue that the Treaty is concerned only with the elimination of protectionism and with ensuring that foreign goods and persons be treated, substantially and formally, in the same way as domestic goods and nationals. This is also true for the provision of services. The double burden theory is considered by Spaventa as a more refined version of the discrimination theory. The double burden theory overlaps significantly with the discrimination theory. This is illustrated by the fact that a rule which imposes a double burden is almost inevitably also indirectly discriminatory since it affects migrants or imported products more than it affects non-migrants or domestic products. Therefore, in this framework the double burden regulation is referred to as indirect discrimination. Spaventa comes to conclusion that the double burden theory is conceptually more satisfactory than a mere discriminatory theory since it focuses on the specific effect of the rule on products and migrants, rather than on a comparative assessment between national products or persons, and foreign products or persons. Finally, the third theory discussed by Spaventa is a theory according which the key concept in free movement law is market access. The internal market requires not only the abolition of directly and indirectly discriminatory restrictions, but also the elimination of those rules which affect the ability of businesses to access the market. It is argued that the market access theory is the only theory which is able also to accommodate the developments which have occurred in the case-law.

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<sup>57</sup> Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*. Antwerp: Intersentia Publishers, 2005. P. 369.

<sup>58</sup> *Ibid.* P. 417.

<sup>59</sup> See : Craig Paul, de Búrca Gráinne. *EU Law. Text, cases and materials*. Fourth edition. Oxford University Press, 2008. P. 792.

<sup>60</sup> Spaventa Eleanor. *From Gebhard to Carpenter: towards (non-)economic European constitution* // *Common Market Law Review*. New York: Jun 2004. Vol. 41, Iss. 3; pg. 743, 31 pgs

The view cited above is a reasonable one, however, it seems to have some inconsistency, for example, diverse theories are discussed as existing simultaneously. But it is illogical to mention the evolution of the Court's case-law and doctrinal views.

The EU liberalization process of the provision of services is not characterized by an even development. For a long time after the establishment of the European Economic Community, the legal mechanisms were not effective, and the freedom to provide services, as one of principles of the Community law, was almost unrealized due to diverse obstacles. An integral feature of the EU law is the great contribution of the Court of Justice case-law, particularly, in the evolution of the legal regulation of the freedom to provide services. During its practice, Treaty provisions have been widely interpreted and rendered more concrete. For example, the Court formulated the principle of the direct effect of Treaty provisions concerning services, the criteria dividing the scope of the freedom to provide services from the scope of other freedoms; determined the content of the freedom to provide services in reference to the nature of prohibited restrictions imposed by Member States.

Originally, the Court follows its traditional approach in using the discrimination criterion to define the scope of Article 56 TFEU. It has never been in doubt that direct and indirect discrimination is prohibited. Subsequently, the concept of prohibited restriction has been expanded to non-discriminatory measures. The interpretation of the article 56 TFEU by the Court demonstrates that it recognizes that Member States must prohibit all discrimination against a person providing services on the grounds of his nationality or the place of establishment, but also any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services. Indeed, in the regard of recent Court's judgments a restriction on services seems to comprise any measure which affects access to the national market for services. These measures disadvantage the foreign or the cross-border providers compared to domestic, and any measure which requires a person providing services to amend their services or business model in order to provide those services in another state.<sup>61</sup> It is necessary to stress that in recent case-law the discriminatory test has nearly been abandoned. Generally the evolution of EU case-law consists of the broadening of the scope of the freedom to provide services by the application of an expanded notion of prohibited restrictions. As a consequence, with ever increasing

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<sup>61</sup> See: Case C-224/97 *Ciola v Land Vorarlberg* [1999] ECR I-02517.

Case C-518/06 *Commission v Italian Republic* [2009] ECR I-03491.

European Union law. Cases and materials / Damian Chalmers, Gareth Davies and Giorgio Monti. Second edition. Cambridge University Press, 2010. P. 797.

frequency, Member States try to make these measures compatible to Article 56 TFEU by reliance on justifications provided by the TFEU provisions and the Court's practice.

At the same time it should be taken into consideration that the Court's case-law depends on the kind of issues it is required to rule on, and sometimes contains controversial rulings and disputed conclusions. However, this does not detract from its significance for the development of the liberalization process in the sphere of the provision of services in the EU. It continues to play a pivotal role in the evolution of the EU law concerning the freedom to provide services.

Finally, it is appropriate to digress slightly from the main objective of this article to correlate EU and WTO legal mechanisms functioning in the sphere of the provision of services. The EU approach of the legal regulation of service is somewhat different from the WTO/GATS approach. The EU tendency towards liberalization in the provision of services is ultimately reflected in the maximum freedom of access to EU Member State markets. The WTO approach is different, for example, because market access is an object of specific commitments, and the relevant obligations have an restrictive nature.<sup>62</sup> Specific obligations are assumed only with respect to certain service sectors particular to each Member. National schedules containing specific commitments represent an integral part of GATS. Regarding the high level of liberalization in trade in services in the EU, it is provided that the Union enjoys some derogations from general obligations. The EU plays an active and constituent role in the multilateral negotiations on liberalization issues concerning the trade in services in WTO. In a review of the EU in the framework of WTO/GATS, it was stated that while recognizing that WTO rules were a growing point of reference in the elaboration of EU policies, Members urged further efforts to ensure that all EU regulations respected the principles of transparency and non-discrimination.<sup>63</sup> GATS, in its turn, plays an important role in defining the external dimension of the EU internal market in services. EU Member States note that in a growing number of areas, the internal market and external liberalization have been mutually supportive. The result is an improvement of market access for external providers and the increased exposure of the EU economy to competition.

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<sup>62</sup> GATS provides for two groups of obligations: general and specific. General obligations are applicable to all service sectors irrespective of their inclusion in any Member's schedule. It is possible to divide the general obligations into two groups: those which relate to the conditions of operation in a market (for example, non-discrimination and transparency) and those which are related to conditions of competition (for example, subsidization and behavior of monopolies). Friedl Weiss, from the University of Amsterdam, concludes that GATS is based on a separation between trade barriers (market access) and domestic regulations (national treatment) - Weiss Friedl. *The General Agreement on Trade in services 1994 // Common market law review*. 1995. Volume 32. № 5. P. 1189.

<sup>63</sup> European Union 1997 / World trade organization – Geneva: WTO, 1998 – (Trade policy review).

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