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FREEDOM TO PROVIDE SERVICES IN THE INTERNAL MARKET AND CONSUMER PROTECTION

1. INTRODUCTION

During the last decade, freedom to provide services in the internal market was marked by a large number of court cases on which the European Court of Justice (hereinafter referred to as ECJ) took decisions, and by the attempts of the European legislators, and above all, of the Commission of the European Communities (hereinafter referred to as EC Commission), to adopt the Directive on Services in the internal Market (hereinafter referred to as DSIM). After years of endeavours[2] and lobbying efforts, the Directive was adopted on 19 December 2006. DSIM[3] implements a great deal of the case law of the ECJ. However, it does not determine all those justifications which the ECJ has made (through longstanding case law) for the exceptions to the freedom to provide services. Although this is largely a codifying Directive (this applies primarily to its second and third parts specifying the rules on freedom of establishment for service providers and the rules on free movement of

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[2] See more at C. Barnard, Unravelling the services Directive, ***CML Rev.***, No. 2/2008, pp 325-331.

[3] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, ***Official Journal of the European Union***, L376/36, of 27 December 2006. The Directive must be implemented in the national legal systems by 28 December 2009.

services in general), it has outlined some differences between freedom of establishment and freedom to provide services. Inter alia, these differences also refer to the justified restriction on both freedoms for a consumer protection reason. The latter might be a possible justification for freedom of establishment, whereas this reason is not included in the justified exceptions to observing the rules on free movement of services. This paper tries to analyse the consumer protection role in the area of freedom to provide services whether it is about the provision of services throughout establishment or it is about the standard ***active*** and ***passive freedom***[4] to provide services without including freedom of establishment.

The paper pays attention to the situation justified by a reason relating to consumer protection within the framework of two freedoms: freedom to provide services and freedom of establishment. First, the situation is analysed within the development of the case law of the EG (Chapters 2 and 3). Then the changed situation is dealt with according to DSIM (4). Namely, regarding the exceptions justified by reasons relating to the overriding reason in public interest, such as consumer protection, the case law is not changed concerning the exceptions to the freedom of establishment, and it follows this line of case law as an established axiom. In the area of freedom to provide services (i.e., when it is not about the freedom of establishment for service providers), DSIM enacted the country of origin principle that is restricted and weakened. It no longer determines the consumer protection reason as an overriding reason relating to the public interest.

[4] Active freedom to provide services means that the service provider actively provides services to a service recipient in a Member State (host Member State) other than its country of establishment (Member State of origin). Passive freedom to provide services means that the service provider is passive in the sense that it provides a service in the country of establishment because the service recipient fetches the service from another Member State (e.g., a visit to a doctor to receive medical services, a visit to an adviser, etc.) For more information, please see at W.H. ROTH, Freier Deinstleistungsverkehr und Verbraucherschutz, ***VuR - Verbraucher und Recht***, No. 5/2007, pp 161-162.

2. FEEDOM TO PROVIDE SERVICES

2.1 Overview

The basic rule of the freedom to provide services, which is included in the Treaty Establishing the European Community (hereinafter referred to as ECT, Article 49), defines the prohibition of formal and covert discrimination in the area of freedom to provide services. The case law has extended this directly effective rule to the prohibition of indistinctly applicable measures. This means that the measures of the Member States, which do not formally discriminate between different service providers or between services recipients from different Member States, but the circumstances of the case nevertheless lead to discrimination, are not allowed either. The case law underwent its further development in the ***Säger case*** where it made a close approach to the rules on the free movement of goods (Article 28 ECT). It is not only about the indistinctly [sic] applicable measures that would imply actual discrimination, but following the model of the ***Cassis de Dijon***[5] decision, no indistinctly applicable measures taken by the Member States are allowed to make providing and receiving services less attractive (weniger attraktiv machen, less attractive)[6] in the other Member State. Despite some deviations in the cases ***Viacom***[7] and ***Mobistar,***[8] the rules, adopted in the ***Säger*** case, still

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[5] Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, ECR 1979, page 649.

[6] Case C-76/90, ***Manfred Säger v Dennemeyer & Co. Ltd.***, ECR 1991, page 4221. Advocate-general Has noted on this: "it may be thought that services should rather be treated by analogy with goods, and that non-discriminatory restrictions on the provision of services should be approached in the same way as non-discriminatory restrictions on the free movement of goods under the ***Cassis de Dijon*** line of case-law. That analogy seems particularly appropriate, where, as in the present case, the nature of the service is such as not to involve the provider of the service in moving physically between Member States but where instead it is transmitted by post or telecommunications (see ***Introduction to the Law of the European Communities***, by P.J.G. Kapteyn and P. VerLoren van Themaat, 2nd edition, edited by L.W. Gormley, 1989, pp. 443-452)." See also a similar case No. 55/94, ***Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procurator! di Milano***, ECR 1995, p. 4165.

[7] Case C-134/03, ***Viacom Outdoor Sri v Giotto Immobilier SARL***, ECR 2005, page 1-1167.

[8] Joined cases C-544/03 and 545/03, ***Mobistar SA v Commune de Heron in Belgacom Mobile SA v Commune de Schaerbeek***, ECR 2005, page 1-7723; in both cases there is a de minimis deviation. For more information, please see J. Meulman, H. de Waele: A Retreat from

serve as a lighthouse to judge what restrictions are allowed and which ones are not in view of the freedom to provide services.[9]

Services are defined either as services performed by individuals who pursue professional occupations or as onerous services provided by companies and enterprises, etc. This is a very abstract definition that practically includes any economic activity based on a contractual relationship. In principle, such activities are performed for certain compensation that can be in cash, in kind, in service, etc.

The rules on free movement of services are used for at least four possible ways to provide services. A standard way: (i) the service provider goes to the Member State of the service recipient and the service provider provides the service there, (ii) The other way is the way where the service recipient goes to the service provider in another EU Member State to receive services there, (iii) However, there are also two ways where a service provider and a service recipient are in their EU Member States, and the service is provided on a cross border basis through certain media (e.g., Internet, post, etc.). (iv) In the fourth way, a service provider and a service recipient (both of them can have their head office or residence in the same Member State) provide and receive services in another Member State. In doing so, active and passive freedom is differentiated to provide services as described above. In free movement of services, where the service itself moves from one EU Member State to another, and persons do not have to move at all, there is no division to active and passive freedom to provide services.

The ECJ case law formed a considerable number of rules in the area of freedom to provide services in the late nineties. These rules upgraded the basic rules for interpreting Article 49 of ECT. However, the case law of the ECJ has never made a considerable deviation nor has it exhibited other perception of freedom to provide services.[10] DSIM has codified mentioned

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Säger? Servicing or Fine-Tuning of the Application of Article 49 ECT, ***Legal Issues of Economic Integraion***, Volume 33, No. 3/2006, pp 226-228.

[9] For more information, please see J. Meulman, H. de Waele: ***ibid***, similarly also R. Knez, Consumer Protection in the European Union. ***Revizor***, June 2004, Vol. 15, No. 6, pp 88-111.

[10] For more information, please see V. Hatzopoulos, T. Uyen Do: The Case Law of the ECJ concerning the Free Provisions of Services: 2000-2005, research Papers in Law, ***CIVIL Rev***. No. 4/2006.

case law which refers to all the above-described four types of freedom to provide services, and partially also to the case law of Articles 43 and 48 of ECT applying to the freedom of establishment.[11] Under the rules of both freedoms, (i.e., in freedom to provide services and in freedom of establishment) as well as under the case law justifications based on the overriding reasons relating to the public interest are possible.[12] [13]

One such reason is also consumer protection. Namely, it is not that neither one nor the other freedom could be completely absolute and that it would, per se, prohibit anything that is not completely free (so, it is not about full liberalisation[14]), but under certain conditions and reasons, justifications under the ECT are possible (public order, public security, public health: Article 46 of ECT) as well as case law based justifications by overriding reasons relating to the public interest (these reasons justified by overriding reasons relating to the public interest can be found in paragraph 40 of the preamble to DSIM[15]).

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[11] Under item 6 of the preamble, DSIM clarifies why codification is necessary: "Those barriers (i.e., barriers to freedom to provide services and barriers to freedom of establishment, a note by the author) cannot be removed solely by relying on direct application of Articles 43 and 49 of the Treaty, since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation."

[12] See more details in note 14

[13] For more information, please see C. Barnard, Unravelling the services Directive, v: ***Common Market Law Review*** (CML Rev.), No. 2/2008, pp 350-376

[14] In this context, in the second paragraph of item 1 in Article 16, DSIM misleads us by indicating that "The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory." It needs to be interpreted along with other provisions that allow restrictions and not a total liberalization.

[15] The preamble for item 40 correctly summarizes the ongoing development of the ECJ case law regarding the reasons (21) that are considered as overriding reasons relating to the public interest: The concept of "overriding reasons relating to the public interest" to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy

2.2 Consumer Protection

In limine, it needs to be clarified that in addition to the anticipated justifications of limitations to freedoms, such as freedom to provide services and freedom of establishment included in the ECT, the ECJ realized already in its first decisions (referring to options of additional justifications.[16] Quite some additional case law based justifications are possible. At the same time, the EG began (praeter legem) to create the conditions for their enforcement. The list of justifications is still not final yet. In the area of free movement of services, this practice was commenced with the ***Van Binsbergen***[17] case which had emerged prior to the famous ***Cassis de Dijon***[18] case in which the ECJ decided that the four freedoms should be completed with the justifications on a case law basis and not just by those anticipated by the ECT.

In this respect, the ECT was overoptimistic and justification reasons from Article 46 of ECT could be self-sufficient only in the event that the harmonisation and unification of freedom of establishment and freedom to provide services would be so perfect and simultaneously so intense that many other reasons, which appear legitimate for the Member States to restrict one or other freedom, would be either superfluous or unjustified. On the one

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objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy."

[16] The difference between "entitlement" and "justification" lies in the fact that the reasons for entitlement are given beforehand, i.e., ***ex ante***. The word implies that it is about a well-founded measure, whereas the term "justification" means that the reasons for an exception are only being looked for and the exception is being justified (***ex post***). When justifications (according to the EG case law, they are overriding reasons) are accepted in DSIM, they are becoming entitlements.

[17] Case 33/74, ***Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid***, ECR 1974, p. 1299.

[18] Please see note 5 above.

hand, it became legally and actually clear already in the sixties of the last century that the ECJ would have to find an intermediate path between the idea and the internal market tendency toward a large degree of liberalisation of the four freedoms, but on the other hand, it would have to find an intermediate way between the well-grounded expectations, solid reasons and a small degree of sovereignty of tne Member States in areas such as social policy, consumer protection, protection of workers, animal protection, financial security, security of economic systems of the Member States, environmental protection, creditor protection, etc. in which the EU cannot find such important reasons as to deny the well-grounded and legitimate expectations of the Member States for observance of their national rules even in the case when the four economic freedoms of the internal market are hindered of their full effect.

However, for all these reasons collectively called ***overriding reasons relating to the public interest***,[19] and to which consumer protection also pertains, the ECJ has drawn up a test that has to be completed so that an overriding reason relating to the public interest can be justified. The substance of the test, called justification test, is the following check list:

1) to check out whether or not there already exists protection of such an overriding reason relating to the public interest at the level of the EU law rules;
2) if this is not the case, then it needs to be ascertained whether the reason can be defined as an overriding reason relating to the public interest;
3) the measure taken by the Member State must be non-discriminative;
4) the measure taken by the Member State must be legal;
5) the measure taken by the Member State must be appropriate for achieving such an overriding reason relating to the public interest;
6) the measure taken by the Member State must be necessary and indispensable;

[19] In the filed of free movement of services the notion mandatory requirements is more frequently used.

7) protection of an overriding reason relating to the public interest is not sufficiently protected in the Member State of origin, i.e., in the Member State of the service provider, and

8) the Member State action must be such as to ensure the attainment of the objective set, i.e., the protection of an overriding reason relating to the public interest, and it must not exceed what is necessary to achieve this objective; in addition, it cannot be replaced by other less restrictive measure through which the same results can be achieved (proportionality test).

The standards of the check-list described above are the control standards which the ECJ does not consistently test in each case. In its case law, one can detect more or less detailed arguments given by the ECJ in various cases with varying degrees of intensity of its arguments when the court tries to substantiate whether or not a certain measure taken by the Member State is justified. The same applies to consumer protection.

The key question that arises here is where the consumer protection level is actually set so high toachieve the qualification of the overriding reason relating to the public interest. The EU accepts aninformation model as an appropriate consumer protection system. This is the model after which the consumer is understood as a member in the production and sales chain. As such, the consumer must be sufficiently well informed to decide on the conclusion of a legal transaction (purchase of goods or services). In this case, the consumer must act with ***due diligence of an average consumer***.[20] In the EU, the consumer image [sic] is thus a well informed consumer who shall decide upon transactions on his/her behalf. Children as a special group of consumers are protected by a higher level. Therefore, the level of control standards is here considerably higher. What has been described is, of course, the European legislator standard and case law (the ECJ has frequently noted in its decisions that the consumer must not be overprotected), whereas the consumer protection level may be different under the Member State national legislation. In addition, the Member States usually treat consumers as individuals who are one-shot litigants without legal knowledge, and

[20] For more information, please read R. Knez, ***EU Law Concerning Consumer Protection***, GV Pubishing House, (Editor V. Trstenjak, authors D. Možina, V. Trstenjak, R. Knez), Ljubljana, 2005, pp 28-30.

therefore they rarely decide to seek their rights either within the out-of-court or judicial enforcement of consumer protection. That is why consumers are usually more protected at the national legal systems as compared to the protection level in the EU. In this respect, the European legislator's recent exclusive approach to ***minimum harmonisation***[21] was in favour to the Member States since the latter were able to enact a higher level of consumer protection when implementing the directives.

Irrespective of the protection level the individual Member States exercises, for the consumer protection reason as being justified from the viewpoint of the overriding reason relating to the public interest, the EU sets its limit to the definition of the European consumer. This limit is not entirely clear either. In addition to the basis and the starting point of the protection level at the EU level, which is simultaneously the level that justifies the overriding reason relating to the public interest, there is an information model of consumer protection where there are certain areas in which the consumer is more strictly and more comprehensively protected than in other areas. These are, for example, the areas of financial services where the ECJ admits their especially sensitiveness[22] with complex legal products. But the field of in the

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[21] The EU legislation uses several harmonisation methods: total or exhaustive harmonisation that does not allow deviations, except when it comes to protective clauses; optional harmonisation that allows application of the national law of the Member States or the EC law in a given area, and delegates the decision to the Member States themselves (opting-out option); partial harmonisation that only refers to certain aspects of a given area (for example, to international transactions only); ***minimum harmonisation*** that allows the Member States to introduce more stringent measures; alternative harmonisation allows the Member States to choose between several alternative harmonisation methods. For more information, please read W. van Gerven, Harmonization of Private Law: Do we need it? CML Rev. No. 4/2004, page 508.

[22] In the case C-225/95, ***Societe civile immobiliere Parodie v Banque H. Albert de Bary et Cie***, ECR 1997, page 1-3899, the ECJ explained under the point 22: "It must be recognized in this regard that the banking sector is a particularly sensitive area (emphasis a.) from the point of view of consumer protection. It is, in particular, necessary to protect the latter against the harm which they could suffer through banking transactions effected by institutions not complying with the requirements relating to solvency and whose managers do not have the necessary professional qualifications or integrity (emphasis a.)."

first place, within financial services, the need for special protection is prevailing in insurance,[23] banking and securities[24] services.

The consumer protection criterion, which satisfies an overriding reason relating to the public interest, is not the criterion that would be determined by the Member States irrespective of understanding the consumer at the ED level and particularly at the level shaped by the ECJ. This is because the ECJ decides on justified exceptions by way of the preliminary ruling proceedings.

3. FREEDOM OF ESTABLISHMENT

3.1 Overview

In the field of freedom of establishment, consumer protection is a less explicit overriding reason relating to the public interest as it has been described above under the rules of the freedom to provide services. This is due primarily to the fact that the country of establishment principle requires greater integration of the legal entity (a market player) in the market. This is different to the country of origin (principle of origin) as it is characteristic of the freedom to provide services, where the market player is not integrated in the market where the service is provided. . This means that through the integration in the country of the establishment the national consumer protection rules are observed - a country of establishment and a country where the service is provided is one and the same. Integration into the market environment, in which the entity operates, also means operation under the market rules of that country. Therefore, the conflict is smaller (or it does not exist at all) than in free movement of goods or in freedom to provide services where in any case the integration is not taking place at all or in very small proportion. In both free movement of goods and freedom to provide services, the lawful operation is in the sphere of the country of manufacture or establishment, which may mean a conflict with the country of destination of the goods or services in general and also in the consumer protection area.

However, this position may also be controversial according to the court decision in the CaixaBank France case.[25] In this case, the French bank, which

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[23] Case C-225/95, ***Socićte civile immobiliere Porodi v Banque H. Albert de Baey et Cie***, ECR 1997, page I-3899.

[24] Case C-384/93, ***Alpine Investments BVv Minister van Finanden***, ECR 1995, page I-1141.

was basically a branch of a Spanish bank, offered a 2% annual interest rate on the sight deposits of its clients. The bank was not allowed to do so in France because the French legislation did not permit that. This prohibition applied not only to foreign banks, but also to French banks. The bank believed that this was a barrier to market entry, and that actual discrimination occurred and not a legal one (indistinctly applicable measure). The court ruled that this was indeed so and that the consumer protection reason could not be justified because it was not proportionate even though the consumers would actually reap certain benefits from such a mode of operation. In this case, the decision of the ECJ actually means that the court looked upon the subsidiary bank activity as services provided by the mother company. This can, of course, lead to the consumer protection issue to the same extent as it applies to the justified restriction issue of Article 49 of ECT regarding the freedom to provide services. The basic issue the court highlighted in this case was an option of placing a certain product (i.e., a certain service - offering sight bank accounts) on the market. Thus, the court resolved the case in accordance with the decision on the Gourmet[26] case. The court actually asked itself whether the product was more easily launched by the French banks (which are . better known to consumers or potential clients) than by foreign banks. The achieved result was identical to that in the Gourmet case; despite the indistinctly applicable measure, the entity which newly starts offering a certain market product, in this case a service, is in a worse position. Thus, the rules, formed in the case law in the area of free movement of goods and services, were transferred to free establishment and thereby possible justifications, such as consumer protection, were also simultaneously transferred.

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[25] Case C-442/02, ***CaixaBank France v Ministere de l'Economie, des Finances et de l'Industrie***, ECR 2004, page I-8961.

[26] 25 Case C-405/98, ***Konsumentombudsmannen (****KO****) v Gourmet International Products AB*** (GIP), ECR 2001, page I-1795. In this case, the Swedish publisher of the Gourmet periodicals believed that the Swedish legislation, which prohibits advertising of alcoholic beverages containing more than 2.25% of alcohol, except in press where alcoholic beverage are advertised by producers and restaurants that sell such beverages, did not comply with the ECT rules (it violated the free movement of goods; Article 28 and freedom to provide services; Article 49); the ECJ used the market access principle and assumed an attitude that also entirely non-discrimination rules could mean such a barrier. It continued that the reason for maintaining the financial market reputation was an overriding reason relating to the public interest, and thus enabled that restriction by the Netherlands.

3.2 Consumer Protection

Consumer protection is the undisputed part of the case law of the ECJ not only when it is about the interpretation of numerous directives on consumer protection (this is not the subject of this paper), but also when it is about the justification of the restrictive measures taken by the Member States in the areas of free movement of goods and services, freedom to provide services, and freedom of establishment. Since very early cases, e.g., Van Binsbergen[27] Cassis de Dijon[28] and the like, for the ECJ, consumer protection has been an overriding reason relating to the public interest, to which the above-described justification test can be used. With the adoption of DSIM and the case law codification in the areas of freedom to provide services and freedom of establishment, it was expected that the argument on consumer protection would also represent a possible exception in the DSIM itself. However, as mentioned at the beginning of this paper, the rules on free movement of services no longer include exceptions to consumer protection, unlike the rules on freedom of establishment. The codification is actually complete in the case of the rules on freedom of establishment; following the continuity principle, the current case law of the ECJ (not only regarding the consumer protection reason, but also regarding all the overriding reasons relating to the public interest) continues to be used.

4. DSIM AND CONSUMER PROTECTION

DSIM regulates the issue of consumer protection in different ways. The exception mentioned above or deviation from the existing case law, justification of the measures taken by the Member States to restrict or to make the freedom to provide services less attractive are not isolated solutions referring to consumer protection. To a large extent, DSIM is truly a codifying directive. But in addition to the case law codification, it includes three important areas: administrative simplification (Chapter II, Administrative Simplification), quality of services (Chapter V, Quality of Services), and administrative cooperation between the Member States (Chapter VI, Administrative Cooperation). Consumer protection does not play a major

[27] See note 17 above.

[28] See note 5 above.

role in the administrative simplification, whereas in chapters on quality of services and on administrative cooperation between the Member States, consumer protection is seen as one of the reasons for taking individual measures against a service provider from another Member State. Such measures are possible under the special procedure described in the Directive (Article 35 of DSIM). This is ex post control over the service provider. When the Member State, in which a service is provided, believes that a higher protection level is needed for the consumer with regard to certain services or to a service provided by this provider, but the country of origin does not achieve that level, it may take the necessary measures under a special procedure (so, not automatically and unilaterally). These measures must be proportionate. Like most articles of the Directive, Article 35 is, nomotechnically speaking, user-unfriendly. It is complex and terse; in it, procedural law is intertwined with substantive law, and it is quite comprehensive. It attempts to define and clarify the procedure for individual derogations when certain measures can be taken for a certain service provider (so, not in general and ex ante). These measures will be taken in favour of the service quality and consumers. It also determines mutual assistance of the Member States in such a procedure. It pursues the request that competent bodies of the Member States should operate as competent bodies within the Member State itself. This is a big step forward for the completion of the internal market. Such cooperation has never been so exacting before. On the basis of the DSIM, the state bodies are becoming interstate bodies at least in terms of activities, but not in legal and organisational terms. In conjunction with the sovereignty of the Member States, such a provision is a typical reflection of the internal market development. The more it is developed, the lesser sovereignty of the Member States.

According to DSIM, the overall picture of consumer protection can also be described so that protection is achieved by the provisions that have the nature of administrative law (command-and-control). These are the rules that refer to the mandatory information on providers: Article 22, assistance to recipients; Article 21, settlement of disputes; Article 27, mutual administrative assistance of the Member States in control; Articles from 29 to 31, warning mechanism when it comes to the services that are hazardous to health or safety of persons; Article 32, information on the reputation of providers; Article 32, additional deviations from the freedom to provide services for individual cases under Article 18 that refers to consumer protection, the requirement for mandatory liability insurance; Article 23, etc. On the basis of these rules, DSIM attempts to substitute for consumer

protection provided by the Member States through exceptions in the prevailing public interest. The latter is no longer possible on the basis of DSIM (for more on this, see below); consumer protection is not enhanced at the level of general provisions, but at the level of an individual case or a service provider through administrative law. It is about reducing barriers to the freedom to provide services, and also, I think, it is about a lower level of consumer protection (***Abschwachung***)[29] by using general acts at the ex ante state level. It is about an infelicitous substitute for an ex ante derogation as we know it in the case law in the area of freedom to provide services. The essential difference between what the ECJ case law has formed on the one hand and Article 18[30] in relation to Article 35 of DSIM that determine the procedure and individual cases of derogations from the rules on the freedom to provide services is in the fact that these derogations are possible and not in advance, but ex post for merely individuals, and that a procedure needs to be carried out to prove that the issue of safety of services is so important and the measures taken by the country of origin are insufficient; that the Member State where the service is provided may (in accordance with its legislation) impose additional proportionate measures on such a service provider to ensure greater safety of services for the consumer.

Differently from the description of the combination of Articles 18 and 35 of DSIM in the area of freedom to provide services, the provisions on freedom of establishment determine that the services can be the subject of exceptions for overriding reasons relating to the public interest (Article 15, paragraph 3, item b). These reasons are explained in paragraph 8 of Article 4 of DSIM, and consumer protection can be found in sixth place among other 15 reasons. Thus, the rules on freedom of establishment are, by way of exception, not used, and the freedom of establishment can be restricted or it can be less attractive for foreign service providers from other Member States, if it is

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[29] Also W. H. Roth, Freier Deinstleistungsverkehr und Verbraucherschutz, ***VuR - Verbraucher und Recht***, No.5 / 2007,pp 167-171.

[30] This provision ensures under procedure terms pursuant to Article 35 of DSIM (international cooperation between competent bodies) that the country of service provision shall take measures for safety of services. Furthermore, such a measure is only possible if it is not about the harmonised area at the EU level, if this measure ensures a higher level of safety than it is ensured by the country of establishment (or it has not any at all), and that the measure is proportionate.

about a non-discriminative measure of a Member State, if such a measure is proportionate, and if it is urgent for a reason, inter alia, consumer protection. Such a measure is not restricted to individual providers only, but the measure is general and can be enforced by a national legislator as an ex ante measure in certain areas. The national legislator must detect and analyse the justification of such a measure. In this respect, it can be concluded that the DSIM rules have not restricted anything nor caused any deviation from the ECJ case law, unlike is this true for the rules on the freedom to provide services. In the latter case, the Member States will no longer be able to justify restrictive rules. This, of course, only applies to those areas to which the DSIM refers or is applicable. The provisions of Article 2 of DSIM exclude several areas, inter alia, services of a non-economic nature in general interest, financial services, such as banking, insurance and similar services, medical services, protection services, etc. Within the provisions on freedom to provide services there are areas listed in Article 17 of DSIM, such as harmonised fields of postal services, energy sector services, legal services, etc. They are all important fields where consumer protection is especially sensitive (see above).

Faced with such a different approach to both freedoms that refer to service providers (freedom of establishment on the one hand and freedom to provide services on the other), it seems important to find reasons and possible substitutions that the DSIM could make them available in exchange for a very limited possibility for the Member States to successfully enforce restriction for the consumer protection reason in the area of free provision of services. If the answer in both cases is not cognitively satisfactory (i.e., when no acceptable arguments can be found in ex nihilo reasons and no appropriate substitutions (quid pro quo that would offer adequate consumer protection) can be found in objectives and of the DSIM itself, a question arises whether or not regulation is moot in the light of the primary law (ECT) when it was adopted according to the ***neminem oportet esse sapientiorem legibus***[31] principle. To deny the Member States the opportunity to successfully enforce exceptions for the consumer protection reason prior to adopting the Directive or prior to its implementation without simultaneously offering adequate consumer protection in another appropriate way means a deviation from the TEC rules. For their objective, they set efficient protection of consumers (Article 153 of

[31] No man ought to be wiser than the law.

TEC)[32] and give the Member States an opportunity to take stricter measures for achieving a higher level of protection. Such European legislator's approach exhibits a major emphasis placed on the significance of the country of origin (principle of origin), which, like a red thread, accompanies all the attempts (including the attempt with the Bolkenstein dirtecive) of codification and regulation of the free service management. The restricted derogations under Article 18 of DSIM are thus a reflection of the enhanced confidence in the statutory regulation of certain services in individual Member States wherefrom providers come to provide services in other Member States. Corollary, it can be understood that this confidence level has increased to the extent that in the light of consumer protection, no problems which would need general regulation should occur. It is assumed that problems, by way of exception, would be merely periodic. The regulation which allows exceptions only on a case by case basis (case by case derogation) along with a special procedure for cooperation between the competent bodies in the Member States is adequate. It restricts these derogations in both content and form; with regard to content - in the light of Article 18; formally - in the light of Article 35 DSIM.

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[32] This Article determines: "1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.

3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).

5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

Can such a weak country of origin principle, which also has an impact on consumer protection, mean non-compliance with the TEC which stipulates that the exceptions and the national regulations justifying these exceptions are possible only in cases when there is no full harmonisation at the Community level (Article 95, paragraph 4 TEC)? I believe that this issue needs to be interpreted in accordance with the ECJ case law which permanently stipulates that it is possible to invoke the overriding reasons relating to the public interest only in cases where there are no harmonisation measures that are already used for the protection of an individual interest and for the appropriate measures in this regard.[33]

5. Conclusion

In DSIM, which is another big step toward ensuring freedom to provide services in the internal market, consumer protection is regulated the other way than we could have expected if DSIM had taken into account the complete case law of the ECJ. In some DSIM chapters, consumer protection is not mentioned and DSIM does not interfere with it either (e.g., regarding the contractual provisions in the consumer relationship between consumers and retailers). The Directive does not change the legislator's views on the protection of the consumer as a person who alone is responsible for the decision on conclusion of a long-term legal transaction based on sufficient information the consumer gets from the retailer. It can also be ascertained that the case law regarding the exceptions justified by overriding reasons relating to the public interest, such as consumer protection in view of exceptions to freedom of establishment, is not changed. DSIM follows the rules drawn up by the case law of the EG. In the area of all the four types of freedom to provide services (i.e., when it is not about the freedom of establishment for service providers), DSIM has enacted the country of origin principle that is restricted and weakened where it is possible to invoke consumer protection merely on the grounds set out in Article 18 of DSIM. That is to say, the overriding reason is safety of services. In addition to this reason, if it exists, it is necessary to carry out the procedure laid down in Article 35 of DSIM, and to call on the Member State of establishment to take appropriate measures that will assure adequate safety of services. This is

[33] Case C-389/05, ***EC Commission v France***, ECR 2008, item 67.

possible only in those cases where no harmonisation rules have been adopted at the Community level regarding the safety of an individual service, and only in the case if the measure, required by the state where the service is provided, would contribute to greater safety of services. At the same time, the Member State of establishment has not taken such a measure or does not require it, and in any case, greater safety requirements, imposed by the Member State where a service is provided, must be proportionate.

Thus, the supervision duty (along with the rules on cooperation between the competent bodies of the Member States) is delegated to the country of establishment or origin even when it comes to providing services in the host Member States. But on the other hand, this means weakened supervision efficiency offered by the Member States where the service is provided. In this case, the rules on the mandatory professional liability insurance and on the information, which the provider must give to the service recipient irrespective of whether or not the recipient requests it (and other rules listed above, and which are in favorem consumatoris), partially mitigate and compensate for the country of origin principle that is weakened, and for the supervision efficiency weakened by the Member States where the service is provided.

From an overall point of view, all Member States are thus gaining and losing because they will find themselves in the role of the Member State of establishment or origin as well as in the role of the country where a service is provided. Hence, the countries which have stricter consumer protection standards will be losing more in comparison with those having less strict standards. That is to say, in order to assure safety of a certain service, the countries in the first group will have to carry out the cooperation procedure laid down in Article 35 of DSIM, and they will have to warn the country of establishment with less restrictive consumer protection provisions to take (in the event of a specific provider) stricter measures to assure safety of the service in another Member State. One can easily imagine that this will not be easy. It may occur that the country of establishment will not have a legal basis in its legislation to be able to ask such a service provider to take a certain measure requested by the competent body in the host Member State. Only in this case, i.e., with a certain delay time, the country will be able to introduce this measure for the specific service provider.