CONCESSIONS RELATING TO STATE-OWNED MARITIME PROPERTY WITHIN THE CONTEXT OF FREE MOVEMENT: REFLECTIONS ON THE *PROMOIMPRESA* JUDGMENT

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Abstract

In Promoimpresa and Melis judgment, the Court of Justice did not hesitate to assert that concessions of State-owned maritime property for tourist and leisure-oriented business purposes "concern a right of establishment on State-owned land with a view to conducting tourist and leisure-oriented business activities so that the situations at issue in the cases in the main proceedings fall, by their very nature, within the scope of Article 49 TFEU". This legal classification not only provides the necessary premise for limiting the scope of EU law, but is also helpful in fully appreciating the Court's reasoning in which primary law intersects with secondary law. The parameters offered respectively by the former and the latter are not neutral or equivalent. On the contrary, the consequences resulting from the application of one or the other parameter seem to be rather significant for the residual room for manoeuvre of the Member States.

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1. Introduction: freedom of establishment as the reference standard for assessing legislation regulating the grant of concessions of State-owned maritime property

In its judgment in the *Promoimpresa* and *Melis* cases,[1] the Court of Justice did not hesitate to assert that concessions of State-owned maritime property for tourist and leisure-oriented business purposes "concern a right of establishment on State-owned land with a view to conducting tourist and leisure-oriented business activities so that the situations at issue in the cases in the main proceedings fall, by their very nature, within the scope of Article 49 TFEU".[2]

This legal classification not only furnishes the premise necessary in order to limit the scope of EU law, to the exclusion of other bodies of rules,[3] but is also useful in fully appreciating the Court's reasoning within which, as will be seen below, primary law intersects with derived law and where the provisions of each are mutually exclusive.

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[1] ECJ, judgment of 14 July 2016 in Joined Cases C-458/14 and C-67/15. See, on the judgment, D. Dero-Bugny, A. Perrin, *Cour de justice, 5e ch., 14 juillet 2016, Promoimpresa srl e.a. c/ Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro e.a., aff. C-458/14 et C-67/15, ECLI:EU:C:2016:558*, in *Jurisprudence de la CJUE 2016*, *Décisions et commentaires* 95 (2017); A. Cossiri, *La proroga delle concessioni demaniali marittime sotto la lente del giudice costituzionale e della Corte di giustizia dell'UE*, 14 Federalismi 23 (2016); L. Di Giovanni, *Le concessioni demaniali marittime e il divieto di proroga* ex lege, 3-4 *Riv. It. Dir. pubbl. com.* 912-926 (2016); V. Squaratti, *L'accesso al mercato delle concessioni delle aree demaniali delle coste marittime e lacustri tra tutela dell'investimento ed interesse transfrontaliero certo*, 2 *European Papers* 767 (2017); M. Magri, *Direttiva Bolkestein e legittimo affidamento dell'impresa turistico balneare: verso una importante decisione della Corte di giustizia U.E.*, 4 *Riv. Giur. Edil.* 359 (2016); F. SANCHINI, *Le concessioni demaniali marittime a scopo turistico-ricreativo tra meccanismi normativi di proroga e tutela dei principi europei di libera competizione economica: profili evolutivi alla luce della pronuncia della Corte di Giustizia resa sul caso Promoimpresa v. Melis*, 2 *Riv. Reg. merc.* 182 (2016). On the direct effect of the Directive, see M. Manfredi, *L'efficacia diretta della "direttiva servizi" e la sua attuazione da parte della pubblica amministrazione italiana: il caso delle concessioni balneari*, in 1 *JUS* 63 2021; F. Ferraro, *Diritto dell'Unione e concessioni demaniali: più luci o più ombre nelle sentenze gemelle dell'Adunanza Plenaria? Diritto dell'Unione e concessioni demaniali*, in 3 *Dir. soc.* 359 (2021); E. Cannizzaro, *Demanio marittimo. Effetti in* malam partem *di direttive europee? In margine alle sentenze 17 e 18/2021 dell'Adunanza Plenaria del Consiglio di Stato*, in *Giustiziainsieme* (30 dicembre 2021); R. Mastroianni, *Il Consiglio di Stato e le concessioni balneari: due passi avanti e uno indietro?*, in 1 *Eurojus* (2022).

[2] *Promoimpresa* judgment, cit., para. 63.

[3] E.g. services concessions; see the *Promoimpresa* judgment, cit., para. 47.

It is therefore useful to start with an (albeit brief) analysis of the reference legal framework.

As is known, freedom of establishment manifests itself essentially in the right for a citizen of a Member State (or, *mutatis mutandis*, a legal person) to pursue activities as a self-employed person stably within the territory of another Member State.[4] Whilst the self-employed nature of the relevant activity delineates the operational scope of freedom of establishment from that of the free movement of workers,[5] the "stable and continuous" nature[6] of the activity establishes the dividing line between the scope of freedom of establishment and freedom to provide services,[7] which are generally temporary and occasional in nature.

As far as its substantive content is concerned, in order for freedom of establishment to be realised as a right, all legislative and regulatory obstacles imposed by the Member States on the exercise of that freedom must be removed (so-called "negative integration"). That obligation not only entails, first and foremost, the right to free movement and to reside throughout the EU, but also implies a prohibition on the subjection by Member States of access to or the conduct of self-employed activity within their respective territories to measures that discriminate on the grounds of nationality or the Member State of establishment. That prohibition is clearly apparent from the wording of Article 49(2) TFEU: "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and

[4] On freedom of establishment, see P. Craig, G. de Búrca, *EU Law*, 6th edition (2015); V. Hatzpopoulos, *Regulating Services in the European Union* (2012); S. Van den Bogaert, A. Cuyvers, I. Antonaki, *Free Movement of Services, Establishment and Capital*, in *The Law of the European Union* (2018); H.-J. Blanke, S. Mangiameli (eds), *Treaty on the Functioning of the European Union - a commentary* (2021).

[5] Under this latter scenario, workers perform work as employees and under the direction of another person.

[6] There is a copious body of case law regarding this issue. See, *ex multis*, the historic judgments of 21 June 1974 in Case 2/74, *Reyners*, para. 21, and of 30 November 1995 in Case C-55/94, *Gebhart*, para. 25.

[7] See Articles 56 et seq TFEU. On the Relation of freedom of services and freedom of establishment see R.C. White, *Workers, Establishment and Services in the European Union* (2004); A. Tryfonidou, *Further steps on the road to convergence among the market freedoms*, in 1 *Eur.Law. Rev*. 36 (2010); H.-D. Jarass, *A Unified Approach to the Fundamental Freedoms*, in M. Andenas, W.-H. Roth (eds), *Services and Free Movement in EU law* (2002); P. Oliver, W.-H. Roth, *The Internal Market and the Four Freedoms*, in *Comm. Mark. Law Rev.* 407 (2004); M. Poiares Maduro, *Harmony and Dissonance in Free Movement*, in *Cambridge Yearbook of European Legal Studies* 315 (2001)

manage undertakings, (…), under the conditions laid down for its own nationals by the law of the country". It may be useful to note that, since the *Reyners* judgment,[8] the Court of Justice has taken the view that the prohibition on discrimination on the grounds of nationality has direct effect and may therefore be relied on by individuals against the Member States, even if there are no implementing measures at national or supranational level.

It has also been clarified within the case law that the prohibition on discrimination covers both direct discrimination[9] as well as indirect discrimination, that is measures that apply *de iure* without distinction both to citizens and non-citizens, but that *de facto* entail greater burdens or reduced benefits for the latter compared to the former.[10] In relation to freedom of establishment, the negative integration provided for under the Treaty also entails a prohibition on the adoption by the Member States of merely restrictive measures, that is measures that, whilst not entailing any discrimination on the grounds of nationality or the country of establishment, are nonetheless liable to hinder, discourage or even present the exercise of freedom of establishment guaranteed under the Treaty.

At the same time, the Treaty provides that these various prohibitions may be subject to a number of derogations, which may be express[11] or tacit, in order to enable the Member States to pursue self-standing objectives that are deemed to be worthy of protection. These include so-called *overriding reasons relating to the public interest*. These are tacit derogations, introduced by the Court of Justice, and may apply only to measures that are not discriminatory. In a similar manner to express derogations, a Member State invoking overriding reasons relating to the public interest must demonstrate that the contested measures are not only

[8] Judgment of 21 June 1974 in Case C-2/74, cit.

[9] Directly discriminatory measures are those that "affect a foreign national *qua* foreign national" and where the prerequisite for their application is the relevant person's foreign nationality. See, *ex multis*, judgment of 18 June 1985 in Case C-197/84, *Steinhousen*, paras. 17 and 18.

[10] National legal systems contain provisions that, whilst being applicable without distinction to foreign nationals and to citizens, thus depending upon a prerequisite different from nationality, *de facto* cause concealed discrimination against the citizens of other Member States. See, *ex multis*, judgment of 17 November 1992 in Case C-279/89, *Commission v. United Kingdom*, para. 42.

[11] See Article 52 TFEU.

capable of achieving those objectives, but are also proportionate in relation to them.[12]

In addition to the requirements of negative integration – which, whilst being essential, may not be sufficient to eliminate the overall impediments to freedom of establishment – the Treaty has established another instrument for guaranteeing the effective exercise of freedom of establishment within the internal market: the adoption by EU lawmakers of harmonised measures seeking to achieve convergence amongst the various national laws (so-called "positive integration"). The purpose of harmonised measures is precisely to eliminate, either entirely or in part, differences between national legislation that prevents the proper operation of the internal market. Consequently, Member States can no longer invoke the express derogations or overriding reasons relating to the public interest that have been found within the case law to deserve protection in order to adopt national measures that depart from harmonised rules. This harmonised rulebook in fact becomes the parameter with reference to which it is assessed whether the Member States have exercised their legislative powers properly. On the other hand, the provisions of primary law continue to apply to all scenarios that are not governed by harmonised legislation. Accordingly, the relationship between primary and secondary law may be conceptualised as a relationship between *lex specialis* and *lex generalis*.[13]

2. The two parameters: harmonised rules; primary law

In view of the above, in the *Promoimpresa* judgment the Court was first required to identify the applicable law, and to verify whether the facts at issue in the cases before it fell within the scope of harmonised law, i.e. Directive 123/2006 on services in the

[12] See below section 4.2.

[13] On this topic see I. MALETIĆ, *Trade Regulation and Policy in the EU Internal Market. An Assessment through the Services Directive*, Elgar Studies in European Law and Policy, Elgar Publishing, 2021.

internal market,[14] or whether on the contrary they fell within the scope of primary law.[15]

It is important to note in this regard that the parameters offered by primary law and derived law respectively are not neutral or equivalent. On the contrary, the consequences resulting from the application of one or the other appear to be quite significant for the Member States' residual scope for manoeuvre.

As regards primary law, it is sufficient to note that, thanks to the mechanism of either the express derogation or overriding reasons relating to the public interest, Member States retain a certain degree of legislative discretion, and may enact legislation to derogate from the rules laid down by Articles 49 TFEU et seq.[16]

On the other hand, where harmonised legislation has been adopted, the margin of discretion of the Member States becomes more limited, and may eventually disappear entirely, depending on the extent to which harmonisation has been achieved by derived law. In this regard, it is possible to identify a range of harmonisation

[14] In OJEU L 376 of 27 December 2006, pp. 36-68. This is known as the "Bolkestein" Directive, the aim of which is to establish general provisions in order to facilitate the exercise of the rights to freedom of establishment and free movement of services. See within the literature, *inter alia*, M. Klamert, *The Services Directive: Innovation and fragmentation*, in *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (2014); G. Davies, *The Services Directive: extending the country of origin principle, and reforming public administration*, in 32 *Eur. Law Rev.* 232 (2007); P. DELIMATSIS, *Standardisation in services - European ambitions and sectoral realities*, in 41 *Eur. Law Rev*. 513 (2016); J. Monteagudo, A. Rutkowski, D. Lorenzani, *The economic impact of the Services Directive: A first assessment following implementation*, in 456 *Ec. Papers*. 2012; C. Barnard, *Unravelling the Services Directive*, in 45 *Comm. Mark. Law Rev.* 323 (2008); J. Wolswinkel, *Concession Meets Authorisation: New Demarcation Lines under the Concenssions Directive?*, in 12 *Eur. Proc. Publ. Priv. Partn. Law Review* 396 (2017); D. Diverio, *Limiti all'accesso del mercato dei servizi* (2019); M. Condinanzi, A. Lang, B. Nascimbene, *Cittadinanza dell'Unione e libera circolazione delle persone* (2006); F. Bestagno, L. Radicati di Brozolo, *Il mercato unico dei servizi* (2007), G. Fonderico, *Il Manuale della Commissione per l'attuazione della direttiva servizi*, in 8 *Giorn. Dir. Amm.* 921 (2008). With respect to the case of the concessions of State-owned maritime property see F. Capelli, *Evoluzione, splendori e decadenza delle direttive comunitarie. Impatto della direttiva CE n. 2006/123 in materia di servizi: il caso delle concessioni balneari* (2021).

[15] See M.E. Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (2018).

[16] See below section 4.2.

"models".[17] These include both *partial* harmonisation, where national provisions regulate different aspects from those expressly regulated under EU law,[18] as well as *full* or *exhaustive* harmonisation. In such cases, since the EU law regulates a sector exhaustively, the Member States do not have any ability to intervene. *Exhaustive* or *full* harmonisation involves the replacement of a variety of national legislative provisions with a uniform European *standard*, which does not permit the adoption of any rules, whether divergent or not, by national lawmakers.[19]

Within this perspective, since the Member States cannot adopt "measures other than those expressly provided for",[20] "more restrictive" measures[21] or "unilateral" measures[22] of any type, unless expressly provided for under derived law,[23] the exhaustive nature of the harmonisation essentially deprives the Member States of any power to legislate.

3. The first parameter: Directive 123/2006/EC and the degree of harmonisation achieved by it

The Court of Justice operated precisely within this conceptual framework, verifying first and foremost whether Directive 123/2006 was applicable,[24] including in particular Article 12, to

[17] See regarding this issue A. Arena, *Il principio della* Preemption *in diritto dell'Unione europea* (2013); P.J. SLOT, *Harmonisation*, in 21 *Eur. Law Review* 378 (1996).

[18] See e.g. the judgment of 21 December 2016 in Case C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)*, para. 29-33.

[19] The prohibition also in fact extends to neutral measures; see E. Cross, *Preemption of Member State Law in the European Economic Community: A Framework for Analysis*, in 29 *Comm. Mark. Law Rev.* 459 (1992).

[20] See e.g. the judgment of 26 May 1993 in Case C-52/92, *Commission v. Portuguese Republic*, para. 19.

[21] E.g. judgment of 5 April 1979 in Case C-148/78, *Criminal proceedings against Tullio Ratti*, para. 27.

[22] See e.g. the judgment of 13 December 1983 in Case C-222/82, *Apple and Pear Development Council v. K.J. Lewis Ltd and others,* para. 23.

[23] See e.g. the judgment of 29 January 2013 in Case C-396/11, *Radu*, para. 36.

[24] Cit. See within the literature, U. Stelkens, W. Weiß, M. Mirschberger (eds.), *The Implementation of the EU Services Directive Transposition, Problems and Strategies* (2012); M. Wiberg, *The EU Services Directive - Law or Simply Policy?* (2014); E. Faustinelli, *Purely Internal Situations and the Freedom of Establishment Within the Context of the Services Directive,* in 44 *Leg. Iss. of Ec. Int.* 77 (2017); J. Krommendijk, *Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situation*s, in 18 *German Law Journal* 1359 (2017); W.

concessions of State-owned maritime property as well as the degree of harmonisation established by it.

In stating that Article 12 "concerns the specific case in which the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity",[25] the Court was called on as a preliminary matter to clarify the concept of "authorisation", at the same time verifying whether the prerequisites of "scarcity of available natural resources" had been met. The Court did not have any difficulty in concluding that - "concessions granted by public authorities of State-owned maritime and lakeside property relating to the exploitation of State land for tourist and leisure-oriented business activities"[26] were equivalent to authorisations under Article 12. Since the authorisation regime covers "any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof",[27] the Court stated that the concessions to which the references for a preliminary ruling related "may therefore be characterised as 'authorisations' within the meaning of the provisions of Directive 2006/123 in so far as they constitute formal decisions, irrespective of their characterisation in national law, which must be obtained by the service providers from the competent national authorities in order to be able to exercise their economic activities".[28] On the other hand, the task of verifying the additional requirement laid down by Article 12, i.e. the need to authorise a limited number of concessions on account of the scarcity of natural resources, was left to the national court.[29] Clearly, if this additional prerequisite were also met, Article 12 would be applicable to concessions of State-owned maritime property.

The Court then went on to examine the provisions laid down by Article 12 in order to establish whether the national legislation

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Lewandowski, *Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice*, in *Utrecht Law Review* 57 (2022).

[25] *Promoimpresa* judgment, cit., para. 37. See A. Sanchez-Graells, C. De Koninck, *Shaping EU Public Procurement Law: A Critical Analysis of the CJEU Case Law 2015–2017* (2018).

[26] *Ibidem*, para. 40.

[27] *Ibidem*, para. 38.

[28] *Ibidem*, para. 41.

[29] *Ibidem*, para. 43.

was compliant with it. As is clearly stated, where the number of authorisations is limited because of the scarcity of available natural resources, Article 12 subjects their issue to "a selection procedure between potential candidates which must ensure full guarantees of impartiality and transparency, including, in particular, adequate publicity".[30] Considerations related to the protection of legitimate expectations of the holders of authorisations may only be taken into account subject to compliance with those prerequisites of impartiality and transparency, and thus at the time when the rules for the selection procedure are determined and within the ambit of those rules.[31] Consequently, national legislation such as that at issue in the main proceedings that provides for a statutory extension of authorisations, and does not enable an impartial and transparent selection procedure to be organised, does not enable divergent interests to be taken into account.[32] A justification grounded in the principle of legitimate expectations "cannot therefore be relied on in support of an automatic extension enacted by the national legislature and applied indiscriminately to all of the authorisations at issue".[33]

Ultimately, in the light of the analysis carried out by the Court in accordance with the parameter established by the Directive, the national legislation was found to be incompatible with EU law. In addition, since the Directive, including in particular Articles 9 to 13, provides for exhaustive harmonisation,[34] the Court did not hesitate to reiterate that "a national measure in a sphere which has been the subject of full harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty".[35]

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[30] *Ibidem*, para. 49.

[31] *Ibidem*, paras. 52-54. See within the literature S. Bastianon, *La tutela del legittimo affidamento nel diritto dell'Unione europea* (2012); W. LEWANDOWSKI, *Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice*, cit., at 70.

[32] *Ibidem*, paras. 50, 51 and 55.

[33] *Ibidem*, para. 56.

[34] *Ibidem*, para. 61; see by analogy the judgment of 16 June 2015 in Case C-593/13 *Rina Services and others*, paras. 37 and 38). V. I. Maletic, *Servicing the Internal Market: The Contribution of Positive Harmonization Through the Services Directive and Its Interaction with Negative Integration*, in 48 *Legal Issues of Economic Integration* 252 (2021).

[35] *Promoimpresa* judgment, cit., para. 59. See also the judgment of 30 April 2014 in *UPC DTH*, C-475/12, para. 63 and the case law cited.

It is clear that, under the framework described above, exhaustive harmonisation deprives the State of the opportunity to rely on the express derogations provided for under primary law, as well as the overriding reasons recognised within the case law, as justification for measures that will have a restrictive effect on activities or services that have been subject to harmonisation. Within this perspective, full harmonisation has similar effects to those resulting from the recognition of exhaustive competence for the EU.[36]

In fact, this approach underlies the view that, once full and exhaustive legislation has been adopted at EU level, the interest in maintaining the uniform standard established by that legislation prevails over any other requirements: Member States are thus obliged to eliminate at root any instance of disharmony at national level.

4. The second parameter: primary law

On the other hand, primary law comes back into play where the Directive is not applicable to the main proceedings. Under such a scenario, the *lex generalis* will reappropriate its space and revert to its function as a parameter for establishing the conformity of State legislation.

In its judgment in the *Promoimpresa* case, the Court applied this paradigm in an absolutely unobjectionable manner: "in so far as the questions referred for a preliminary ruling concern the interpretation of primary law, those questions arise for consideration only if Article 12 of Directive 2006/123 is not applicable to the cases at issue in the main proceedings, which it is for the referring courts to determine, (…)".[37]

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[36] Cf. L. Daniele, *Diritto dell'Unione Europea* (2014): "[W]here the Union to choose to adopt full and detailed provisions to regulate a certain area falling under concurrent competence, the Member States would be precluded any ability to establish rules. In cases of this type, the Union's competence – originally concurrent – would in actual fact become exclusive (a phenomenon that can be defined as depletion or pre-emption)"; see also R. Baratta, *Le competenze interne dell'Unione tra evoluzione e principio di reversibilità?*, in 3 *Il Diritto dell'Unione Europea* 527 (2010); G. Gaja, A. Adinolfi, *Introduzione al diritto dell'Unione europea* (2012); S. Weatherill, *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, in D. O'keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* 14 (1994).

[37] *Promoimpresa* judgment, cit., para. 62.

4.1. The cross-border interest

Since the provisions on freedom of establishment only apply where there is a cross-border element, as is also the case for other fundamental market freedoms, the Court first ascertained, as a preliminary matter, whether the concessions at issue in the main proceedings, which concerned a right of establishment on State-owned land with a view to conducting tourist and leisure-oriented business activities,- had a "certain cross-border interest".

It is important to note that it is the cross-border or trans-national aspect that engages EU law, that brings the case within the scope of EU law and that triggers the application of its rules.[38] In other words, the cross-border element is a notion that that can be used to distinguish between situations in which free movement between Member States is not at stake and those (which may even be similar or identical) in which by contrast there is a risk of prejudice to free movement rights. The purpose of the notion is to delineate the practical scope of the rules on free movement.[39] Within this perspective, any Member State legislation that restricts free movement will not be prohibited *per se*, but only insofar as it interferes with intra-Community movement.

Traditionally, the Court has taken particular care to identify an international element, i.e. at least one cross-border aspect, before engaging the provisions of the Treaty on free movement, also in situations where it is not immediately apparent that EU law is relevant. Even where it is tenuous, not significant or even artificial, the cross-border element in any case performs an essential function

[38] For an overview of the notion, see N.N. Shuibhne, *The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?*, in P. Beaumont, C. Lyons, N. Walker (eds.), *Convergence and Divergence in European Public Law* 194 (2002).

[39] See M. Mislav, *Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market*, in *Col. Publ. Law. Res.* 36 (6 February 2009). According to the author, "[t]he internal situation rule has been developed by the European Court of Justice with the same values in mind, attempting to determine the proper scope of the internal market provisions of the EC Treaty and the amount of elbow room they leave to Member States. The case law on internal situations narrows the scope of EC provisions by excluding cases which seem to have little to do with the internal market, allowing Member States to subject these situations entirely to their own law".

in establishing whether a given situation triggers the rules on free movement.[40]

Within this perspective, the cross-border element has been construed in various ways within the case law of the Court. As well as consisting in a factual element, it may also manifest itself in the normative dimension. The term "normative transnationality" refers to the presence, within a given situation, of aspects that are of relevant for EU law not due to any cross-border circumstances or aspects within the facts of the case, but rather having regard to the *transnational goals* of the Treaty provisions on free movement.[41] The emphasis is in fact placed on the relationship between the national measure applicable to the specific facts and EU internal market rules in order to establish whether the national law may have potentially restrictive effects on free movement.

In referring to a "certain cross-border interest", the Court thus used a normative linking criterion, detaching the transnational element from the factual dimension. In fact, although the facts of the case within which the preliminary reference was made were circumscribed to within one single Member State, it was governed by national law that was clearly capable of producing effects that would not be limited to that Member State. In such an eventuality, "having regard, in particular, to the geographic location of the public property and the economic value of that concession",[42] it cannot be excluded that citizens of other Member States may have an interest in exercising their right to freedom of establishment. The Court clearly provided several criteria for establishing whether there is a certain cross-border interest. Specifically, it referred to "the financial value of the contract, the place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned".[43]

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[40] For an example, see ECJ judgments: of 6 June 2000 in Case C-281/98, *Angonese*; of 2 October 2003 in Case C-148/02, *Garcia Avello*; of 11 July 2002 in Case C-60/00, *Carpenter*; and of 19 October 2004 in Case C-200/02, *Zhu and Chen*.

[41] See B. Lebaut-Ferrarese, *Dans quelle situation, le droit de l'Union européenne trouve-t-il à s'appliquer en droit interne?*, in 97 *Petites affiches* 7 (17 May 2005). See also R.E. Papadopoulou, *Situations purement internes et droit communautaire: un instrument jurisprudentiel à double fonction ou une arme à double tranchant?*, in 38 *Cahiers de droit européenne* 95 (2003).

[42] *Promoimpresa* judgment, cit., para. 67.

[43] *Ibidem*, para. 66.

4.2. Overriding reasons in the public interest

Having established a certain cross-border interest, the Court held that legislation permitting the award of a concession "without any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession and which are located in other Member States".[44] That legislation thus gave rise to a difference in treatment, which is as a general principle prohibited by Article 49 TFEU.[45] The Court thus held that the Italian law was incompatible with the provisions of primary law on freedom of establishment.

However, in the light of the conceptual framework set out briefly above, the existence of so-called "*overriding reasons*" at the same time constitutes an obstacle to the full exercise of fundamental freedoms.[46] This category was elaborated by the Court of Justice for the purpose of identifying measures that, whilst interfering with interests that are protected under EU law, may be justified on the basis of Member State requirements.[47] An overriding reason subsists whenever a national measure that interferes with a freedom guaranteed by the Treaty pursues an objective of general interest for the Member State's legal system, provided that it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it. Accordingly, within the case law of the Court, the assessment of the legitimacy of measures aimed at furthering a Member State's general interests is based on three aspects: the significance of the interests pursued by the state action; the reasonableness of the standard of protection for the interests that the Member State intends to pursue; and the tolerability of the interference with legal interests derived from the Treaty. By combining these parameters, and applying the proportionality principle, it is thus possible to counterbalance two requirements: the Member States' need to maintain a reasonable

[44] *Ibidem*, para. 65.
[45] *Ibidem*, para. 70.
[46] See the famous judgment of 20 February 1979 in Case C-120/78, *Cassis de Dijon*, in which the Court launched its line of case law recognising Member States' powers to interfere with free movement of goods due to "overriding reasons.
[47] See on this issue P. Pescatore, *Variations sur la jurisprudence "Cassis de Dijon", ou, la solidarité entre l'ordre public national et l'ordre public communautaire*, in *Etudes de droit communautaire européen 1962-2007* 961 (2008).

level of legislative discretion and the need to ensure the efficacy of the freedoms guaranteed by the Treaty.[48]

Whilst the Court has not encountered any difficulty when applying this framework in qualifying the need to respect the principle of legal certainty as an objective of general interest for the Member State legal system,[49] the same cannot be said as regards the suitability of the Member State measure for securing the attainment of that objective. Although the extensions provided for under the Italian law seek to enable concession holders to recoup their investments, they "were awarded when it had already been established that contracts with certain cross-border interest were subject to a duty of transparency".[50] In reaching this conclusion the Court thus held that, as they had been awarded at a point in time that came after the assertion of the requirements of transparency, the concessions could not be considered to be suitable and proportionate, and in consequence could not be regarded as legitimate under EU law.

5. Concluding remarks

In the light of the overall argumentation contained in the *Promoimpresa* judgment, it is difficult to avoid the impression that national lawmakers only have very limited room for manoeuvre in order to protect the legitimate expectations of the holders of concessions of State-owned maritime property. This must be concluded both for concessions that fulfil the prerequisites for the application of Directive 2006/123/EC (and which consequently fall within its scope) as well as for concessions that, whilst not fulfilling the prerequisites, are subject to the rules set out in the Treaty. In fact, legitimate expectations can only be relevant within the regulatory context of a directive if the prerequisites of impartiality and transparent procedural rules, which must by definition be established in advance, have been met. Similarly, within the context

[48] For a critical examination of the method used by the Court, see N. Reich, *How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ*, in H.W. Micklitz, B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* 83 (2012).

[49] *Promoimpresa* judgment, cit., para. 71. See W. Lewandowski, *Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice*, cit., at. 72.

[50] *Ibidem*, para. 73.

of primary law, legitimate expectations can only be taken into account in accordance with more general requirements of transparency, which are not specified in any greater detail. In any case, irrespective of which specific reference parameter is relevant, since a statutory derogation (or automatic renewal) is in its very essence incompatible with requirements of transparency, it will not comply with EU law on free movement, and is therefore not a suitable instrument for protecting legitimate expectations.

Whereas, as things currently stand, it would thus appear difficult to identify a solution that was capable of reconciling automatic extensions with the requirements laid down by EU law, it must also be noted that this conclusion is only mandated in relation to concessions of State-owned maritime property that have some relevance for EU law. Conversely, if a concession violated the principle of free movement but had exclusively national effects, the rule prohibiting automatic extensions would no longer apply. This solution would arise in the event that the cumulative prerequisites that enable a Member State measure to fall within the scope of EU law were not met. This would be the case for any concession concerning natural resources that are not scarce (within the meaning of the Directive), and that do not in turn engage a certain transnational interest (within the meaning of primary law).

It is thus reasonable to conclude that considerations related to the protection of the legitimate expectations of the beneficiaries of automatic extensions can be taken into account solely and exclusively in the event that the concession falls outside the category of concessions that, in one way or another, lie within the reach of EU law.

It is only within this limited and perhaps unrealistic spaces that Member State legislation can be applied in full without being subject to the constraints imposed by EU law. *Tertium non datur*.