Articles

The Process of Granting Exclusive Rights in the Light of Treaty Rules on Free Movement

By Marek Szydło[*]

Abstract

After the *Sporting Exchange* and *Ernst Engelmann* rulings of the European Court of Justice (ECJ) in 2010, it is now entirely clear that the process of granting exclusive rights to undertakings must be conducted in compliance with the Treaty rules on free movement, particularly in accordance with the consequent principles of non-discrimination, equal treatment and transparency, irrespective of whether the right is awarded by means of a public contract or by other legal means (public or private). Thus, even if public authorities wish to exclude competition in a given market due to justified reasons, and are authorized by EU law to do so, they must nonetheless ensure a sufficient degree of competition for that market so as to ensure an undistorted rivalry of the various market operators at the stage of application for that right. It is submitted that the public authorities granting exclusive rights should not complain about the requirements that are imposed upon them by the TFEU rules. After all, by granting exclusive rights within competitive and transparent procedures, the public authorities have an excellent chance to select, from among the many potentially interested operators— including those from other Member States— beneficiaries that will best serve the needs of the relevant community. In turn, if they want to depart from those requirements, they must substantiate the existence of a clearly defined public interest that is capable of outweighing the benefits resulting from a competitive and transparent procedure.

A. Introduction

In a system of highly competitive market economy, as accepted by the drafters of the Treaty (see Article 3(3) of the Treaty on Functioning of the European Union – TFEU, every exclusive right granted to an undertaking is inevitably perceived by other market operators as a "foreign body," which strongly conflicts with the fundamental ideas inherent in the above-mentioned vision of economic life's organization. In particular, the exclusive

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(monopoly) right contradicts the assumption underlying free market economy that equal and unhindered access to the economic activity should be secured for all those undertakings interested in satisfying the given kind of consumer needs. In turn, it is exactly the competition in a market, as well as the competition for a market between undertakings that is expected to bring about the desired consequences in terms of consumer welfare.[1] However, even in a market economy, there are some instances where exclusive rights turn out to be indispensable means of achieving the desired objectives. Exclusive rights can remedy market failure (including the case of natural monopoly); they can sometimes be welfare enhancing; or they can be instruments of realization of some non-market (e.g. social and environmental) values.[2] Therefore, the legal order, even if based on the free market economy paradigm cannot, as a rule, be completely closed to the exceptional creation of monopolists by public authorities (although obviously with exceptions only for justified reasons and in very limited circumstances).

Accordingly, the EU legal order also permits Member States to grant exclusive rights to undertakings, provided they are compatible with specific Treaty rules, with the rules on competition and free movement being the most important in that regard. Pursuant to Article 106(1) TFEU, in the case of undertakings to which Member States grant exclusive (or special) rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to the rules provided for in Article 18 (prohibition of discrimination based on nationality) and Articles 101 to 109 (rules on competition). It thus follows that TFEU presupposes (and allows) the existence of undertakings, which have certain exclusive (or special) rights. On the other hand, it does not mean that all of the exclusive (or special) rights are necessarily compatible with the Treaty, because that compatibility depends on different rules, to which Article 106(1) refers.[3] The Treaty rules that are the relevant point of reference in assessing the legality of exclusive rights granted by Member States include in particular the rules on competition (expressly referred to in Article 106(1) TFEU) and the rules on free movement. To be sure, the latter are not explicitly pointed out in Article 106(1), nevertheless they are rightly

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[1] On the concept of consumer welfare see for more RICHARD JUST, DARRELL HUETH & ANDREW SCHMITZ, THE WELFARE ECONOMICS OF PUBLIC POLICY. A PRACTICAL APPROACH TO PROJECT AND POLICY EVALUATION 98 (2004); MASSIMO MOTTA, COMPETITION POLICY. THEORY AND PRACTICE 19 (2005); ALISON JONES, BRENDA SUFRIN, EC COMPETITION LAW. TEXT, CASES, AND MATERIALS 13 (2008); EUGENE BUTTIGIEG, COMPETITION LAW: SAFEGUARDING THE CONSUMER INTEREST. A COMPARATIVE ANALYSIS OF US ANTITRUST LAW AND EC COMPETITION LAW 1 (2009); KATALIN CSERES, COMPETITION LAW AND CONSUMER PROTECTION 20-21 (2005).

[2] *See e.g.* RICHARD MCKENZIE & DWIGHT LEE, IN DEFENSE OF MONOPOLY. HOW MARKET POWER FOSTERS CREATIVE PRODUCTION (2008).

[3] Case C-202/88, French Republic v. Commission, 1991 E.C.R. I-1223, para. 22.

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regarded as special cases of application of the non-discrimination principle[4], which, in turn, is expressly mentioned in Article 106(1).[5]

In the present article, it is submitted that the above-mentioned Treaty rules are the right point of reference not only for the evaluation of legality of exclusive rights as such (i.e. legality of their very existence, and their content, extent and organization), but also for the assessment of the process of their granting. Accepting, thus, the distinction between the issue of the lawfulness of the exclusive right as such, and the issue of the lawfulness of the way in which it is granted[6], this paper is concerned merely with the latter issue and analyzes the lawfulness of the process of granting exclusive rights in the light of Treaty rules on free movement. In this context, it is submitted that every exclusive right within the meaning of Article 106(1) TFEU must be granted in compatibility with the principles of non-discrimination, equal treatment and transparency stemming from the Treaty rules on free movement. To put it more concretely, the process of granting exclusive rights must be opened up to a sufficient degree of competition ("competition for a market," as opposed to "competition in a market"), and the conditions (criteria) of that process must be sufficiently advertised, so that every undertaking interested in pursuing such reserved activity--provided that some cross-border element is present there--could have the legal opportunities, as created by the Member State concerned, to apply for such rights. In that regard, the present article adheres to the recent judgments of the ECJ in *Sporting Exchange* and *Ernst Engelmann* cases, where it was held that, at the stage of issuing an exclusive license to pursue an economic activity there should be a call for tenders, or a similar competitive procedure for the award of the license in question, and that the criteria of that award must be known (advertised) in advance.[7] Until those judgments were delivered the situation in this respect had been highly unclear. Some authors were apt to claim that at

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[4] See Case 2/74, Jean Reyners v. Belgian State, 1974 E.C.R. 631, paras. 15-16; Case C-41/90, Klaus Höfner and Fritz Elser v. Macrotron GmbH*,* 1991 E.C.R. I-1979, para. 36.

[5] Referring to Article 106(1) of the Treaty on Functioning of the European Union – TFEU (ex Article 90(1) EEC, ex Article 86(1) EC), the Court also held that EU law does not prevent the granting of exclusive (monopoly) rights "for considerations of a non-economic nature relating to the public interest. However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition": Case C-260/89**,** Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, 1991 E.C.R. I-2925, para. 12.

[6] "The lawfulness of the exclusive right and the lawfulness of the way in which it was granted are two distinct questions that should not be mixed up": Berend Jan Drijber & Hélène Stergiou**,** *Public Procurement Law and Internal Market Law*, 46 COMMON MARKET LAW REVIEW 826 (2009).

[7] Cases C-203/08, Sporting Exchange Ltd. v. Minister van Justitie, European Court of Justice judgment of 3 June 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0203:EN:HTML>, paras. 46 *et seq.*; C-64/08, Ernst Engelmann, European Court of Justice, judgment of 9 September 2010, not yet reported, paras. 52 *et seq.*

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the stage of granting the exclusive right, such a competitive and transparent procedure was by no means mandated by the Treaty rules on free movement.[8]

In order to substantiate the main thesis that in the light of the Treaty rules on free movement the process of granting exclusive rights must be sufficiently transparent and open to competition, this article is structured as follows. Section B analyzes the very concept of exclusive rights, paying special attention to conceptual relations between, on the one hand, exclusive rights and, on the other hand, public (procurement) contracts, including public works and service concessions. These conceptual relations are important, because it happens that public procurement contracts grant exclusivity to contractors, allowing such contracts to be treated as exclusive rights within the meaning of TFEU. At the same time, public contracts (with the exception of service concessions), including those ensuring exclusivity to contractors, have their own legal regime in the EU secondary legislation, including also the process of their awarding.[9] In this connection, the discussed section proposes objective criteria, which make it possible to unequivocally determine when an exclusive right to pursue some economic activity can be qualified as a public contract, subject to the specific set of EU rules. Section C explains why and when the Treaty rules on free movement are (and should be) applied with regard to the process of granting exclusive rights to undertakings. In particular, this section puts forth operational criteria to determine when the granting of an exclusive right is of a certain cross-border interest, i.e. of interest to undertakings located in a Member State other than the Member State where the given right is being granted. Section D in turn, is concerned with the principles of non-discrimination, equal treatment and transparency, inferred from the Treaty rules on free movement. In particular, it explains why the principle of transparency is perceived by the ECJ as a corollary of the principles of non-discrimination and equality, and what the exact legal implications of all those principles are in the context of the State granting scarce resources to individuals. Section E considers the legal implications of application of the above-mentioned principles, specifically in the case of granting exclusive rights. In that regard, abstract models of competitive and transparent granting procedures in full compliance with those principles are presented. It is, among others, argued there that it is not only the classical tender that satisfies the requirements in question. In Section F, the issue of justification of non-compliance with the above-mentioned principles is analyzed. In that regard, this section questions the thesis accepted by the ECJ in the *Sporting Exchange* case, according to which the fact of granting an exclusive right to a public operator whose management is subject to direct State supervision, or to a private

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[8] Drijber & Stergiou, *supra* note 6, at 825-826.

[9] *See* in particular Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors, 2004 O.J. (L 134) 1 and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L 134) 114.

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operator whose activities are subject to strict control by the public authorities, constitutes, as such, an appropriate justification of that restriction of fundamental freedoms which stems from granting the exclusive right in question without any competitive tendering procedure.[10] It is submitted that such reasoning, resembling the Court's ratiocination within the framework of the State Action Doctrine elaborated under the Treaty rules on competition, does not seem to be in conformity with the existing ECJ case law concerning the issue of justification of restrictions of fundamental freedoms. Finally, Section G concludes this article.

B. The Concept of Exclusive Rights Within the Meaning of Article 106 TFEU

It is undisputed that the notion of *exclusive rights* within the meaning of Article 106(1) TFEU, although lacking a legal definition in the Treaty itself, is a Union-specific concept. It means that its content must be shaped independently and uniformly at the EU level, irrespective of how identical or similar notions are understood in the national legal orders.[11] In that regard, it is quite commonly accepted in the EU legal doctrine that an exclusive right within the meaning of the Treaty is a right that creates a single beneficiary, a monopolist that is authorized to pursue some kind of an economic activity in a given territory, without the need of facing competition from other undertakings. The legal notion of *exclusive right* thus corresponds to the popular notion of *monopoly.*[12] The decisive criterion for defining the concept in question is the effect of a given right that boils down to the legal exclusion of all and any actual or potential competitors from the given (product and/or geographical) market, within the validity of the right in question.

For the right to be classified as an exclusive right under the Treaty, it is immaterial whether the Member State grants it by an act of public law (e.g. statute, regulation or administrative order), or by a private contract. Such a formal aspect of granting exclusivity does not matter, because taking it into account when defining this concept would allow Member States – by recourse to some artificial arrangements – to interfere with the

[10] *Sporting Exchange Ltd.*, *supra* note 7, paras. 59-62.

[11] However, at the initial stage of existence of the European Economic Community many authors undertook attempts to "nationalize" that notion. Only at the end of 1960s was it widely accepted that the notion of an exclusive right (within the meaning of the Treaty) was a genuine Community concept: *see*, for more, VOLKER EMMERICH, DAS WIRTSCHAFTSRECHT DER ÖFFENTLICHEN UNTERNEHMEN (The Commercial Law of Public Enterprises) 517 (1969), as well as the literature indicated therein.

[12] Jose Luis Buendia Sierra, *Article 86 – Exclusive Rights and Other Anti-Competitive State Measures*, *in* THE EC LAW OF COMPETITION 282-283 (Jonathan Faull & Ali Nikpay eds., 1999); WALTER FRENZ, HANDBUCH EUROPARECHT. BAND 2. EUROPÄISCHES KARTELLRECHT (European Law Handbook. 2nd Band European Antitrust Law) 742 (2006).

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operation of Article 106(1) TFEU.[13] However, in order to be classified as an exclusive right within the meaning of Article 106(1) TFEU, the right must be granted by a State acting in its role as a public authority. Exclusive rights awarded by the State (or by public undertaking) acting in its role as an economic operator do not fall under Article 106(1) TFEU, but rather under Article 101 TFEU. Obviously, acting in its role as public authority, the State is allowed to use not only public law means, but also private law means (i.e. contracts). Nevertheless, the exclusive right awarded by means of the latter is covered by Article 106(1) TFEU only when the State fulfills a regulatory, and not a commercial function.[14]

The legal definition of exclusive right, which strongly, if not entirely, corresponds to the above-mentioned characteristics, can be found in two Directives issued by the Commission on the ground of Article 106(3) TFEU. The Commission states there that *exclusive rights* means "rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a service or undertake an activity within a given geographical area."[15] It is true, that from a purely theoretical point of view, that the legal definitions of exclusive rights included in the aforementioned Directives, as well as definitions of special rights and public undertakings included there--while unable to be wider or go beyond the limits determined (although implicitly) by Article 106(1) TFEU[16]– need not necessarily fully agree – as regards their matter – with analogous notions included in Article 106(1). The object of the Directives' provisions defining the notion of exclusive rights is not to define this concept as it appears in Article 106(1) TFEU, but to establish the necessary criteria to delimit the group of undertakings (i.e. undertakings having the exclusive rights within the meaning of those

[13] DERRICK WYATT & ALAN DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 366 (*1980).*

[14] Buendia Sierra, *supra* note 12, at 283-284.

[15] Article 2(f) of Commission Directive 2006/111/EC of 16 November 2006 on the Transparency of Financial Relations Between Member States and Public Undertakings As Well As On Financial Transparency Within Certain Undertakings, 2006 O.J. (L 318) 17; Article 1(5) of Commission Directive 2002/77/EC of 16 September 2002 on Competition In The Markets for Electronic Communications Networks and Services, 2002 O.J. (L 249) 21. Before the aforementioned Directives went into force the legal definition of the discussed notion had been contained, among others, in the following Directives issued on the ground of ex Article 90(3) EEC: in Article 1(1) of Commission Directive 90/388/EEC of 28 June 1990 on Competition in the Markets for Telecommunications Services, 1990 O.J. (L 192) 10, and in Article 2(1)(f) of Commission Directive of 25 June 1980 on the Transparency of Financial Relations Between Member States and Public Undertakings As Well As on Financial transparency Within Certain Undertakings, 1980 O.J. (L 195) 35.

[16] Since Article 106(3) TFEU authorizes the Commission to Issue Directives Exactly In Order to Ensure The Application of the Provisions of Article 106(1) and (2) TFEU, it thus follows that Directives issued on the ground of Article 106(3) TFEU cannot concern undertakings other than those mentioned in Article 106(1) and (2) TFEU (PAUL KAPTEYN & PIETER VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 938 (1998)). As a result, Directives adopted on the ground of Article 106(3) TFEU cannot define undertakings granted with exclusive rights wider than it is admissible on the ground of Article 106(1) TFEU.

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Directives) that should be subject to the specific duties laid down by those Directives.[17] As a result, there may potentially be some exclusive rights and undertakings granted with exclusive rights within the meaning of Article 106(1) TFEU that are not encompassed by the relevant definitions included in the aforementioned Directives.

Nevertheless, irrespective of such a theoretical possibility, the legal definitions of exclusive rights included in the Directives issued on the ground of Article 106(3) TFEU are in fact so broadly constructed, that it would hardly be possible to identify an exclusive right within the meaning of Article 106(1) TFEU not covered by the definitions included in the Directives. The latter definitions – similar to an analogous concept under Article 106(1) TFEU – focus on the effect of a given right (i.e. whether it legally guarantees the exclusivity to pursue an economic activity within a given area), irrespective of the legal form that is used to award it. The requirement that the State cannot act in that regard as an undertaking also remains valid under the aforementioned Directives.

Many authors argue that an indispensable element of the exclusive right's concept is the requirement that it must be granted by a Member State in a discretionary manner, in the sense that it must involve some scope of arbitrary choice on the part of the State. As a consequence, a right that is granted according to objective, transparent and non-discriminatory criteria does not deserve the attribute "exclusive" within the meaning of Article 106(1) TFEU, even if it is awarded to a single undertaking. Exclusive rights within the discussed meaning must always be the result of an arbitrary choice of the beneficiary on the part of the Member State.[18]

However, the above-mentioned view is by no means correct. First, it would be in striking contrast to the literal wording of Article 106(1) TFEU, according to which Member States must abstain from any discrimination based on nationality with regard to all undertakings granted with exclusive rights. In turn, it is exactly the prohibition of discrimination that implies that every exclusive right (also those within the meaning of Article 106(1) TFEU) must be granted in an objective, transparent and non-discriminatory manner in order to eliminate the arbitrariness on the part of public authorities. Such consequences of the prohibition of discrimination were identified in the Court's ruling in the *Sporting Exchange Ltd* case[19] (see more in Section C). From the perspective of literal wording of Article 106(1) TFEU, it follows that the prohibition of discrimination included in that provision, implying the lack of arbitrariness while awarding the exclusive right, is an external element with regard to the concept of exclusive rights and does not have any influence on the

[17] *See*, by analogy, Case 188-190/80, French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v. Commission, 1982 E.C.R. 2545, para. 24.

[18] RICHARD WHISH, COMPETITION LAW 220-221 (2003); Buendia Sierra, *supra* note 12, at 284.

[19] *Sporting Exchange Ltd., supra* note 7, paras. 50-55.

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qualification of the right in question as an exclusive right. In other words, the very concept of exclusive rights, on the one hand, and the prohibition of discrimination that binds Member States with regard to undertakings granted with such rights, and which implies the lack of arbitrariness at the stage of granting such rights, on the other hand, are two different things that should not be mixed up. Consequently, the right to pursue an economic activity that is reserved to a single operator within a given geographical area undoubtedly retains its qualification as an *exclusive right* within the meaning of the Treaty, even if it was granted in conformity with the above-mentioned requirements of the ECJ which boil down to the elimination of any arbitrariness.

Second, an exclusive right that was granted without any discretion, in a non-arbitrary manner, and after conducting a competitive procedure, may still threaten the values on which the free market economy is based, requiring an appropriate justification, exactly in its role as an exclusive right. Acceptance of the thesis that authorization, license or permission granted to a single undertaking in compliance with the principles of transparency, objectivity and non-discrimination is not an exclusive right within the meaning of the Treaty would possibly invalidate the obligations of Member States stemming from Article 106(1) TFEU with regard to undertakings granted with such rights. This, in turn, would be hardly understandable from the perspective of the aims of that provision, as it would threaten the values protected by that Article. Thus, it is not only the literal wording, but also the teleological interpretation of Article 106(1) TFEU that implies that the very lack of any discretion or arbitrariness at the stage of awarding the right should not automatically deprive that right of the label *exclusive*.

It is very significant in that regard that the legal definitions of exclusive rights included in Commission Directives issued on the ground of Article 106(3) TFEU do not treat the discretion or arbitrariness at the stage of granting the right as a necessary prerequisite for classifying that right as exclusive. The situation is quite different in the case of *special rights* that are defined there as rights granted "otherwise than according to objective, proportional and non-discriminatory criteria."[20] If the notion of *exclusive rights* within the meaning of Article 106(1) TFEU was understood as encompassing only the rights granted otherwise than according to objective, proportional and non-discriminatory criteria (i.e. rights granted arbitrarily), then the definitions of exclusive rights included in Directives issued on the ground of Article 106(3) TFEU would have to contain an analogous requirement as well, because otherwise the definition included in those Directives would be wider than the analogous concept under Article 106(1) TFEU. However, as previously stated, the definition of exclusive rights embodied in the Directives issued on the ground of Article 106(3) TFEU cannot be wider than the definition of an analogous concept inferred from Article 106(1) TFEU. The lack of elements of discretion or arbitrariness in the definitions enshrined in the above-mentioned Directives indirectly indicates that such an

[20] Article 2(g) of Directive 2006/111; Article 1(6) of Directive 2002/77, *see* both at *supra* note 15.

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element – at least in the Commission's view – is also lacking in the case of Article 106(1) TFEU.

Obviously, this is not to say that from now on every exclusive right will be granted by Member States without any discretion or arbitrariness. Even arbitrariness, in this regard being the prohibited restriction of the Treaty rules on free movement, may in some instances be justified and proportionate (see more in Section F). Nevertheless, the very lack of that discretion or arbitrariness does not deprive the right of an attribute of *exclusive right* within the meaning of Article 106(1) TFEU.[21]

Sometimes it happens that an exclusive right within the meaning of the Treaty is granted by means of a public contract under the EU public procurement Directives. This is the case when there is a contract concluded in writing between a contracting authority[22] (or contracting entity)[23] and an economic operator, which reserves the right to perform works, supply products or provide services within a given geographical area to that operator only, and which guarantees to that operator a pecuniary interest (see Article 1(2) of Directive 2004/18; Article 1(2) of Directive 2004/17). However, for the contract authorizing a single economic operator to pursue economic activity (in the field of supply, works or services), to be classified as a public contract within the meaning of EU public procurement Directives, it is required that the work, supply or service effected or performed by the operator must be of a direct economic benefit to the contracting authority (entity). In that regard it is not sufficient if the contract concluded by the contracting authority in the fulfillment of its public tasks simply authorizes the economic operator to conduct the activity in question, or if the effect of that reserved and procured activity lies in the public purpose, the fulfillment of which is the task of the contracting authority.

[21] On the other hand, the right that was granted in a non-arbitrary way and on the basis of objective, transparent and non-discriminatory criteria, while being capable to be categorized as an exclusive right within the meaning of the Treaty, cannot at the same time be classified as an exclusive right within the meaning of EU public procurement Directives. As the EU legislator in those Directives declares: "Nor may rights granted by a Member State in any form, including by way of acts of concession, to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria to enjoy those rights be considered special or exclusive rights" (recital 25 of the preamble to Directive 2004/17; Article 2(3) of Directive 2004/17, *see* both at *supra* note 9). However, the present article is not concerned with the concept of exclusive rights within the meaning of the EU public procurement regime.

[22] Within the meaning of Article 1(9) of Directive 2004/18, *supra* note 9.

[23] Within the meaning of Article 2(2) of Directive 2004/17, *supra* note 9.

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Such a conclusion stems from the recent judgment of the ECJ in the *Helmut Müller* case,[24] where the Court had an occasion to explain the concept of public works contract under Directive 2004/18 more thoroughly (however, the Court's conclusions are also valid with regard to public supply and public service contracts). The ECJ held that on the ground of such contract, the contracting authority, in return for consideration, receives a service pursuant to that contract, consisting in the realization of works from which the contracting authority intends to benefit.[25] Such a service, by its nature and in view of the scheme and objectives of Directive 2004/18, must be of direct economic benefit to the contracting authority.[26] That economic benefit may take various forms,[27] but it has to nonetheless exist, being clearly identified and quantified. However, for such an immediate economic benefit to be identified as really existing, it is not sufficient if the results of intended works (or supplies and services as well) merely fulfill an objective in the public interest, the achievement of which is incumbent on the contracting authority (such as the development or coherent planning of part of an urban district).[28] Thus, the benefit in question must be materialized in more concrete forms, allowing the contracting authority to obtain some quantified gains, at least in the form of cost savings. For example, this is the case when the contracting authority outsources the provision of some universal services to an external contractor and obtains that way some calculable savings in its budgetary expenses.

Consequently if, in the fulfillment of its public tasks, the contracting (public) authority concludes a contract with an economic operator conferring upon the latter the exclusivity in the field of conducting an activity, and at the same time obtains a calculable and immediate economic benefit, then the award of such an exclusive right must follow the EU public procurement Directives.[29] However, there is one important exception: if the

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[24] *See* Case C-451/08, Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben, European Court of Justice (ECJ), judgment of 25 March 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:134:0007:01:EN:HTML>.

[25] *Id.,* at para. 49; *see* also Case C-399/98*,* Ordine degli Architetti delle Province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti, Leopoldo Freyrie v. Comune di Milano, 2001 E.C.R. I-5409, para. 77; Case C-220/05, Jean Auroux and Others v. Commune de Roanne, 2007 E.C.R. I-385, para. 45.

[26] *See Helmut Müller GmbH*, *supra* note 24, para. 49.

[27] For example, the contracting authority may become the owner of the work or works which are the subject of the contract. Such an economic benefit may also be held to exist where it is provided that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract in order that they can be made available to the public. The economic benefit may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work; *See Helmut Müller GmbH*, *supra* note 24, paras. 50-52.

[28] *See Helmut Müller GmbHm, supra* note 24, paras. 55-58.

[29] True, there are some authors who claim that the award of a public contract in accordance with public procurement rules cannot be treated as an exclusive right within the meaning of Article 106(1) TFEU, since such

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exclusivity granted to a single economic operator in the field of provision of some services is linked with the transfer of responsibility for the exploitation of those services to a privileged operator (so that the latter bears the risk involved in operating the services in question), then such an exclusive right, as having the status of service concession,[30] must be granted solely in accordance with the general Treaty rules on free movement, while disregarding the EU public procurement Directives.[31] Similarly, if, in the fulfillment of its public tasks, the contracting (public) authority concludes a contract with an economic operator conferring upon the latter the exclusivity in the field of conducting an activity, but without obtaining any economic benefit within the above-mentioned meaning, then the award of such an exclusive right must only follow the general Treaty rules, including the rules on free movement, and excluding the EU secondary rules on public procurement.

C. The Application of the Treaty Rules on Free Movement with Regard to the Process of Granting Exclusive Rights

It is submitted that with regard to the process of Member States granting exclusive rights to undertakings, one should apply the Treaty rules on free movement, including the prohibition of discrimination on grounds of nationality (which has been concretized within said Treaty rules). Thus, the process of granting exclusive rights by Member States should be governed by the above-mentioned Treaty rules, the legal consequences of which must

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an award is not discretionary (WHISH, *supra* note 18, at 220-221). But as it was already explained, the above-mentioned view cannot be accepted.

[30] "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment (Article 1(4) of the Directive 2004/18; Article 1(3)(b) of the Directive 2004/17, both at *supra* note 9). A factor vital for determining whether a service concession exists is the exploitation criterion. This criterion means that the concession exists when the operator bears the risk involved in operating the service in question (the risk of establishing and exploiting the system), and obtains a significant part of its revenue from the users, particularly by charging fees in any form whatsoever. See point 2.2 of the Commission Interpretative Communication on Concessions Under Community law, 2000 O.J. (C 121) 2). *See* also Case C-458/03, Parking Brixen GmbH v. Gemeinde Brixen, Stadtwerke Brixen AG, 2005 E.C.R. I-8585, para. 40; C-410/04, Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari, AMTAB Servizio SpA, 2006 E.C.R. I-3303, para. 16.

[31] This is a corollary of the fact that the rules included in the EU public procurement Directives do not apply to service concessions (Article 17 of the Directive 2004/18; Article 18 of the Directive 2004/*17*, both at *supra* note 9). At the same time, as the ECJ maintains, notwithstanding the fact that public service concession contracts are, as EU law stands at present, excluded from the scope of EU public procurement Directives, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular (*See* Case C-324/98, Telaustria Verlags GmbH, Telefonadress GmbH v. Telekom Austria AG, 2000 E.C.R. I-10745, para. 60; Case C-231/03, Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti, 2005 E.C.R. I-7287, para. 16; *Parking Brixen GmbH*, *supra* note 30, para. 46; *ANAV*, *supra* note 30, para. 18. *See* also Section III of this article.

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strictly determine all Member States' actions in that regard. Such a conclusion already stems from Article 106(1) TFEU, stipulating that:

> In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

The said provision must be understood as implying that every exclusive right currently being granted to any undertaking is a *measure* within the meaning of that Article and cannot, as such, be granted in a way that is contrary to the rules on free movement. In turn, Article 106(1) TFEU cannot be interpreted in such a way that exclusive rights would be considered State measures falling under Article 106(1) when they were granted to either a *public* undertaking or to a private undertaking to which a Member State *had previously granted* an exclusive or special right.[32] It is significant in that regard that the above-mentioned provision, while determining the group of undertakings with regard to which Member States cannot enact (or maintain) any measure contrary to the rules of the Treaty, uses in that context the phrase: "undertakings to which Member States *grant*… exclusive rights [emphasis added]." It thus follows that Article 106(1) TFEU concerns not only undertakings that are already granted exclusive rights (or special rights, or have the status of public undertakings), but also those undertakings to which Member States are currently granting, or only intend to grant exclusive rights. In other words, Member States shall not enact any measure contrary to the rules of the Treaty also with regard to the undertakings to which they are granting exclusive right, or only intend to grant in the future. Consequently, the very granting (i.e. the original granting) of an exclusive right – being a *measure* under Article 106(1) TFEU – must be effected by Member States in accordance with the rules of the Treaty, including the rules on free movement.

However, in order to substantiate the thesis, according to which the process of (original) granting of exclusive rights by Member States should be effected in accordance with the Treaty rules on free movement, it is not necessary (although possible) to invoke Article 106(1) TFEU. After all, it has to be remembered that Article 106(1) TFEU is only a particular

[32] Buendia Sierra, *supra* note 12, at 287; such an interpretation would consequently mean that the *original* granting of exclusive rights (as opposed to *subsequent* granting of exclusive right) is not a "measure" within the meaning of Article 106(1) TFEU (which would have to be effected in accordance with the Treaty), unless the exclusive right is originally granted to a public undertaking, or to an undertaking already granted with a special right. However, that interpretation, giving the Member States almost absolute leeway in creating monopolies (so-called "Absolute Sovereignty Approach": David Edward & Mark Hoskins, *Article 90: Deregulation and EC Law. Reflections Arising From the XVI FIDE Conference*, 32 COMMON MARKET LAW REVIEW 159, 159-160 (1995), is by no means correct.

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application of certain general principles that bind Member States anyway.[33] Those general principles include, among others, the Treaty rules on free movement, with these latter rules implying that Member States shall not enact measures contrary to the Treaty rules on free movement with regard to any undertaking.[34] Consequently, the Treaty rules on free movement themselves imply that the process of granting exclusive rights must conform to the TFEU rules on free movement, and shall not be effected in a way contrary to said rules. If there is a cross-border economic process that is included within the objective (substantive) scope of protection of the Treaty rules on free movement, then the Member State cannot undertake any measures that would be discriminatory with regard to that process (in comparison to an analogous process having purely internal character), or measures that would otherwise impede or make it less attractive to exercise that process.[35] Since the cross-border application by an undertaking for the exclusive right to pursue an economic activity is undoubtedly encompassed by the objective scope of protection of the Treaty rules on free movement (in particular, by the objective scope of protection of freedom of establishment and freedom to provide services),[36] then the Member State must affect the process of granting such an exclusive right in conformity with the obligations stemming from the Treaty rules on free movement, in particular in conformity with the principle of non-discrimination.

In this context, it would be appropriate to revisit the famous case law relating to public contracts not subject or subject only partially to the EU public procurement Directives, where the legal consequences of the application of the Treaty rules on free movement with regard to the process of awarding such contracts were identified ("*Transparency case law*"). According to the Court, the contracting entities concluding such public contracts are bound by the fundamental rules of the Treaty in general, and by the consequent principles of non-discrimination on the ground of nationality, equal treatment and transparency, in particular. The latter principles imply that the aforementioned public contracts, provided they are of a certain cross-border interest, must be awarded within the framework of

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[33] *See* Case 13/77, SA G.B.-INNO-B.M. v. Association des détaillants en tabac (ATAB), 1977 E.C.R. 2115, para. 42.

[34] Also with regard to undertakings not specified in Article 106(1) TFEU; *See* to that effect Case 13/77, *ATAB*, *supra* note 33, at para. 33.

[35] *See* Articles 34, 35, 45, 49, 56, and 63 TFEU; *see also* Section IV of this document.

[36] On the objective (substantive) scope of protection of the Treaty rules on free movement see for more Dirk Ehlers, *Die Grundfreiheiten der Europäischen Gemeinschaften. Allgemeine Lehren* (The Fundamental Freedoms of the European Communities. General Lessons), *in* EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN (European Fundamental Rights and Freedoms) 203 (Dirk Ehlers ed., 2005); WALTER FRENZ, HANDBUCH EUROPARECHT. BAND 1. EUROPÄISCHE GRUNDFREIHEITEN (European Law Handbook. 1st Band Fundamental Freedoms) 141 (2004); Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti & Adam Tomkins, EUROPEAN UNION LAW 659 (Free Movement of Goods), 699 (Free Movement of Workers and Freedom of Establishment), 747 (Free Movement of Services) (2008); Hans Jarass, *A Unified Approach to the Fundamental Freedoms*, *in* SERVICES AND FREE MOVEMENT IN EU LAW 142, 142-143 (Mads Andenas & Wulf-Henning Roth eds., 2004).

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competitive and impartial procedures, so that the procurement markets could be opened up to competition. Moreover, the call for competition or the call for tender that is inherent in those procedures must be sufficiently advertised and made public by the contracting entities.[37]

Obviously, from the formal point of view, the Court's case law referred to above concerns merely the public contracts within the meaning of EU public procurement Directives, including those public contracts (and public services concessions) which grant exclusivity to contractors, and which accordingly could be classified as exclusive rights within the meaning of Article 106(1) TFEU. But after those judgments were delivered, there was some uncertainty revealed whether this case law is also valid with regard to the award by Member States of all exclusive rights within the meaning of Article 106(1) TFEU, including those rights that are not awarded contractually, or are awarded by means of a contract not having an attribute of a public contract (e.g. due to the fact that the contract does not guarantee the direct economic benefit to the contracting authority). According to some authors, since the mere granting of an exclusive right does not qualify as the award of a public contract under the EU public procurement Directives, not only is the procurement regime of those Directives not applicable, but it is also not necessary to organize a call for tenders or to advertise it in accordance with the *Transparency* case law. This *Transparency* case law should not be applied *per analogiam* when public authorities grant exclusive rights that do not qualify as public contracts or as service concessions. Thus, there are no positive obligations as regards the way public authorities should affect the process of granting exclusive rights.[38]

However, the above-mentioned view does not seem correct. Since the positive obligations concerned with the organization of a competitive awarding procedure and with sufficient advertisement of the conditions thereof are inferred by the Court from the principles of non-discrimination, equal treatment and transparency, stemming, in turn, from the Treaty rules on free movement (which will be substantiated more thoroughly in Section D), then such obligations should be valid in all those instances where the Treaty rules on free movement, together with the above-mentioned principles, are applicable. As the Treaty rules on free movement, including the principles in question, are applicable with regard to the process of granting exclusive rights by Member States (provided that a cross-border element is present there), this applicability equally concerns all legal implications of those

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[37] *See Telaustria Verlags GmbH*, *supra* note 31, paras. 58-62; *Coname*, *supra* note 31, paras. 15-28; *Parking Brixen GmbH*, *supra* note 30, paras. 44-50; *ANAV*, *supra* note 30, paras. 15-22; C-507/03, Commission v. Ireland, 2007 E.C.R. I-9777, paras. 21-32; C-412/04, Commission v. Italy, 2008 E.C.R. I-619, paras. 65-66; C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado, 2007 E.C.R. I-12175, paras. 71-76; C-347/06, ASM Brescia SpA v. Comune di Rodengo Saiano, 2008 E.C.R. I-5641, paras. 57-60.

[38] Drijber & Stergiou , *supra* note 6, 825-826.

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Treaty rules, including the positive obligations concerning the way the exclusive rights should be granted. Thus, the application of the aforementioned positive obligations with regard to the process of granting exclusive rights by Member States has its direct legal justification within the Treaty rules on free movement.

Such a stand was also taken by the ECJ in *Sporting Exchange* and *Ernst Engelmann* cases. The Court held that when granting a single administrative license, Member States must comply with the requirements arising from the Treaty rules on free movement. In particular, Member States must observe in that regard the principle of equal treatment and the obligation of transparency.[39] The obligation of transparency is a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity.[40] The process of granting the license to a single operator cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of European Union law, in particular those relating to a fundamental freedom such as the freedom to provide services.[41] Compliance with the principle of equal treatment and with the consequent obligation of transparency necessarily means that the objective criteria enabling the Member States' competent authorities' discretion to be circumscribed must be sufficiently advertised.[42] The procedure of granting a single license which is not based on objective, non-discriminatory criteria known in advance, in principle precludes other operators from being able to express their interest in carrying on the activity concerned. As a result, those operators are prevented from enjoying their rights under EU law, in particular the rights stemming from the Treaty rules on free movement.[43] The Treaty rules on free movement must be interpreted as meaning that the principle of equal treatment and the consequent obligation of transparency are applicable to procedures for the grant of a license to a single operator or for the renewal thereof.[44] The above-mentioned Treaty rules and the consequent principles preclude the grant of an exclusive license without any competitive procedure.[45]

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[39] *Sporting Exchange Ltd*., *supra* note 7, para. 46; Engelmann, *supra* note 7, para. 52.

[40] *Id.* at para. 47; *Id.* at para. 53.

[41] *Id.* at para. 49; *Id*. at para. 54.

[42] *Sporting Exchange Ltd.*, *supra* note 7, para. 51.

[43] *Id.* at paras. 50 & 55.

[44] *Id.* at para. 62.

[45] Engelmann, *supra* note 7, para. 58.

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However, while the Court is fully right regarding the applicability of the Treaty rules on free movement at the stage of awarding exclusive rights by Member States—including the applicability of the consequent principles of non-discrimination, equal treatment and transparency, which in turn mandates the competitive procedure, the conditions of which must be sufficiently advertised—there is hence no need to additionally substantiate the obligation to effect the process of granting exclusive rights in accordance with the above-mentioned principles by the fact that "the effects of such a [exclusive] license on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract."[46] This latter reasoning would possibly mean that the imposition of positive obligations on Member States at the stage of granting exclusive rights is merely the result of an analogous application of obligations that were elaborated earlier specifically for the process of award of the public contracts not subject or subject only partially to the EU public procurement Directives. In other words, one could possibly argue that this is merely the identity of effects of service concessions and exclusive rights that make it necessary to apply, by analogy, the principles identified earlier in the case of service concessions (and other public contracts) to all exclusive rights. In contrast, it is the very application of the Treaty rules on free movement, together with consequent principles of non-discrimination, equal treatment and transparency, that activates the obligation to organize the award of some goods within the framework of competitive procedure, the conditions of which must be sufficiently advertised in advance (any additional *argumentum per analogiam* is unnecessary in this regard). Provided that in a given case the Treaty rules on free movement are applicable, the Member States should proceed in compliance with the aforementioned determinants in the case of all processes that consist in granting goods (benefits) to individuals, irrespective of whether the award of public contracts, granting of exclusive rights, giving of social benefits, or granting of State aid is at stake.

However, as was mentioned earlier, the Treaty rules on free movement, implying the positive obligations referred to above, are (and should be) applied with regard to the process of granting exclusive right only when the exclusive right may be of interest to undertakings located in a Member State other than the Member State where the right is awarded. In other words, in order to activate the Treaty rules on free movement, together with the subsequent obligations, the exclusive right that is to be awarded must be of a certain cross-border interest. Such a precondition – expressly laid down by the Court in the case of award of public contracts not subject or subject only partially to the EU public procurement Directives[47] – is fully understandable insofar as the presence of cross-border

[46] *Sporting Exchange Ltd.*, *supra* note 7, at para. 47; Engelmann*, supra* note 7, at para. 53.

[47] *See Coname*, *supra* note 31, at paras. 17 &20; *Commission v. Ireland*, *supra* note 37, para. 29; *Commission v. Italy*, *supra* note 37, paras. 66 & 81; *ASM Brescia SpA*, *supra* note 37, paras. 59 & 62; Case C-91/08, Wall AG v. Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service (FES) GmbH, European Court of Justice (ECJ), judgment of 13 April 2010, not yet reported, at para. 34.

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element is the necessary prerequisite for the application of the Treaty rules on free movement in general. The non-existence of such trans-border element makes the Treaty rules on free movement inapplicable.[48]

It is a duty of the public authority awarding the exclusive right to make a deep, thorough and reasonable assessment whether the right in question has such a significant economic relevance that it may also be of interest to undertakings located in other Member States. While making this evaluation, a number of factors may be taken into account.[49] The most important ones include in particular: subject-matter of the exclusive right; its estimated value (which is especially of relevance when the exclusive right has the form of a public contract, including a service concession); the specifics of the sector concerned (size and structure of the market, commercial practices, etc.); the geographic location of the place of performance of the exclusive right (for example, the fact that the exclusive right is to be exercised in the conurbations which are situated in the territory of different Member States); the costs of entering—via undertakings from other Member States—into the market in a Member State awarding the exclusive right (e.g. transportation costs, costs of modifying equipment, other costs concerned with the adaptation of the activity carried on by foreign undertakings to the needs of consumers in a host Member State); price variations within the EU, offering the prospects of exploitation of these price differences in order to obtain higher profits. Obviously, the evaluation involving the consideration of the above-mentioned factors is a very complicated process, which very often triggers uncertainty on the part of public authority awarding the exclusive right as to whether the result of that assessment is in fact correct. In order to diminish that uncertainty, a solution could be accepted, according to which the fact of carrying out such a reasonable assessment (irrespective of the result thereof) would create a presumption of compliance

[48] The objective scope of protection of the Treaty rules on free movement does not encompass the economic processes which are purely or wholly internal, (*see* Case C-19/92, Dieter Kraus v. Land Baden-Württemberg, 1993 E.C.R. I-1663, para. 15; C-115/78, J. Knoors v. Secretary of State for Economic Affairs, 1979 E.C.R. 399, para. 24; C-20/87, Ministère public v. André Gauchard, 1987 E.C.R. 4879, para. 13; C-204/87, Criminal proceedings against Guy Bekaert, 1988 E.C.R. 2029, para. 13; C-107/94, P. H. Asscher v. Staatssecretaris van Financiën, 1996 E.C.R. I-3089, para. 32), or – in other words – which are confined in all respects within a single Member State (*See* Case C-332/90, Volker Steen v. Deutsche Bundespost, 1992 E.C.R. I-341, para. 9; C-41/90, Klaus Höfner and Fritz Elser v. Macrotron GmbH, 1991 E.C.R. I-1979, para. 37; C-52/79, Procureur du Roi v. Marc J.V.C. Debauve and others, 1980 E.C.R. 833, para. 9; C-23/93, TV10 SA v. Commissariaat voor de Media, 1994 E.C.R. I-4795, para. 14; C-3/95, Reisebüro Broede v. Gerd Sandker, 1996 E.C.R. I-6511, para. 14).

[49] The great majority of those factors are identical with those that were elaborated earlier in the context of public contracts not subject or subject only partially to the EU public procurement Directives (in order to decide whether the public contract is of a certain cross-border interest); on those latter factors see for more Commission's interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, 2006 O.J. (179/2) point 1.3; *See* Case C-147/06 SECAP SpA v. Comune di Torino and Santorso Soc. coop. arl v. Comune di Torino, 2008 E.C.R. I-3565, para. 31**;** opinion of AG Sharpston in Case C-195/04, Commission v. Finland, 2007 E.C.R. I-3351, paras. 93-94; David McGowan, *Clarity at Last? Low Value Contracts and Transparency Obligations*, 16 PUBLIC PROCUREMENT LAW REVIEW 280 (2007).

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of actions of the public authority awarding the exclusive right with EU law. This presumption could be rebutted (e.g. by the Commission) only if there was evidence of bad faith or negligence on the part of the public authority in question.[50]

D. The Principles of Non-Discrimination, Equal Treatment and Transparency as Determinants of Actions of Public Authorities Granting Some Scarce Resources to Individuals

I. General Remarks

In its *Transparency* case law, as well as in its recent judgments concerning the award of exclusive rights (*Sporting Exchange* and *Ernst Engelmann*), the Court held that at the stage of awarding public contracts or exclusive rights to undertakings, one should apply, at least in cross-border situations, the Treaty rules on free movement, together with consequent principles of non-discrimination, equal treatment and transparency. The latter principles, in turn, imply the imposition of positive obligations on public authorities granting the goods (scarce resources) in question. Those obligations exist in the organization of a competitive awarding procedure, as well as advertising the conditions (criteria) of that procedure. However, while the Court's main conclusions deserve full support, they were uttered without sufficient dogmatic explanation of why the Treaty rules on free movement might be considered as implying the principles of non-discrimination, equal treatment and transparency, and why from those principles one must infer obligations such as the ones mentioned above as regarding the way the public authorities should grant certain goods to individuals. The exact content of the above-mentioned obligations is problematic and not entirely resolved by the Court. Those dogmatic issues should now be elaborated upon more completely.

II. The Principles of Non-Discrimination and Equality

The TFEU rules on free movement mandate, in the field of their application, the prohibition of discrimination based on nationality, a result from the literal wording of the relevant provisions of TFEU itself.[51] However, a much more complex issue is the dogmatic explanation of why the rules in question mandate in their scope of application the general principle of equality *i.e.* the prohibition of discrimination based on any criterion. In other words, a thesis should be proven that the free movement provisions of TFEU are not only

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[50] McGowan, *supra* note 49, 280.

[51] *See* Article 45(2) & Article 49 at para. 2, TFEU.

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special cases of the principle's application of non-discrimination based on nationality,[52] but they are also special cases of the application of the general prohibition of any discrimination.[53]

In that regard it should be observed that the Treaty provisions on free movement, apart from prohibiting direct discrimination on grounds of nationality, are interpreted by the Court as prohibiting any other discrimination, *i.e.* discrimination based on any criteria of differentiation other than nationality, provided that such a discrimination leads in fact to the same result as if the criterion of nationality (and the consequent discrimination based on nationality) applied (covert or indirect discrimination).[54] In other words, the Treaty rules on free movement prohibit such discrimination based on any criterion of differentiation that is merely an instrument of achieving discrimination based on nationality. The prohibition of such an indirect discrimination based on nationality serves as a safeguard against attempts of Member States to avoid their obligations to eliminate direct discrimination based on nationality.

Treaty rules on free movement also ban the unequal treatment of cross-border economic processes in comparison with purely internal economic processes, *i.e.* discrimination based on the territorial dimension of the concerned activity, even if it by no means leads to a direct or indirect discrimination based on nationality.[55] Thus, the presence of any cross-

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[52] *See* cases *Jean Reyners* and *Klaus Höfner,* referred to in *supra* note 4.

[53] That latter thesis was expressly uttered by the Court that, while interpreting the Treaty rules on free movement, on many occasions has held that in the case of economic processes encompassed by the objective scope of protection of the said Treaty rules "[b]esides the principle of non-discrimination on grounds of nationality, the principle of equal treatment (…) is also to be applied to such (…) [processes] even in the absence of discrimination on grounds of nationality": *See Parking Brixen GmbH*, *supra* note 30, para. 48; *ANAV*, *supra* note 30, para. 20; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, *supra* note 37, para. 74.

[54] *See* Case 152/73, Giovanni Maria Sotgiu v. Deutsche Bundespost, 1974 E.C.R. 153, para. 11; Case C-41/84, Pietro Pinna v. Caisse d'allocations familiales de la Savoie, 1986 E.C.R. 1, para. 23; C-33/88, Pilar Allué and Carmel Mary Coonan v. Università degli studi di Venezia, 1989 E.C.R. 1591, para. 11; C-330/91, The Queen v. Inland Revenue Commissioners, ex parte Commerzbank AG, 1993 E.C.R. I-4017, para. 14; C-1/93, Halliburton Services BV v. Staatssecretaris van Financiën, 1994 E.C.R. I-1137, para. 15; C-279/93, Finanzamt Köln-Altstadt v. Roland Schumacker, 1995 E.C.R. I-225, para. 26; C-90/96, David Petrie and others v. Università degli Studi di Verona and Camilla Bettoni, 1997 E.C.R. I-6527, para. 54; C-190/98, Volker Graf v. Filzmoser Maschinenbau GmbH, 2000 E.C.R. I-493, para. 14; C-400/02, Gerard Merida v. Bundesrepublik Deutschland, 2004 E.C.R. I-8471, para. 21; C-383/05, Raffaele Talotta v. État belge, 2007 E.C.R. I-2555, para. 17.

[55] Such an understanding of the concept of prohibited discrimination within the Treaty rules on free movement (going well beyond the mere discrimination based on nationality, both direct and indirect), has already been accepted by the Court in the field of services. In that regard the ECJ consistently maintains that Article 56 TFEU (*ex* Article 49 EC) 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 a Member State" (*See* Case C-381/93, Commission v. French Republic, 1994 E.C.R. I-5145, para. 17; C-118/96, Jessica Safir v.

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border element within the economic activity cannot be the criterion of differentiation that would put such an activity at a disadvantage, even if it does not result in any direct or indirect discrimination based on nationality.

Finally, one must remember that the Treaty rules on free movement also explicitly prohibit all other “restrictions” on processes that are protected by the said provisions.[56] This is interpreted by the Court as meaning that the Treaty rules on free movement prohibit measures that, while not discriminating on the ground of nationality (or on the ground of foreign origin of goods or capital), simply hinder access of goods to the market of a Member State,[57] or hamper, impede or make less attractive the exercising of fundamental freedoms,[58] or dissuade investors in other Member States from investing in the Member

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Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län Safir, 1998 E.C.R. I-1897, para. 23; C-94/04, Federico Cipolla v. Rosaria Fazari, née Portolese and C-202/04, Stefano Macrino, Claudia Capodarte v. Roberto Meloni, 2006 E.C.R. I-11421, para. 57; C-250/06, United Pan-Europe Communications Belgium SA, Coditel Brabant SPRL, Société Intercommunale pour la Diffusion de la Télévision (Brutélé), Wolu TV ASBL v. Belgium, 2007 E.C.R. I-11135, para. 30). In this context it is argued that “the Court shifts its focus from the protection of the natural/legal person providing/receiving services, to the enhancement of the provision of services as such. This is a considerable extension of the scope of the relevant Treaty provisions, since it brings within their ambit measures which are not particularly restrictive or prejudicial to any specific group of people, but to the free movement of services itself”: *see* Vassilis Hatzopoulos, *Recent Developments of the Case Law of the ECJ in the Field of Services*, 37 COMMON MARKET LAW REVIEW 60 (2000). Nothing precludes the application of a similar approach in the field of import or export of goods, gainful employment, establishment or transfer of capital. Consequently, the Treaty rules on free movement prohibit the national measures that make the cross-border activity more difficult than the purely internal activity, irrespective of whether such discrimination at the expense of cross-border activity is effected directly or indirectly.

[56] *See* the literal wording of Articles 34, 35, 45(1), 49 at para. 1, 56 at para. 1, and 63 TFEU.

[57] *See* Case C-110/05, Commission v. Italy, 2009 E.C.R. I-519, para. 37; C-142/05, Åklagaren v. Percy Mickelsson, Joakim Roos, 2009 E.C.R. I-4273, para. 24. On those two judgments that emphasize the very role of the market access criterion in the case of free movement of goods, and their relation to the famous *Keck-Mithouard* formula *see e.g.* Peter Pecho, *Good-Bye Keck? A Comment on the Remarkable Judgment in Commission v. Italy, C-110/05*, 36 LEGAL ISSUES OF ECONOMIC INTEGRATION 257 (2009); Thomas Horsley, *Annotation to Case C-110/05, Commission v. Italy, Judgment of the Court (Grand Chamber) of 10 February 2009;* Case C-142/05, Åklagaren v. Percy Mickelsson and Joakim Roos*,* Judgment of the Court (Second Chamber) of 4 June 2009*;* Case C-265/06, Commission v. Portugal, Judgment of the Court (Third Chamber) of 10 April 2008*,* 2008 E.C.R. I-2245, 46 COMMON MARKET LAW REVIEW 2001 (2009); Eleanor Spaventa, *Leaving Keck Behind? The Free Movement of Goods After the Rulings in Commission v Italy and Mickelsson and Roos*, 34 EUROPEAN LAW REVIEW 914 (2009); Pål Wennerås, Ketil Bøe Moen, *Selling Arrangements, Keeping Keck*, 35 EUROPEAN LAW REVIEW 387 (2010).

[58] *See Dieter Kraus*, *supra* note 48, para. 32**;** C-55/94**,** Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, para. 37*;* Cases C-369/96 and C-376/96*,* Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)*,* 1999 E.C.R. I-8453, para. 33*;* C-205/99, Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v. Administración General del Estado, 2001 E.C.R. I-1271, para. 21*;* C-439/99, Commission v. Italy, 2002 E.C.R. I-305, para. 22; C-79/01, Payroll Data Services (Italy) Srl, ADP Europe SA v. ADP GSI SA, 2002 E.C.R. I-8923, para. 26; C-442/02, Caixa-Bank France v. Ministère de l'Économie, des Finances et de l'Industrie, 2004 E.C.R. I-8961, para. 11.

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State concerned.[59] It is beyond any doubt such broadly defined notions of fundamental freedom restrictions also encompass such national measures that discriminate against goods, persons, services or capital on grounds of differentiation other than nationality, origin or presence of a cross-border element. The national measure that discriminates against some goods, persons, services or capital based on differentiating criteria other than nationality, origin or presence of the cross-border element within the given activity, creates an obstacle hindering access of goods discriminated against to the market of a Member State; makes the conduct of an economic activity or the provision of services less attractive for those persons who are discriminated against; and dissuades investors from other Member State from making the investments that are discriminated against. Thus, the creation of unequal conditions of competition between some categories of goods, persons, services or capital forms an essential barrier for those products and factors of production that are placed at a disadvantage in comparison with others. In the genuine internal market such barriers cannot be treated as permitted, even if they do not lead to the direct or indirect discrimination based on nationality, origin, or presence of the cross-border element.

The reason why the notion of fundamental freedom restriction includes measures that are discriminatory on the grounds of differentiation other than nationality, origin, or presence of the cross-border element can also be found in the fact that the general principle of equality (*i.e.* prohibition of any discrimination) belongs to the fundamental (general) principles of EU law.[60] Such fundamental principles of EU law are binding in the field of TFEU's application, not only as autonomous values being effected on the ground of their own legal bases, but they also radiate on other provisions of the Treaty, influencing the way those other provisions are interpreted.

It is commonly accepted that one of the main purposes of general (fundamental) principles of EU law is to influence the interpretation of other provisions of the Treaty, especially if

[59] *See* Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, para. 45; C-483/99, Commission v. France, 2002 E.C.R. I-4781, para. 41; C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, para. 61; C-98/01, Commission v. United Kingdom of Great Britain and Northern Ireland, 2003 E.C.R. I-4641, para. 47; C-282/04 and C-283/04, Commission v. Kingdom of the Netherlands, 2006 E.C.R. I-9141, para. 20; C-112/05, Commission v. Germany, 2007 E.C.R. I-8995, para. 19.

[60] *See* Case C-810/79, Peter Überschär v. Bundesversicherungsanstalt für Angestellte, 1980 E.C.R. 2747, para. 16; *See* also Articles 2 and 3(3) of TEU, Articles 8 and 10 of TFEU, and Articles 20 and 21 of Charter of Fundamental Rights of the European Union, proclaimed in Nice in 2000, 2007 O.J (C 303) 01**;** on equality in its role as a general principle of EU law see for more JOSEPHINE STEINER, LORNA WOODS & CHRISTIAN TWIGG-FLESNER, TEXTBOOK ON EC LA*W* 175-76 (2003); PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 558 (2008); Gillian More, *The Principle of Equal Treatment: From Market Unifier to Fundamental Right?*, *in* THE EVOLUTION OF EU LAW 517 (Paul Craig & Gráinne de Búrca eds., 1999); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EC LAW 40 (1999).

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the latter are not precisely clear or unambiguous in their content.[61] Given that specific provisions of EU law must be interpreted in such a way as not to conflict with the general principles of that law,[62] it would be questionable to claim that the notion of fundamental freedoms restriction should be interpreted in conformity with (and in the light of) the general principles of EU law, including the general principle of equality.[63] Consequently, the prohibited restrictions of fundamental freedoms include any differentiation between goods, persons, services or capital that are in a similar situation, irrespective of what specific criterion of differentiation is then used. Obviously, such prohibited restrictions may only be challenged on the ground of the Treaty rules on free movement in cross-border situations, *i.e.* provided that in a given situation any cross-border element is present, even if the national measure triggers the same discriminatory effects in purely internal situations.

Since in the light of arguments presented above, the Treaty rules on free movement should be understood as implying not only the principle of non-discrimination based on nationality, but the general principle of equality as well. Thus, it follows that with regard to economic processes that may be of interest to undertakings from other Member States the public authorities (including legislature and administrative bodies) should proceed in full conformity with that latter principle, not allowing *any* discrimination. As a result, if a given economic process (in which, at least potentially, some cross-border element is present) consists in the undertakings' application for some scarce resources granted by a Member State, then the legal rules determining the award of such resources must include objective and non-discriminatory criteria of granting the goods in question. Consequently, the criteria in accordance with which the scarce resources are to be granted cannot give rise to any discrimination and must guarantee equal or at least comparable conditions of applying for such resources for all undertakings concerned, securing for all of them a level playing field standard. Therefore, the criteria of awarding scarce resources must be constructed in such a way that all undertakings concerned would be given an equal chance of complying with them, and would not be placed at a disadvantage (due to some legal or factual reasons). In order to achieve such an outcome the criteria in question must be feasible (*i.e.* giving all undertakings the real opportunity to comply with them), verifiable (*i.e.* enabling the reliable verification of whether in a given instance they are in fact fulfilled), and mostly

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[61] Sideek M. Seyad, *Contribution of General Principles to EC Financial Market Integration*, *in* GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT 178 (Ulf Bernitz, Joakim Nergelius, & Cecilia Cardner eds., 2008); NORBERT REICH, UNDERSTANDING EU LAW: OBJECTIVES, PRINCIPLES AND METHODS OF COMMUNITY LAW 32 (2005).

[62] JUHA RAITIO, THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW 101 (2003).

[63] Thus, irrespective of the fact that the general principle of equality should be applied in the field of exercising fundamental freedoms of TFEU on its own legal basis, *i.e.* as a general principle of EU law that is binding in the entire scope of application of EU law, it must also influence the interpretation of notions that are included within the very Treaty rules on free movement, and that are applied merely in the field of application of those rules.

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linked to the subject matter of the resource that is being awarded. In turn, the farther and more loosely the criteria are connected with the subject-matter of the resource in question, the greater is the risk that they would be set arbitrarily, being beneficial merely for select applicants.

This is not to say that the legal rules determining the award of scarce resources by public authorities cannot empower those authorities to undertake any discretionary actions in that field. "Discretionary" within the discussed meaning are such actions that consist of the application by public authorities in the following legal techniques: 1) administrative discretion in a strict sense (that consists of a choice by an administrative body of a single decision from among many different decisions),[64] 2) interpretation of general clauses (that entails the determination by administrative authorities of the expressions' specific content which are formulated in rather general and vague ways; thus, this administrative action implies the concretization of notions that are unclear in their exact content and require more specific definitions),[65] 3) margin of appreciation with regard to the subsumption (which means an assessment by the administrative authority of whether the specific facts and circumstances established in a given factual situation may be subsumed under the given legal notion, especially under the general clause, in order to apply the legal norm that uses such notion).[66]

Discretion within the above meaning belongs to the inherent and usual features of a great majority of actions b public authorities, and the legal rules empowering public authorities to award some scarce resources and allow them to apply the discretionary techniques described above must not necessarily be categorized as being non-objective or contrary to the principle of equality (*i.e.* giving rise to an unequal treatment of applicants). Rather, it should be said that the legal rules authorizing public authorities to exercise such discretionary conduct still has a chance at being shaped in such a way as to fully conform with the principle of equality, as enshrined within the Treaty rules on free movement.

Such a stance finds its support, among others, in the *Sporting Exchange* judgment where the Court held that compliance with the principle of equal treatment (at the stage of granting exclusive rights) means that Member States must apply "the objective criteria

[64] *See e.g.* HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT (General Administration Law) 135 (2006); Fritz Ossenbühl, *Rechtsquellen und Rechtsbindungen der Verwaltung* (Legal Sources of Administrative and Legal Ties), *in* ALLGEMEINES VERWALTUNGSRECHT 209 (Hans-Uwe Erichsen & Dirk Ehlers eds., 2002); HANS J. WOLFF, OTTO BACHOF & ROLF STOBER, VERWALTUNGSRECHT. BAND 1 454 (1999); FRANZ-JOSEPH PEINE, ALLGEMEINES VERWALTUNGSRECHT 46 (2004).

[65] MAURER, *supra* note 64, at 143.; Ossenbühl, *supra* note 64, at 215.; WOLFF, BACHOF & STOBER, *supra* note 64, at 443; PEINE, *supra* note 64, at 52.

[66] Günther Korbmacher, *Ermessen – unbestimmter Rechtsbegriff – Beurteilungsspielraum* (Discretion—An Indefinite Legal Term), 18 DIE ÖFFENTLICHE VERWALTUNG 697 (1965); MAURER, *supra* note 64, at 145; WOLFF, BACHOF & STOBER, *supra* note 64, at 446.

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enabling the Member States' competent authorities' discretion to be circumscribed".[67] Thus, it follows that in order to comply with the principle of equality, the discretion of public authorities may still be maintained and must not necessarily be eliminated entirely, because it is sufficient to circumscribe that discretion by applying the objective criteria.[68] Consequently, if the legal rules determining the discretionary actions of public authorities in the discussed field are appropriately "objective," then the administrative discretion enshrined within the above-mentioned legal rules is circumscribed (restricted) and, accordingly, conforms to the principle of equality stemming from the Treaty rules on free movement.

The above-mentioned "objectivisation" of legal rules authorizing public authorities to undertake discretionary actions may potentially be affected in a number of ways. First, the legal notions used as criteria of granting scarce resources, even if they have a nature of general clauses, should be as clear and precise as possible. Such legal notions should belong to such phrases that, within the juridical discourse, are very well known and commonly understandable, and the legal meaning of which has already been very thoroughly analyzed in the judicature. Second, the legal rules that are enacted in the discussed field should include such legal norms that could play the role of legal principles, *i.e.* norms indicating some desired objectives or values that are to be materialized, and that could guide the public authorities when they interpret the general clauses or make

[67] *See Sporting Exchange Ltd.*, *supra* note 7, para. 51.

[68] In that regard one must also bear in mind the settled case-law of the Court according to which if a prior administrative authorization scheme is based on objective and non-discriminatory criteria, then the exercise of the national authorities' discretion is circumscribed in such a way that it cannot be used arbitrarily (*see* Case C-205/99, Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v. Administración General del Estado, 2001 E.C.R. I-1271, para. 38; C-385/99, V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, and E.E.M. van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, 2003 E.C.R. I-4509, para. 85; C-389/05, Commission v. French Republic, 2008 E.C.R. I-5337, para. 94; C-169/07, Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung, Oberösterreichische Landesregierung, 2009 E.C.R. I-1721, para. 64; *Sporting Exchange Ltd*., *supra* note 7, para. 50; *Ernst Engelmann*, *supra* note 7, para. 55. In such a situation the administrative discretion as such still exists, but it cannot be used arbitrarily, which in turn makes this discretion conform with the principle of equality. In such instances the authorization scheme, being in conformity with the principle of equality, can be justified relatively easily. It thus follows that in order to preserve the principle of equality, as enshrined within the Treaty rules on free movement, the administrative discretion must not necessarily be eliminated completely, because it is sufficient to circumscribe this discretion appropriately, so that it could not be transformed into arbitrariness. To achieve this aim the national legislator must introduce such statutory criteria of exercising administrative discretion by public authorities that are sufficiently objective. In turn, if a prior administrative authorization scheme is not based on objective and non-discriminatory criteria, then the exercise of the national authorities' discretion is not circumscribed (*i.e.* it may be used arbitrarily), and the principle of equality is then breached. True, under the Treaty rules on free movement such a non-objective scheme can still be justified, but it would be rather hard to substantiate that it constitutes the least restrictive alternative and that there are no other equally efficient legal means that could be less burdensome for the undertakings concerned.

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their choice of the relevant decision from among the many options available.[69] Such legal principles, by providing public authorities (that grant the scarce resources) with some aim-oriented determinants could steer their discretionary activity in a predictable manner, ensuring the objectivisation of the process of realization by those authorities of their discretionary competences. Those latter competences could not then be exercised voluntarily, but would be subject to a uniform set of legal standards. This would create equal chances for all undertakings concerned, by eliminating (so far as possible) the risk that public authorities administrative discretion will be used to the disadvantage of some selected applicants.

In general, the objective statutory criteria of granting scarce resources (*i.e.* criteria that are feasible, verifiable, linked to the subject-matter of the awarded resources, sufficiently clear and precise, and applied in accordance with uniform legal standards) ensure a level playing field for all interested undertakings, so that such undertakings are able to compete for scarce resources on equal footing. As a result of such criteria, the competition for the above-mentioned resources is not as distorted.

However, legal rules authorizing public authorities to award scarce resources, which are sufficiently objective within the above-mentioned meaning, and are in compliance with the principle of equality stemming from the Treaty rules on free movement, does not by itself mean the rules in question are free of obstacles hindering free movement. Rather, one must say the prohibited fundamental freedoms restrictions of the Treaty also include such national legislative measures that are entirely non-discriminatory and objective, *i.e.* that are not only non-discriminatory on the grounds of nationality, origin or presence of the cross-border element, but do not discriminate (and do not give rise to discrimination) on the grounds of any other criterion as well.[70] At the same time, such objective and non-discriminatory rules can be justified relatively easily, since in most instances they constitute the least restrictive means of achieving the desired public interest. In contrast, the legal rules that are not sufficiently objective within the discussed meaning, even if from a purely theoretical point of view, are still open to justification. Such legal rules in most instances will fail to comply with the proportionality test (see more in Section VI).

[69] On the essence and function of legal principles. For more, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1978); ROBERT ALEXY, THEORIE DER GRUNDRECHTE 71 (1994); KARL LARENZ, RICHTIGES RECHT. GRUNDZÜGE EINER RECHTSETHIK 23 (1979); Ulrich Penski, *Rechtsgrundsätze und Rechtsregeln. Ihre Unterscheidung und das Problem der Positivität des Rechts* (The Legal Principles and Rules of Law. Their Distinction, and the Problem of Positivity of the Right) 44 JURISTENZEITUNG 105 (1989).

[70] Obviously, the qualification of those measures as prohibited restrictions of fundamental freedoms is conditioned upon the fulfillment of the criteria of such qualification that were elaborated in that regard by the Court, *i.e.* the measures in question must hinder access of goods to the market of a Member State, or hamper, impede or make less attractive the exercising of fundamental freedoms, or dissuade investors in other Member States from investing in the Member State concerned.

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III. The Principle of Transparency

As already mentioned, the Court in its *Transparency* case law very strongly emphasizes principles of non-discrimination and equal treatment, as enshrined within the Treaty rules on free movement, particularly imply an obligation of transparency. That obligation of transparency, which is imposed on the contracting authority, consists of ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed. The aim of this obligation is to enable the contracting authority to satisfy itself that the principles of non-discrimination and equal treatment have been complied with.[71]

It thus follows that the Court perceives the obligation of transparency as a means of achieving the desired equality (the impartial treatment) of all interested parties at the stage of granting public contracts. In other words, transparency is seen here as an instrument of guaranteeing the compliance of actions of contracting authorities with the principle of equality (and with the principle of non-discrimination on the ground of nationality, as well).

From the perspective of ensuring the effective materialization of the principle of equality, the relevance of the transparency requirement is twofold. First, the realization of the transparency obligation ensures the transmission of information about the future award of a public contract to all market operators that may potentially be interested in concluding that contract. By obtaining the relevant information that has appropriately been publicized *ex ante*, the interested parties have the real opportunity to express their will to conclude the contract and have the possibility to prepare themselves to participate in the awarding procedure. Without the contracting authorities appropriately providing such publicized information, the great majority of potential contractors would not even be aware of the possibility of applying for the contract in question, being thus placed at a disadvantage in comparison with those who were selectively informed by the contracting authority. The sufficient degree of transparency of the awarding procedure removes the essential informational barrier that in the case of most potential contractors forecloses their access to the market of public contracts. Without appropriate actions of contracting authorities the above-mentioned barrier would be, for most potential contractors, practically

[71] *See Telaustria Verlags GmbH*, *supra* note 31, paras. 61-62; *Parking Brixen GmbH*, *supra* note 30, para. 49; *ANAV*, *supra* note 30, para. 21; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, *supra* note 37, para. 75.

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insurmountable. As a result, the transparency of the awarding procedure guarantees the equality of opportunity to all potential contractors when formulating their tenders.[72]

Second, the realization of the transparency obligation gives a practical effect to those actions of contracting authorities that consist in the application of objective and non-discriminatory criteria of awarding public contracts. The very fact of enacting and applying the objective and non-discriminatory awarding criteria, with an intention to guarantee equal chances to all interested parties, would be of little practical importance from the perspective of achieving the desired equality, if all the potential contractors were not given sufficient information about the awarding procedure in question and did not have the possibility of participating in the objective and non-discriminatory procedure. In other words, for the application of objective and non-discriminatory criteria of awarding public contracts to be indeed able to ensure equal treatment of all interested parties, the latter must *ex ante* obtain the relevant information about the possibility of taking part in the awarding procedure. All in all, even the most objective awarding criteria will not guarantee the genuine equality of all interested parties, if there is only one undertaking to whom the information about the awarding procedure has been delivered. This instrumental link between the sufficient degree of transparency of the awarding procedure (on the one hand), and the objective and non-discriminatory awarding criteria (on the other hand), was rightly emphasized by the Court in the *Ernst Engelmann* ruling.

In this case, the award of an exclusive administrative license (to operate gaming establishments) was at stake. Defending the compliance of the national legislation applied in the field of awarding the license with the principle of equal treatment, the Austrian government claimed the above-mentioned national legislation included the objective and non-discriminatory criteria of license award so that operators fulfilling those criteria had equal chances of obtaining the license, provided they had lodged an application for that license**.** Responding to that argument, the Court observed that in order to ensure the genuine equality of all potential contractors, it is clearly insufficient to apply the objective and non-discriminatory award criteria. The principle of equality requires also the publicization of those criteria in advance, so that the whole procedure is sufficiently transparent.[73] Without fulfilling that transparency requirement there would be no

[72] *See* to that effect Case C-87/94, Commission v. Kingdom of Belgium, 1996 E.C.R. I-2043, para. 54; *Parking Brixen GmbH*, *supra* note 30, para. 48.

[73] *See Ernst Engelmann*, *supra* note 7, paras. 55 & 57; *See* also *Analir and Others*, *supra* note 68, para. 38; *V.G. Müller-Fauré*, *supra* note 68, para. 85; *Commission v. French Republic* (2008), *supra* note 68, para. 94; *Hartlauer Handelsgesellschaft mbH*, *supra* note 68, para. 64; *Sporting Exchange Ltd*., *supra* note 7, para. 50. In all those latter judgments the Court emphasized that even if prior administrative authorization scheme implies the discretionary actions on the part of public authorities, it is nonetheless still in conformity with the principle of equality and could, as such, be subject to justification, provided that, first, there are objective and non-discriminatory award criteria applied, and, second, the above-mentioned criteria are known to all interested parties in advance (requirement for transparency). This shows the very close link that in the Court's view exists

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undertakings (or there would be at most very few undertakings) with regard to which the objective and non-discriminatory criteria could be applied in practice.

Interestingly, also in *Sporting Exchange,* the Court emphasized that in the light of the principle of equal treatment "the obligation of transparency appears to be a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator."[74] It thus follows that the very method of selecting the operator, even if it is based on objective and non-discriminatory criteria, is not capable of ensuring full implementation of the principles of equality and non-discrimination within that particular procedure. To that end the observance of the transparency obligation is needed as well, and the non-compliance with that latter obligation makes the application of objective and non-discriminatory awarding criteria practically useless (without due transparency the latter are merely a kind of veneer). Obviously, the content and nature of the award criteria (on the one hand), and the transparency and publicization of those criteria (on the other hand), are formally two different issues, but in functional terms they are closely linked, and they both aim at ensuring the genuine equality of all interested market operators.

The non-compliance actions of public authorities in the field of granting scarce resources to individuals with a transparency obligation amounts to a breach of the Treaty rules on free movement. According to the Court, the award of a public contract, in the absence of any transparency, to an undertaking located in the same Member State as the contracting authority, amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract, but which are located in other Member States. Such a difference in treatment, by excluding all undertakings located in other Member States, operates mainly to the detriment of the said undertakings and amounts to indirect discrimination on the basis of nationality, which is prohibited under Articles 49 and 56 TFEU.[75] In the absence of any transparency, such undertakings have no real opportunity to express their interest in obtaining that public contract.[76] A complete lack of transparency (any call for competition) in the case of the public contract that is of cross-border interest fails to comply with the requirements of Articles 49 and 56 TFEU as well as the consequent principles of equal treatment, non-discrimination and transparency.[77]

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between the content of award criteria (on the one hand) and the issue of their publicization (on the other hand) in ensuring the desired equality of all market operators.

[74] *See Sporting Exchange Ltd*., *supra* note 7, para. 47; *see* also case *Engelmann*, *supra* note 7, para. 53.

[75] *See Coname*, *supra* note 31, paras. 17 & 19; *Commission v. Ireland* (2007), *supra* note 37, paras. 30-31; C-*Commission v. Italy* (2008), *supra* note 37, para. 66; *ASM Brescia SpA*, *supra* note 37, paras. 59-60.

[76] *See Coname*, *supra* note 31, para. 18.

[77] *See Parking Brixen GmbH*, *supra* note 30, para. 50; *ANAV*, *supra* note 30, para. 22; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, *supra* note 37, para. 76.

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While the Court is indeed right in claiming that the lack of any transparency is detrimental mainly to undertakings located in other Member States (indirect discrimination), such a qualification is not always correct in the case of such procedures of granting scarce resources that fulfill the requirement of transparency at least partially, *i.e.* when the advertisement of conditions of granting the resources in question is delivered at least to *some* selected undertakings.

Such partial transparency measures must not necessarily be detrimental mainly to undertakings from other Member States, or to undertakings involved in cross-border activity. One may easily imagine a situation where the awarding authority delivers the information about the future awarding procedure to some select undertakings from other Member States, or to those exercising cross-border activity. In such instances the action of the awarding authority does not discriminate undertakings (neither directly nor indirectly) on the ground of their nationality, origin or presence of cross-border elements in their activity. The undertakings that have not been informed about the awarding procedure are then discriminated against on the other grounds of differentiation criteria. However, the lack of differentiation on the ground of nationality, origin or presence of cross-border elements does not prevent the categorization of the awarding authority's action as the prohibited restriction of the Treaty rules on free movement, provided that not all undertakings involved in the cross-border activity were treated equally as regards the scope of information that has been delivered to them. The occurrence of a differentiation based on any other criterion is clearly sufficient to reach a conclusion that fundamental freedoms of the Treaty have been breached.

The mandated transparency of the awarding procedure raises the questions of what specific content the relevant advertisements should include and what means of publicization should then be used. In that regard the Court only very vaguely states that the information regarding a public contract or an administrative license before they are awarded must be "appropriate"[78] and "adequate,"[79] adapted to the particularities of the scarce resource that is being awarded.[80] It seems that the minimal content of advertisements must include a closer characterization of the specific scarce resource that is to be awarded, the information of how the interested undertakings should formally express their will of obtaining that resource (in particular, where and when they should file their applications), and what the awarding criteria that the awarding authority intends to apply are. As regards the means of advertisement, one may propose in particular the

[78] *See Coname*, *supra* note 31, para. 21.

[79] *See Commission v. Ireland* (2007), *supra* note 37, para. 32.

[80] *See Parking Brixen GmbH*, *supra* note 30, para. 50.

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national official journals, notice-boards, own websites of awarding authorities, the websites that are specially designed for publication of advertisements concerning the specific scarce resources, specialist or trade journals, *etc*.[81] In general, the greater the interest of the scarce resource to potential recipients from other Member States, the wider the coverage should be.

IV. Competitive and Transparent Model Procedures for Granting Exclusive Rights

The Treaty rules on free movement merely include some general determinants of the process of granting exclusive rights to undertakings. Namely, the rules in question require the application of objective and non-discriminatory awarding criteria that must be known in advance by all undertakings. The main point is to put all interested undertakings on equal footing and to induce competition between them for a given market.

However, the exact details of such competitive and transparent procedures must be constructed at the national level, either by the national legislature or by individual public authorities granting the exclusive rights. Except for instances when in a given field there is an EU act of secondary legislation determining the way the exclusive rights should be granted (*e.g.* in the field of public passenger transport services by rail and by road),[82] Member States have at their disposal a relatively wide spectrum of model procedures that fully comply with the principles of non-discrimination, equal treatment and transparency. Some of these options will be briefly outlined below.

First, when granting exclusive rights, Member States may use such awarding procedures that resemble the procedures for awarding public contracts provided for by the EU public procurement Directives. What is important in that regard is that the procedures laid down in the above-mentioned Directives may be used to select the undertakings to whom the exclusive rights will be granted irrespective of a legal form of those rights, *i.e.* irrespective

[81] In that regard see the literature concerning the issue of transparency of public contracts not subject or subject only partially to the EU Directives: Adrian Brown, *Seeing Through Transparency: The Requirement To Advertise Public Contracts and Concessions Under the EC Treaty*, 16 PUBLIC PROCUREMENT LAW REVIEW 18, 18-20 (2007); Adrian Brown, *Transparency Obligations Under the EC Treaty In Relation To Public Contracts That Fall Outside the Procurement Directives: A Note On C-231/03, Consorzio Aziende Metano (Coname) v. Comune di Cingia De' Botti*, 14 PUBLIC PROCUREMENT LAW REVIEW NA158 (2005); Totis Kotsonis, *The Extent of the Transparency Obligation Imposed On a Contracting Authority Awarding a Contract Whose Value Falls Below the Relevant Value Threshold*, 16 PUBLIC PROCUREMENT LAW REVIEW, point 3.3 (2007); Erik Pijnacker Hordijk & Maarten Meulenbelt, *A Bridge Too Far: Why the European Commission's Attempts To Construct An Obligation To Tender Outside The Scope of the Public Procurement Directives Should Be Dismissed*, 14 PUBLIC PROCUREMENT LAW REVIEW 127 (2005); McGowan, *supra* note 49, 280-281.

[82] *See* Article 5 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on Public Passenger Transport Services By Rail and By Road and Repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70, 2007 O.J. (L 315) 1.

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of whether those rights are granted by means of contracts (public or private) or by means of administrative acts. Even if the exclusive right does not qualify as a public contract within the meaning of EU public procurement Directives, nothing prevents the designation of the right beneficiary in question in making (an analogous) use of one of the procedures provided for in those Directives. Thus, the grantee of the exclusive right may be selected after conducting an open procedure, restricted procedure, negotiated procedure or competitive dialogue, under the stipulation that the two latter procedures are conducted in successive stages in order to gradually reduce, on the basis of previously indicated award criteria, the number of tenders which the contracting authorities will go on to discuss or negotiate.[83] Obviously, using one of those procedures in order to select the exclusive right grantee will not transform the granting of that exclusive right into a public contract within the meaning of EU public procurement Directives, unless the act in question has all of the features that are constitutive for a public contract within the discussed meaning.

Second, Member States may create such a scheme of granting an administrative authorization (*e.g.* permission, license, concession) to pursue an economic activity which, as a rule, allows granting that authorization to all interested undertakings fulfilling the objective, non-discriminatory and transparent criteria, but which at the same time provides for exceptional circumstances under which the process of granting the above-mentioned authorizations can be suspended for some period of time. When those circumstances occur and the granting authority decides to suspend the granting process in question, and when there is only one undertaking in a given market that has previously obtained the authorization required, then the authorization will be transformed into an exclusive right (however, that exclusive right will be merely of a transitional nature, until the process of granting of those authorizations is renewed).

For the above-mentioned exclusive right to be classified as granted in conformity with the requirements stemming from the Treaty rules on free movement, the circumstances which empower the public authority to suspend the process of granting the authorizations in question must be determined in objective and relatively strict terms. In other words, the above-mentioned circumstances must be described in such a way so as to give the interested parties a chance to reasonably predict when they may expect the public authority's decision on suspension. The main point in this process is to eliminate the risk that, after the first authorization is granted, the granting authority will arbitrarily (voluntarily) suspend the process of granting subsequent authorizations, being driven in that regard by subjective and discriminatory criteria. If the granting authority could, after the first authorization is awarded, affect the suspension of subsequent authorizations on an arbitrary basis (*i.e.* not in accordance with objective and non-discriminatory criteria), then the transformation of the first authorization into an exclusive right (equivalent in fact

[83] On those procedures *see* Articles 28 *et seq.* of Directive 2004/18/EC.

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to the granting of exclusive right) would have to be classified as effected in a way contrary to the determinants included in the Treaty rules on free movement.

Third, the process of granting exclusive rights may also be realized under a scheme of granting administrative authorizations to pursue an economic activity that provides for the possibility of awarding those authorizations to all interested undertakings in accordance with objective, non-discriminatory and transparent criteria, while at the same time allowing the revocation of all those authorizations, except one, provided some prerequisites are fulfilled.

Assuming that the said prerequisites are satisfied, the revocation of other authorizations will result in the transformation of that single authorization that has not been withdrawn into an exclusive right. For that right to be categorized as granted in accordance with the requirements resulting from the Treaty rules on free movement, the prerequisites which empower the granting authority to revoke the other authorizations must be formulated by using the relatively strict, precise and objective expressions that would prevent any arbitrary actions on the part of the public authority granting and revoking authorizations. In the light of the Treaty rules on free movement, the public authority cannot be entitled to select undertakings whose authorizations will be revoked on an arbitrary basis. On the contrary, the criteria of that revocation must be sufficiently objective, so that the compatibility of the act of revocation with those criteria could be subsequently and reasonably verified.

VI. Justification of Granting Exclusive Rights in a Manner Contrary to the Principles of Non-Discrimination, Equal Treatment and Transparency

First of all, it has to be recalled here that the justification of legal rules determining the process of granting exclusive rights is also required in the case of rules that comply with the principles of non-discrimination, equal treatment and transparency, provided that such rules fulfill the criteria of categorization as prohibited restrictions of fundamental freedoms, elaborated upon by the Court (see more in Section IV). While the rules complying with the above-mentioned principles are relatively easily justified (most constituting the least restrictive means of achieving a given public interest objective), the legal rules breaching the principles of non-discrimination, equality and transparency have much smaller chances of being successfully justified. For the latter's justification to succeed, it must be proven (among others) that the rules compliant with the principles in question, while being less restrictive for the undertakings involved in cross-border processes, would not be as efficient in achieving the public interest objective as the rules breaching the principles of non-discrimination, equality and transparency. Such proof, which is not easy produce, is mandated by the principle of proportionality that must be strictly observed during the process of justification.

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In *Sporting Exchange* the Court held that restrictions on the fundamental freedoms of the Treaty, arising specifically from such procedures for the grant of a license to a single operator or its renewal, which breaches the principles of non-discrimination, equal treatment and transparency, "may be regarded as being justified if the Member State concerned decides to grant a license to, or renew the license of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities."[84] Such a conclusion, if read *in abstracto*, without considering the wider context of the quoted passage, would possibly mean what justifies the restrictions of fundamental freedoms in question is the very fact of granting the exclusive right to a public operator whose management is subject to direct State supervision or to a private operator whose activities are subject to strict control by the public authorities.[85]

In other words, even if the exclusive right was granted contrary to the principles of non-discrimination, equal treatment and transparency, such a breach of the Treaty rules on free movement can nonetheless be justified by the very fact of the State's involvement in that right, taking the form of public ownership (of the monopolist operator) or public supervision (over private operator). Thus, the very fact that the exclusive right granted without any competitive and transparent procedure is sufficiently public (due to the ownership, or institutional or procedural arrangements present in the case of a monopolistic operator), is capable of saving the process of granting that right, even if that process was contrary to the Treaty rules on free movement.

Interestingly, a very similar kind of reasoning also underlies the *State Action Doctrine*, elaborated by the Court under the Treaty rules on competition. According to that Doctrine, a Member State infringes the TFEU rules on competition "where it divests its own rules of the character of legislation [where it deprives its own legislation of its official character] by delegating to private economic operators responsibility for taking decisions affecting the

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[84] *Sporting Exchange, supra* note 7, para. 59.

[85] This conclusion seems to be reinforced by the wording of para. 62 of *Sporting Exchange* where the Court held that "Article 49 EC must be interpreted as meaning that the principle of equal treatment and the consequent obligation of transparency are applicable to procedures for the grant of a license to a single operator or for the renewal thereof in the field of games of chance, in so far as the operator in question is not a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities." This means *a contrario* that if the operator in question *is* a public operator whose management is subject to direct State supervision or *is* a private operator whose activities are subject to strict control by the public authorities, then the principle of equal treatment and the consequent obligation of transparency are *not* applicable to the procedures for the grant of a license to a single operator or for the renewal thereof (or are applicable, but their breach is then *eo ipso* justified).

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economic sphere."[86] It thus follows that even if the legislative or administrative arrangement created by the Member State, and one within the framework of decisions affecting the economic sphere are taken, distorts competition (within the meaning of TFEU rules on competition), it will nonetheless not be categorized as infringing the Treaty rules on competition, insofar as it retains its official or public character. That character may result from the fact public authorities are authorized to decide the composition and structure of regulatory bodies competent to take decisions affecting the economic sphere, or are empowered to approve or reject those decision, or to amend them.[87] Such active State involvement or supervision suffices to immune the arrangement from antitrust scrutiny.

However, the position that even under the TFEU rules on competition this factor of State involvement or supervision, State presence which suffices (at least in the Court's view) to exempt the arrangement from antitrust scrutiny, has been met with criticism.

It has been proposed in this regard that what should make the legislative or administrative arrangement (which distorts competition) conform with the Treaty rules on competition, is not the public or official character of that arrangement, but rather the presence of some clearly defined public interest, provided it is affected in a proportionate manner.[88] This latter stance should be adopted when assessing the compatibility of the process of granting exclusive rights with the Treaty rules on free movement, since only such a solution would be fully consistent with the settled case law of the Court concerning the justification of restrictions of fundamental freedoms.

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[86] *See* Case 267/86, Pascal Van Eycke v. ASPA NV, 1988 E.C.R. 4769, para. 16; C-332/89, Criminal proceedings against André Marchandise, Jean-Marie Chapuis and SA Trafitex, 1991 E.C.R. I-1027, para. 22; C-2/91, Criminal proceedings against Wolf W. Meng, 1993 E.C.R. I-5751, para. 14; C-185/91, Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG, 1993 E.C.R. I-5801, para. 14; C-245/91, Criminal proceedings against Ohra Schadeverzekeringen NV, 1993 E.C.R. I-5851, para. 10; C-153/93, Germany v. Delta Schiffahrts- und Speditionsgesellschaft mbH, 1994 E.C.R. I-2517, para. 14; C-379/92, Criminal proceedings against Matteo Peralta, 1994 E.C.R. I-3453, para. 21; C-401 & 402/92, Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans, 1994 E.C.R. I-2199, para. 16; C-96/94, Centro Servizi Spediporto Srl v. Spedizioni Marittima del Golfo Srl, 1995 E.C.R. I-2883, para. 21; C-35/99, Criminal proceedings against Manuele Arduino, 2002 E.C.R. I-1529, para. 35; C-198/01, Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, 2003 E.C.R. I-8055, para. 46; C-250/03, Giorgio Emanuele Mauri v. Ministero della Giustizia, Commissione per gli esami di avvocato presso la Corte d'appello di Milano, 2005 E.C.R. I-1267, para. 30; *Federico Cipolla, supra* note 55; *Stefano Macrino, Claudia Capodarte*, *supra* note 55, para. 47.

[87] *See Bundesanstalt für den Güterfernverkehr*, *supra* note 86, paras. 20-24; *Centro Servizi Spediporto Srl*, *supra* note 86, paras. 26-30; *Criminal proceedings against Manuele Arduino*, *supra* note 86, paras. 36-43; *Federico Cipolla, supra* note 55; *Stefano Macrino, Claudia Capodarte*, *supra* note 55, paras. 48-52.

[88] Opinion of AG *Jacobs* in Cases C-180/98 to C-184/98, Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten, 2000 E.C.R. I-6451, para. 163; opinion of AG *Léger* in Case C-35/99, Criminal proceedings against Manuele Arduino, 2002 E.C.R. I-1529, paras. 89-91; Thomas Deisenhofer, *Towards a proportionality test in the field of the liberal professions?*, 12 COMPETITION POLICY NEWSLETTER 30 (2005).

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According to the well-established Court's position, restrictions of fundamental freedoms of the Treaty resulting from the Member States' measures are justified only when the measures in question pursue some legitimate objective in the public interest; are suitable for securing the attainment of the objective which they pursue; and do not go beyond what is necessary in order to attain that objective.[89] The same must be true in the case of such State measures that consist of granting exclusive rights to undertakings selected without a sufficiently competitive and transparent procedure.

If the award of an exclusive right to a given operator (either public or private) in a way contrary to the principles of non-discrimination, equal treatment and transparency is to be justified, there must always be a clearly defined public interest that will materialize as a consequence of such an award, provided there are no measures less burdensome for undertakings concerned which would be equally efficient in achieving the above-mentioned public interest. As a result, when a Member State, without a sufficiently competitive and transparent procedure, grants an exclusive right to a public operator or to a private operator whose activities are subject to strict control by the public authorities, it must be ensured that such an arbitrary choice of that operator is a suitable means of achieving some desired public objective, and that there are no other equally efficient but less restrictive means of attaining that objective.[90] However, that latter condition (i.e. necessity test) is rather difficult to fulfill, since the measures that are less restrictive for all interested undertakings and that should be perceived, at least in normal instances, as equally efficient means of realization of the desired public objective, include a competitive and transparent procedure of award of an "exclusive right." Within the framework of such a procedure the granting authority may select such an operator that is capable of best serving the given public interest, and who fulfills the objective and non-discriminatory award criteria to the greatest extent possible. It does not eliminate the possibility of selecting a public operator or a private operator whose activity is under strict control by public authorities, provided that it is exactly such an operator that is the best candidate in

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[89] *See e.g.* Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, para. 8; C-34/95, C-35/95 & C-36/95, Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95), 1997 E.C.R. I-3843, para. 45 (Goods); C-19/92, *supra* note 48, para. 32**;** C-55/94, *supra* note 58*, para. 37* (Establishment); C-288/89, Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media, 1991 E.C.R. I-4007, paras. 13-15; C-384/93, Alpine Investments BV v. Minister van Financiën, 1995 E.C.R. I-1141, para. 44-45 (Services); *Commission v. Portugal* (2002), *supra* note 59, para. 49; *Commission v. Spain* (2003), *supra* note 59, para. 68 (Capital).

[90] Such a conclusion, emphasizing the role of the principle of proportionality in the discussed respect, stems also from those Court's judgments that are referred to in para. 59 of *Sporting Exchange* ruling; *See* Case C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), 1999 E.C.R. I-6067, para. 42; C-42/07, Liga Portuguesa de Futebol Profissional, Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, 2009 E.C.R. I-7633, paras. 66-67; *Sporting Exchange, supra* note 7, para. 60 (the importance of the requirement of proportionality in that regard was also underlined in para. 60).

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the light of the pre-established award criteria. But *ex ante* exclusion of all other market operators, without even considering their offers, would usually go clearly beyond what is necessary in order to attain the public objective.

Another matter entirely is a question of whether the granting of an exclusive right to a given operator without a sufficiently competitive and transparent procedure can be justified on the grounds of the so-called Teckal Doctrine elaborated within the Court's jurisprudence.

According to the settled case-law, the application of the Treaty rules on free movement, including the consequent obligations of equal treatment and transparency, is precluded when the contracting authority awards a public contract to the contractor over which it exercises control (similar to that which it exercises over its own departments), provided that the said contractor carries out the essential part of its activities with the controlling entity.[91] There is no doubt that the above-mentioned derogation should be applied with regard to the process of granting exclusive rights by means of public contracts, including public service concessions. But what is more, there are at least two important reasons why the derogation in question should also be applied when the exclusive right is not awarded contractually or is awarded by means of a contract that does not qualify as a public contract (within the meaning of EU public procurement Directives).

First, the *Teckal*-doctrine was introduced in order to give contracting entities an alternative: either to realize the supplies, works or services within their own departments (including separate entities over which they exercise control similar to that exercised over they own departments), where the realization of those supplies, works and services is governed by considerations and requirements proper to the pursuit of objectives in the public interest,[92] or to outsource those supplies, works and services to external contractors by applying to that end competitive and transparent procedures. Exactly the same alternative should be available to public authorities wishing to grant an exclusive right to a single undertaking, namely the public authority should be free to decide whether to award exclusivity to its internal entity, which is in fact its arm in fulfilling objectives in the public interest, or whether to grant such an exclusivity to an external operator that – while

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[91] *See Parking Brixen GmbH*, *supra* note 30, para. 62; *ANAV*, *supra* note 30, para. 24; A*sociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, *supra* note 37, para. 86; C-324/07, Coditel Brabant SA v. Commune d'Uccle, Région de Bruxelles-Capitale, 2008 E.C.R. I-8457, para. 26; C-573/07, Sea Srl v. Comune di Ponte Nossa, 2009 E.C.R. I-8127, paras. 36-37, 40; C-196/08, Acoset SpA v. Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and others, 2009 E.C.R. I-9913, paras. 51-52; C-107/98, Teckal Srl v. Comune di Viano, Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, 1999 E.C.R. I-8121, para. 50, which was, however, concerned with the issue of application of provisions of EU public procurement Directives, and not the Treaty rules on free movement.

[92] *See* to that effect Case C-26/03, Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, 2005 E.C.R. I-1, para. 50.

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principally following private interests – should be selected on the basis of a competitive and transparent procedure. Thus, the main rationale underlying the derogation resulting from the Teckal Doctrine and applied with regard to public contracts remains exactly the same in the case of exclusive rights, including those not qualifying as public contracts.

Second, if the option of granting an exclusive right without any competitive and transparent procedure was admissible only when such a right was awarded by means of a public contract (without such a possibility when the right in question was granted by means of a private contract or an administrative act), then it would potentially create an incentive for public authorities to artificially shape the acts granting exclusivity to their internal bodies as public contracts. In particular, instead of concluding gratuitous contracts with such internal operators (especially when such operators are financed from public resources anyway), the public authorities would conclude contracts for pecuniary interest[93] with those internal operators only to fulfill the prerequisites for application of the Teckal Doctrine. Such artificial arrangements would clearly be undesired, since they would blur the limits of public contracts (which even today are not entirely clear – *see* more in Section II).

The admissibility of granting exclusive rights without a sufficiently competitive and transparent procedure in fulfillment of the Teckal Doctrine prerequisites does not result from para. 59 of *Sporting Exchange*. The Court refers to the admissible granting of an exclusive right (without such a procedure) as "a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities." It is apparent that the prerequisites for the application of the Teckal Doctrine are substantially different from those referred to in para. 59 of *Sporting Exchange*. In contrast to the conditions mentioned in that latter judgment, the Teckal Doctrine contains the qualified condition of control (the mere fact that the management of a given public operator is subject to direct State supervision is not always sufficient from the perspective of the Teckal Doctrine);[94] it does not allow the participation of private operators;[95] and it also includes the second condition (*i.e.* the contractor must carry out the essential part of its activities with the controlling entity), about which para. 59 of *Sporting Exchange* is completely silent. Thus, it cannot be said that in *Sporting Exchange* the Court referred to its Teckal Doctrine.

It is worth emphasizing the admissible granting of an exclusive right to an operator without a sufficiently competitive and transparent procedure (either when it is justified by public

[93] Within the meaning of Article 1(2)(a) of Directive 2004/18/EC and Article 1(2)(a) of Directive 2004/17/EC.

[94] *See Parking Brixen GmbH*, *supra* note 30, paras. 64-70.

[95] *See Stadt Halle*, *supra* note 92, para. 49; C-29/04, Commission v. Austria, 2005 E.C.R. I-9705, para. 46; *ANAV*, *supra* note 30, paras. 31-32; C-337/05, Commission v. Italy, 2008 E.C.R. I-2173, para. 38.

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interest reasons and the principle of proportionality, or when the prerequisites of Teckal Doctrine are fulfilled) does not mean that the exclusive right as such (*i.e.* its very existence, content, extent or organization) is compliant with EU law. In all those instances where the public authority is entitled to grant an exclusive right in a way contrary to the Treaty rules on free movement, there still remains an open possibility that the legality of that right may be questioned, either in the light of fundamental freedoms of the Treaty,[96] or from the perspective of the Treaty rules on competition.[97]

E. Conclusion

After the *Sporting Exchange* and *Ernst Engelmann* rulings it is now entirely clear that the process of granting exclusive rights to undertakings must be affected in compliance with the Treaty rules on free movement, and in particular in accordance with the consequent principles of non-discrimination, equal treatment and transparency, irrespective of whether the right is awarded by means of a public contract or by other legal means (public or private). Thus, even if public authorities wish to exclude competition in a given market due to some justified reasons, and are authorized by EU law to do so, they must nonetheless ensure a sufficient degree of competition for that market so as to ensure an undistorted rivalry of the various market operators at the application stage for that right. Such an obligation is fully understandable in light of essential aims of the Treaty rules on free movement, which boil down not only to the elimination of discrimination based on nationality, origin or presence of the cross-border element, but also include the elimination of any discrimination, provided it constitutes an obstacle hindering the realization of cross-border economic processes. Furthermore, it seems the public authorities granting exclusive rights should not complain about the requirements imposed upon them by the TFEU rules. After all, by granting exclusive rights within competitive and transparent procedures, the public authorities have an excellent chance to select from among the many potentially interested operators, including those from other Member States, such beneficiaries of those rights that will best serve the needs of the relevant community. In turn, if they want to depart from those requirements, they must substantiate the existence of a clearly defined public interest that is capable of outweighing the benefits resulting from a competitive and transparent procedure.

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[96] *See* Andrea Filippo Gagliardi, *What Future for Member States' Monopolies?*, 23 EUROPEAN LAW REVIEW 371 (1998).

[97] For example, Article 106 TFEU, read in conjunction with Article 102(b) TFEU, prohibits Member States from granting or maintaining exclusive rights with regard to such undertakings which are manifestly not in a position to satisfy the demand prevailing in the given market: Case C-41/90, Klaus Höfner and Fritz Elser v. Macrotron GmbH, 1991 E.C.R. I-1979, para. 31.

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