Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 15 September 2022 [1]

Case C-292/21

Administración General del Estado,
Confederación Nacional de Autoescuelas (CNAE),
UTE CNAE-ITT-FORMASTER-ECT
v
Asociación Unión para la Defensa de los Intereses Comunes de las Autoescuelas (AUDICA),
Ministerio Fiscal

(Request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain))

(Reference for a preliminary ruling – Internal market – Directive 2006/123/EC – Road-safety awareness and training courses for the purposes of the recovery of driving licence points – Article 2(2)(d) – Scope – Exclusion – 'Services in the field of transport' – Freedom of establishment – Public service concession – Conditions for the award of the public service concession – Article 15 – Service of general economic interest – Proportionality – National requirements going beyond what is necessary to achieve the objective pursued)

I. Introduction

1. By the present request for a preliminary ruling, the Tribunal Supremo (Supreme Court, Spain) enquires as to the compatibility with EU law of a national measure pursuant to which contracts for the provision of road-safety awareness and training courses designed to enable drivers to recover points on their driving licence must be awarded as public service concessions. Only one public service concession is available in each of the five geographical zones delineated for that purpose across the national territory (with the exception of two regions, Catalonia and the Basque country, which are subject to a different regime). The successful concession holder for each zone is the only entity authorised to provide such courses in the corresponding area.

2. The dispute before that court concerns, in essence, whether such a measure is contrary to the provisions of the Services Directive, [2] which establishes general provisions facilitating the exercise of the fundamental freedoms which are protected by Article 49 TFEU (freedom of establishment) and Article 56 TFEU (free movement of services). [3] In order to answer that question, it is necessary, first, to determine whether that directive applies to the present case.

1 Original language: English.

2 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

3 See Article 1(1) and recitals 5 to 7 of the Services Directive.

3. In short, for the reasons given below, I propose that the Court answer that preliminary question in the affirmative. I am afraid, however, that the national measure at issue in the main proceedings restricts the freedom to provide services in a way that does not respect fully the requirements of that directive.

II. Legal framework

A. European Union law

1. The Services Directive

4. Recital 17 of the Services Directive states, in essence, that services of general economic interest (SGEIs) fall within the scope of that directive unless they are services in the field of transport.

5. Recital 40 of the Services Directive explains that the concept of 'overriding reasons relating to the public interest' to which reference is made in, inter alia, Article 15(3) of that directive, 'has been developed by the Court of Justice in its case-law in relation to [Articles 49 and 56 TFEU] and may continue to evolve'. That concept covers a number of grounds, including road safety.

6. Article 2 of the Services Directive, entitled 'Scope', provides, in paragraph 1 thereof, that that directive applies to services supplied by providers established in a Member State, subject to certain exceptions laid down in Article 2(2) of the directive. According to Article 2(2)(d) of that directive, it does not apply to 'services in the field of transport … falling within the scope of [Title VI TFEU]'.

7. Article 15 of the Services Directive, entitled 'Requirements to be evaluated', provides as follows:

'1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

(a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;

…

(d) requirements, other than those concerning matters covered by Directive 2005/36/EC [of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22)] or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;

…

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only in so far as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.

…'

2. Directive 2014/23/EU[4]

8. Article 5(1)(b) of Directive 2014/23/EU defines 'services concession' as 'a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services … to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment'.

9. Article 8 of Directive 2014/23, as applicable at the material time, provided that the directive 'shall apply to concessions the value of which is equal to or greater than EUR 5 186 000'.

B. National law

10. The Services Directive was transposed into Spanish law by Ley 17/2009, sobre el libre acceso a las actividades de servicios y su ejercicio (Law 17/2009 on free access to service activities and their exercise), of 23 November 2009.[5] Article 3 of that law defines 'service' as 'any self-employed economic activity, normally carried out for remuneration, referred to in [Article 57 TFEU]'. Article 5 of that law indicates that access to a service activity may be subject to authorisation when three conditions are met: those of non-discrimination, necessity and proportionality.

11. Pursuant to Ley 17/2005, por la que se regula el permiso y la licencia de conducción por puntos y se modifica el texto articulado de la ley sobre tráfico, circulación de vehículos a motor y seguridad vial (Law 17/2005 governing the driving licence and driving licence with points and

[4] Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

[5] BOE No 283, of 24 November 2009.

amending the law on traffic, motor vehicle traffic and road safety), of 19 July 2005,[6] the contract to run courses for the recovery of driving licence points must be awarded by means of a public service concession, in accordance with the law governing contracts awarded by public authorities.

12. Orden INT/2596/2005, por la que se regulan los cursos de sensibilización y reeducación vial para los titulares de un permiso o licencia de conducción (Order INT/2596/2005 on road-safety awareness and training courses for holders of a driving licence), of 28 July 2005,[7] implements Law 17/2005. Paragraph 12 of that order provides that 'control and inspection of road-safety awareness and training courses shall be carried out in accordance with the technical specifications set out in the administrative concession contract'.

III. Facts, national procedure and the question referred

13. In 2014, the Dirección General de Tráfico (Directorate-General for Traffic, Spain) announced the tendering procedure 'Concession for the management of road-safety awareness and training courses for the recovery of driving licence credits: five lots'. Those courses were designed for drivers who had lost points on their driving licences as a result of committing traffic offences.

14. For the purposes of that tendering procedure, the national territory (apart from Catalonia and the Basque country) was divided into five zones, each corresponding to a procurement lot. Only one contract was available for each lot and each contract had to be awarded as a public service concession. The successful tenderer for each lot would become the only entity authorised to provide the courses at issue in the corresponding zone.

15. The call for tenders was challenged by the Asociación Unión para la Defensa de los Intereses Comunes de las Autoescuelas (AUDICA) (Association for the Protection of the Common Interests of Driving Schools (AUDICA), Spain) before the Tribunal Administrativo Central de Recursos Contractuales (Central Administrative Court for Contractual Appeals, Spain). AUDICA argued that the fact that the contracts had to be public service concessions was contrary to the freedom to provide services.

16. The Abogado del Estado (Counsel for the State, Spain), on behalf of the Directorate-General for Traffic, appeared in the proceedings as defendant, as did the consortium composed of the Confederación Nacional de Autoescuelas (CNAE) and three other entities (FORMASTER, ECT and ITT) as co-defendant ('the consortium' or 'CNAE and others'). The consortium had been successful in the tendering procedure.

17. By decision of 23 January 2015, the Tribunal Administrativo Central de Recursos Contractuales (Central Administrative Court for Contractual Appeals) dismissed AUDICA's action. AUDICA appealed against that decision before the Chamber for Contentious Administrative Proceedings of the Audiencia Nacional (National High Court, Spain).

18. By judgment of 28 November 2018, the Chamber for Contentious Administrative Proceedings of the Audiencia Nacional (National High Court) upheld AUDICA's appeal, and annulled both the decision of the Tribunal Administrativo Central de Recursos Contractuales (Central Administrative Court for Contractual Appeals) and the call for tenders. It found that the provision of the courses at issue had the characteristics of a service of general economic interest

6 BOE No 172, of 20 July 2005.

7 BOE No 190, of 10 August 2005.

(SGEI), within the meaning of Article 14 TFEU.[8] Moreover, it held that the requirement that those courses be provided as public service concessions was excessive and without justification, given that other methods existed which would enable the administrative authorities to achieve their stated aims without unduly restricting competition between potential service providers.

19. The Counsel for the State and the consortium appealed against the judgment of the Chamber for Contentious Administrative Proceedings of the Audiencia Nacional (National High Court) before the Tribunal Supremo (Supreme Court). That court, harbouring doubts as to the interpretation of several provisions of EU law, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a national provision pursuant to which contracts for the provision of road-safety awareness and training courses for the purposes of the recovery of driving licence points must be awarded by means of a public service concession compatible with [the Services Directive], or, as the case may be, with other provisions or principles of European Union law?'

20. In the present proceedings, written observations have been submitted by CNAE and others, AUDICA, the Czech, Spanish and Netherlands Governments and the European Commission. Those parties, except for the Czech Government, also presented oral arguments at the hearing held on 1 June 2022.

IV. Analysis

21. By its question, the referring court seeks, in essence, to ascertain whether a measure pursuant to which contracts for the provision of road-safety awareness and training courses for drivers who have lost points on their driving licence as a result of committing traffic offences must be awarded as public service concessions, with only one concession holder being allowed to provide such courses in each of the five previously delineated geographical zones of the national territory (not including Catalonia and the Basque country), is compatible with the provisions of the Services Directive.

22. As I indicated in point 2 above, the Services Directive establishes general provisions facilitating the exercise of the fundamental freedoms which are protected by Articles 49 and 56 TFEU. Those two freedoms relate to different aspects of the exercise of an economic activity. The freedom of establishment, as defined by Article 49 TFEU, applies where an operator actually intends to pursue its economic activity by means of a stable arrangement and for an indefinite period, whilst the freedom to provide services laid down in Article 56 TFEU covers all services that are not offered on such a stable and continuing basis from an established base in the Member State of destination.[9] Within that context, Chapter III of the Services Directive (Articles 9 to 15) relates to the freedom of establishment, whereas Chapter IV (Articles 16 to 21) of that directive deals with the freedom to provide services.

[8] Article 14 TFEU provides, in essence, that the European Union and the Member States shall take care that SGEIs operate on the basis of principles and conditions which enable them to fulfil their missions.

[9] See judgment of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraphs 148 to 150). See also recital 77 of the Services Directive.

23. From the outset, it is clear to me that an activity such as that at issue in the main proceedings, which is a 'service' within the meaning of Article 4(1) of the Services Directive, [10] relates to a stable arrangement and that it is intended to be carried out for an indefinite period. Thus, the compatibility of the national measure at issue with EU law should be assessed in the light of the rules on freedom of establishment (Chapter III of the Services Directive), rather than those on the free movement of services (Chapter IV of that directive), if it is established that that directive is applicable to the present case. [11]

24. In that regard, I add that, pursuant to the Court's settled case-law, a national measure in a sphere which has been the subject of full harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty. [12] In so far as Chapter III of the Services Directive is concerned, the Court has already held that Articles 9 to 14 thereof provide for exhaustive harmonisation concerning the services falling within their scope. [13] In my view, the same goes for Article 15, which also forms part of that chapter. [14] Hence, if it is established that the Services Directive applies to the present case, it would suffice, I think, for the compatibility of the national measure at issue in the main proceedings to be assessed exclusively in the light of those provisions, without it being necessary to analyse the matter also in the light of Article 49 TFEU. [15]

25. With that said, I note that the referring court harbours doubts in *two respects* as to whether the Services Directive and, in particular, Articles 9 to 13 thereof, apply to the present case. [16]

26. First, it wants the Court to clarify whether the provision of the courses at issue, although amounting to a 'service', is nevertheless excluded from the material scope of that directive, on the ground that it falls within the category of 'services in the field of transport', within the meaning of

[10] The term 'service' is defined by that provision as 'any self-employed economic activity, normally provided for remuneration, as referred to in [Article 57 TFEU]'. Article 57 TFEU further indicates that 'services' shall in particular include activities of an industrial or commercial character, as well as activities of craftsmen and of the professions. See, also, for more details on how that term ought to be interpreted in the context of the application of the Services Directive, recitals 33 and 34 of that directive.

[11] I note that, in referring mainly to provisions of Chapter III (Articles 9 to 15) of the Services Directive, the referring court itself appears to see the current case as being governed by the rules on establishment rather than by those on services (see, similarly, Opinion of Advocate General Szpunar in *Hiebler* (C-293/14, EU:C:2015:472, points 21 and 22)).

[12] See, in that regard, judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558, paragraph 59 and the case-law cited).

[13] Ibid., paragraph 61 and the case-law cited. See also judgment of 11 June 2020, *KOB* (C-206/19, EU:C:2020:463, paragraph 32).

[14] In that regard, I refer to the Opinion of Advocate General Bot in *Commission* v *Hungary* (C-179/14, EU:C:2015:619, points 69 to 73). I also wish to point out that, as Advocate General Szpunar noted in his Opinion in Joined Cases *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:122, point 41), the Court has confined itself, in at least two judgments, to giving an interpretation of Articles 10, 11 and 15 of the Services Directive and not taking a view on the provisions of the FEU Treaty (see judgments of 1 October 2015, *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:641), and of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843)).

[15] In any case, it is clear to me that, if a measure were to be considered incompatible with Article 15 of the Services Directive, such a measure would be equally incompatible with Article 49 TFEU. For example, the grounds of justification provided by Article 52 TFEU (for 'restrictions' placed, inter alia, on the freedom of establishment protected by Article 49 TFEU) are all listed as 'overriding reasons relating to the public interest' within the meaning of Article 15(3) of that directive (read in the light of Article 4(8) thereof).

[16] I note that, in the request for a preliminary ruling, the referring court also refers to the fact that the provision of the courses at issue may be a SGEI. I will deal with that concept in Section B below. Suffice it to say at this stage that, even if the provision of the courses at issue were considered to be a SGEI, it would still fall within the scope of the Services Directive (see, in that regard, recital 17, Article 1(2) and (3) and Article 15(4) of that directive).

Article 2(2)(d) of the Services Directive, with the result that the compatibility of the national measure at issue should be assessed *exclusively* in the light of Article 49 TFEU (and the Services Directive, including Chapter III thereof, is not applicable *in casu*).[17]

27. Second, the referring court wonders whether, even if it were established that the provision of the courses at issue is not a 'service in the field of transport', the fact that contracts for the provision of such courses are organized as public service concessions should result in their exclusion from certain provisions of the Services Directive, namely Articles 9 to 13 thereof. Public service concessions are not listed among the exclusions contained in Article 2(2) of the Services Directive. However, recital 57 of that directive states, in essence, that the provisions relating to authorisation schemes (namely Articles 9 to 13 thereof) do not 'concern' the conclusion of contracts for services which are already subject to the rules on public procurement contained in other secondary instruments of EU law such as Directive 2014/23.

28. In the next section, I will consider each of those two issues in turn (A). I will explain why I consider that the Services Directive, including Articles 9 to 13 thereof, applies to the present case. I will then provide the reasons that lead me to believe that a measure such as that at issue in the main proceedings is incompatible with the requirements set out in Chapter III (freedom of establishment) of that directive (B).

A. The applicability of the Services Directive

1. The exclusion relating to 'services in the field of transport'

29. Article 2(2)(d) of the Services Directive provides that 'services in the field of transport … within the meaning of [Title VI TFEU]' are excluded from the material scope of that directive. That is because, under Article 58(1) TFEU, the freedom to provide services in the field of transport is specifically governed by Title VI TFEU.[18] Therefore, the Services Directive cannot regulate the freedom to provide services in that field.[19]

30. The concept of 'services in the field of transport' is not expressly defined by that directive or Title VI TFEU.[20] However, the Court has interpreted that concept as covering 'not only any physical act of moving persons or goods from one place to another by means of a vehicle, aircraft or waterborne vessel', but also 'any service inherently linked to such an act'.[21]

31. It is apparent from that case-law, that the mere fact that a service is linked in one way or another to transport is not sufficient for it to come within the ambit of Article 2(2)(d) of the Services Directive.[22] Rather, it is necessary to consider what is the main purpose of the service at

[17] In that regard, I note that, whereas 'services in the field of transport' are explicitly excluded from the material scope of that directive, they are not excluded from the scope of Article 49 TFEU. Indeed, the Court has explicitly stated that the provisions of the FEU Treaty on freedom of establishment are 'applicable directly to transport' (see judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb* (C-338/09, EU:C:2010:814, paragraph 33)). Consequently, if the activity in question in the main proceedings were to be considered a 'service in the field of transport', the compatibility of the measure at hand would fall to be assessed in the light of Article 49 TFEU.

[18] In that sense, Article 2(2)(d) of the Services Directive actually mimics the rule enshrined in Article 58(1) TFEU (see, in that regard, judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 44).

[19] 'Services in the field of transport' instead follow a set of distinct rules which are comprised in Title VI TFEU. (see, to that effect, Opinion of Advocate General Szpunar in Joined Cases *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:505, point 28).

[20] Ibid., point 29.

[21] See judgments of 15 October 2015, *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 46), and of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 41).

[22] In that regard, I fully agree with Advocate General Wahl's Opinion in *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:351, point 28).

issue.[23] Indeed, a distinction must be made between services that are *intrinsically (or inherently) linked* to the physical act of moving persons or goods from one place to another by a means of transport (such as taxis and ambulances as well as port services[24]) given that they have as their main purpose the conveying of goods or people, and those that are ancillary to it, because they have a different primary purpose.[25]

32. That latter category covers car rental services, travel agencies and consumer services in the field of tourism, including tour guides.[26] It also includes services such as on-board services, cleaning services or the provision of food and drink on trains, which although incidental to the service of rail passenger transport, are not inherently linked to it.[27] Such services are *not* excluded from the material scope of the Services Directive.[28]

33. In his Opinion in Joined Cases *Trijber and Harmsen*,[29] Advocate General Szpunar explained that the rationale behind the inclusion of car rental services or tour guides within the material scope of that directive was that their main purpose had been for the recipients of those services, respectively, to rent vehicles and to learn something about a certain place or area, *not to be transported*. By the same token, he concluded that the essential purpose of *driving school services* was for the recipient to learn how to drive and not to be transported.[30]

34. In my view, the services at issue in the main proceedings equally fall within that category. Indeed, much like such driving school services, the main purpose of road-safety awareness and training courses is for the recipient to be trained how to drive safely and responsibly and not to be transported.

35. Given this, I agree with the Commission, the Czech Government and AUDICA that the courses at issue should *not* be considered to fall within the category of 'services in the field of transport'. Such courses should not, therefore, be excluded from the material scope of the Services Directive on the basis of Article 2(2)(d) thereof.[31]

36. My view in that regard is not altered, first, by the Netherlands Government's argument that the courses at issue should be considered to be 'services in the field of transport', within the meaning of Article 2(2)(d) of the Services Directive, given that they are intrinsically linked to the possession of a driving licence, which is a *legal prerequisite* to the moving of a vehicle. I agree with that government that, in at least one judgment, namely the judgment in *Grupo Itevelesa and*

23 See judgment of 1 October 2015, *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:641, paragraph 51).

24 See recital 21 of the Services Directive.

25 See, in that regard, Opinion 2/15 (*EU-Singapore Free Trade Agreement*) of 16 May 2017 (EU:C:2017:376, paragraph 61). See also, to that effect, Opinion of Advocate General Wahl in *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:351, point 31).

26 See recital 33 of the Services Directive.

27 See judgment of 19 December 2019, *Dobersberger* (C-16/18, EU:C:2019:1110, paragraph 26).

28 I note that, pursuant to recital 21 of the Services Directive, 'services in the field of transport' include, but are *not limited* to, 'transport services such as urban transport, taxis and ambulances as well as port services'. However, I consider that that is not reason enough to give Article 2(2)(d) of that directive too wide a scope.

29 C-340/14 and C-341/14, EU:C:2015:505, points 36 to 38.

30 Pursuant to the Commission's non-binding but nevertheless informative *Handbook on the implementation of the Services Directive*, the exclusion in Article 2(2)(d) of that directive does *not* extend to 'driving school services, removal services, car rental services, funeral services or aerial photography services', nor to 'commercial activities in ports or airports such as shops or restaurants' (see *Handbook on the implementation on the Services Directive*, Office for Official Publications of the European Communities, 2007, p. 11, available in English at the following internet address: https://op.europa.eu/en/publication-detail/-/publication/a4987fe6-d74b-4f4f-8539-b80297d29715).

31 Of course, it is for the national court to verify that finding (see judgment of 1 October 2015, *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:641, paragraph 54)).

Others,[32] the Court appears to have adopted a broader legal test than the one which I have outlined in points 30 and 31 above and to have included, within the concept of 'services in the field of transport', services that are a 'prerequisite' to the physical act of moving a vehicle. Based on that definition, it has concluded that 'services in the field of transport' include roadworthiness tests for motor vehicles, which take place as a pre-condition and are indispensable to the exercise of the main activity of transport,[33] or else the activity may be illegal.

37. That being said, I do *not* consider, even in the light of that judgment, that the fact that a service is connected, or, for that matter, 'intrinsically linked', to the possession of a driving licence should be decisive as to whether that service should be considered to be a 'service in the field of transport'. In my view, obtaining or keeping a driving licence is different from roadworthiness tests performed on a vehicle. It concerns the legal method by which an *individual* can procure a means of transport[34] and, as such, it is connected to the individual, rather than the vehicle itself, whereas the activity of vehicle roadworthiness testing centres consists in performing tests *directly* on the vehicle (as a legal prerequisite for the physical movement of that vehicle).

38. On that basis, I am of the view that the situation at hand in the main proceedings differs from that which led to the judgment in *Grupo Itevelesa and Others*[35]. The judicial solution opted for in that judgment should not therefore be applied in the present case.

39. Second, I am not persuaded by the Spanish Government's argument that the concept of 'services in the field of transport' ought to be interpreted having regard to Article 91(1) TFEU. According to that government, the courses at issue are 'services in the field of transport' because they amount to 'measures to improve transport safety' within the meaning of that provision. However, it is rather obvious to me that the aim behind Article 91(1) TFEU is to establish a list of the different aspects that form part of the 'framework of a common transport policy' (as referred to in Article 90 TFEU) and, within that context, to detail the various *measures* which the EU legislature may adopt (in order to regulate, among other things, 'services in the field of transport'). Contrary to what the Spanish Government argues, the purpose of that provision is therefore not to define what 'services in the field of transport' are.

40. In any case, I believe that the interpretation proposed by the Spanish Government, to the effect that any measure designed to improve transport safety necessarily concerns a 'service in the field of transport', is far removed from the interpretation adopted by the Court in its case-law, which, as I have explained above, focuses on whether the service at issue has as its 'main purpose' the conveying of goods or people.

41. Having made those clarifications and explained why I believe that the provision of the courses at issue does not fall within the ambit of the exclusion contained in Article 2(2)(d) of the Services Directive ('services in the field of transport'), I will now attempt to address the referring court's doubts as to whether the fact that such courses must be provided by means of a public service concession has any impact on the applicability of Articles 9 to 13 of the Services Directive.

[32] See judgment of 15 October 2015, C-168/14, EU:C:2015:685.

[33] Ibid., paragraphs 47 and 50. Consequently, the Court has considered the activity of vehicle roadworthiness testing centres to be *excluded* from the scope of the Services Directive (see paragraph 52 of that judgment).

[34] In that regard, see Opinion of Advocate General Wahl in *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:351, point 31).

[35] See judgment of 15 October 2015, C-168/14, EU:C:2015:685.

2. The consequences of the fact that the courses at issue must be provided by means of a public service concession

42. I recall that Article 9(3) of the Services Directive provides, in essence, that Articles 9 to 13 of that directive 'shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other [EU] instruments' such as Directive 2014/23. [36] Consequently, if the courses at issue in the main proceedings were to come within the scope of Directive 2014/23, they would be excluded from the scope of Articles 9 to 13 of the Services Directive. However, in my view, they would still be subject to the remaining relevant provisions of that directive [37] (that is, all the relevant provisions other than Articles 9 to 13 of the Services Directive). [38]

43. I note that, in order for Directive 2014/23 to apply, several concomitant conditions must be fulfilled.

44. First, the service at hand must be organised as a 'concession'. [39] A 'services concession' within the meaning of that directive is defined as a 'contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services … to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment'. [40] The Court has clarified that such a contract is characterised, inter alia, by a situation in which, on the one hand, the right to operate a particular service is transferred by the contracting authority to the concessionaire and, on the other hand, the latter enjoys a certain economic freedom to determine the conditions under which that right is exercised, while also being, to a large extent, exposed to the risks of operating the service. [41]

45. In the present case, all of the parties and interested parties, together with the referring court, are of the opinion that the courses at issue are to be provided pursuant to a public service concession (one for each geographical zone), with the result that the situation in the main proceedings concerns public services concessions within the meaning of Directive 2014/23. I agree. Indeed, it follows from points 13 and 14 above that the contracts at issue in the main proceedings concern the provision of a particular service and that they seek to transfer the right to provide the courses at issue (seemingly together with the risks associated with the running of that activity) from the contracting authority to each concession holder.

[36] That conclusion also derives from recital 57 of the Services Directive, which provides, in essence, that the provisions of that directive relating to authorisation schemes (Articles 9 to 13) cannot apply to concessions of public services capable, inter alia, of falling within the scope of Directive 2014/23 (see judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558, paragraph 45)). Conversely, recital 14 of Directive 2014/23 provides that 'authorisations or licences' do not qualify as 'concessions' within the meaning of that directive and remain subject to the rules of the Services Directive.

[37] Contrary to what CNAE and others argued at the hearing, I am of the view that Directive 2014/23 and the Services Directive are *not* mutually exclusive as a whole.

[38] Conversely, if the courses at issue were not covered by Directive 2014/23, Articles 9 to 13 of the Services Directive may be of application to the situation at hand in the main proceedings, provided however that the national measure at issue can be regarded as an 'authorisation scheme' within the meaning of those provisions (in that regard, see points 51 to 55 below).

[39] See Article 1(1) of Directive 2014/23.

[40] See Article 5(1)(b) of Directive 2014/23.

[41] See, to that effect, judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558, paragraph 46 and the case-law cited).

46. Second, the concession must have been tendered or awarded after 17 April 2014, or else they are excluded from the temporal scope of Directive 2014/23.[42] It is for the national courts to evaluate whether, based on the facts at its disposal, that requirement is met.[43] That question aside, I note that the Spanish Government and CNAE and others are of the opinion that Directive 2014/23 does not apply *ratione temporis* for another (distinct) reason. Indeed, they contend that the deadline for transposition of Directive 2014/23 into national law was February 2016 and that the concessions at issue in the main proceeding were tendered before the expiry of that deadline, at a time when the previously applicable national legal regime was still in force and that directive had not been incorporated into national law.

47. In that respect, I recall that the Court has already found, in a public procurement case in which a bid was excluded from the procedure for the award of a contract before the date on which the period for transposition of the relevant directive had expired and before that directive had been incorporated into the national law, that it would 'be contrary to the principle of legal certainty' to apply that directive, given that the decision which was alleged to have infringed EU law was taken prior to that date.[44]

48. I think that a similar reasoning can be applied in the present case. Therefore, I would be inclined to agree with the Spanish Government and CNAE and others (subject to verification by the national court) that Directive 2014/23 does *not* apply *ratione temporis* to a situation such as that at issue in the main proceedings, given that the period for transposition of that directive had not yet expired and it had not in fact been incorporated into national law at the time when the relevant facts took place.

49. Third, the concession contract must be equal to or above a certain value.[45] At the relevant time, that value was set at EUR 5 186 000.[46] Again, it is for the national court to determine whether, based on the information presented to it, that requirement is met. However, I note that, according to the information provided by CNAE and others, the Spanish Government and the Commission at the hearing, the value of the contract in question in the main proceedings appears to be below that threshold. The Spanish Government explained that, at the time when it was advertised, the value of the contract was EUR 1 285 000. That amount is significantly below the threshold of EUR 5 186 000.

50. In the light of that information, it appears to me that, because the contracts for the provision of the courses at issue (i) were concluded before the expiry of the deadline for transposition of Directive 2014/23 and (ii) fall below the threshold value set by that directive, they are excluded both from the temporal and material scope of that instrument. It follows, in my view, that the application of Articles 9 to 13 of the Services Directive to a situation such as the one in the main proceedings should *not* be precluded on the ground that such a situation is governed by Directive 2014/23.

[42] See Article 54, second paragraph, of Directive 2014/23.

[43] I note that all the parties and interested parties in the present case seem to agree that the call for tenders in the main proceedings was published in November 2014, after the cut-off date of 17 April 2014.

[44] See judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627, paragraph 30).

[45] See recital 23 of Directive 2014/23.

[46] See Article 8(1) of Directive 2014/23.

51. With that said, it remains for me to ascertain whether the conditions for Articles 9 to 13 of the Services Directive to apply in a situation such as that at issue in the main proceedings are fulfilled. In that respect, I note that those provisions apply to a particular type of procedure, namely those procedures that can be qualified as 'authorisation schemes'. Thus, I will consider whether the procedure in question in the main proceedings can be regarded as falling within that category.

52. In that regard, I recall that, as defined under Article 4(6) of that directive, an 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof.

53. Moreover, recital 39 of the Services Directive states that the concept of 'authorisation scheme' covers *administrative procedures for granting concessions* [47] (with the exception of those that, unlike that under consideration in the main proceedings, fall within the scope of Directive 2014/23). [48]

54. As I have already established in point 45 above, the case in the main proceedings concerns public service concessions granted by the competent public authorities in relation to the provision of road-safety awareness and training courses for drivers who have lost points on their driving licences. Those concessions constitute formal decisions which must be obtained by the service providers from the competent national authorities for them to be able to exercise their economic activities. [49] They may therefore, in my view, be characterised as 'authorisations' within the meaning of the provisions of the Services Directive.

55. Accordingly, I consider that Articles 9 to 13 of the Services Directive apply to the case at hand. [50]

3. Conclusion on the applicability of the Services Directive

56. It follows from the above considerations as a whole that Chapter III of the Services Directive, including Articles 9 to 13 thereof, applies to the situation in the main proceedings. The public service concessions at issue in the main proceedings are part of an 'authorisation scheme' within the meaning of those provisions. Furthermore, they do not concern 'services in the field of transport' within the ambit of the exclusion contained in Article 2(2)(d) of that directive.

47 See, in that sense, judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558, paragraph 39).

48 To that extent, I therefore disagree with CNAE and others' argument according to which the fact that the courses at issue are to be provided by means of a 'concession' *precludes* the applicability of the Services Directive.

49 That factor was also the decisive one in *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558, paragraph 41). See also point 6.1.1 (p. 24) of the *Handbook on the implementation of the Services Directive* (referred to in footnote 30 above).

50 For the sake of completeness, I wish to add that, should neither Directive 2014/23 nor Articles 9 to 13 of the Services Directive apply to the case at hand, then the public authorities would be bound, in my view, to comply with the fundamental rules of the FEU Treaty, in general, and the principle of non-discrimination, in particular (see judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558, paragraph 64 and the case-law cited)). In other words, the conditions surrounding the award of the public concession contract in the main proceedings would have to comply with Article 49 TFEU.

B. The compatibility assessment

57. Turning now to the assessment of compatibility of a national measure such as the one at issue in the main proceedings with the provisions of the Services Directive, I will explain why I consider that such a measure imposes a restriction on the freedom of establishment for providers that is not compatible with the requirements of Chapter III (Articles 9 to 15) of that directive.

58. Before I delve into those issues, I wish to make two preliminary remarks.

59. First, I would like to point out that, at the hearing, the parties and interested parties discussed whether the services at issue in the main proceedings have a 'cross-border element', within the meaning of the case-law on Article 49 TFEU.[51] In that regard, I wish to say only that, while it is well-established that the Treaty provisions on the fundamental freedoms are 'do not apply to situations where all the relevant facts are confined within a single Member State',[52] there has been some debate as to whether, for the Court to answer a question on the interpretation of the Services Directive, the existence of a cross-border element is also required.[53] However, the Court has now put that debate to rest and explained that the provisions of Chapter III of the Services Directive must be interpreted as meaning that they also apply to a situation where all the relevant elements are *confined to a single Member State*.[54] Thus, the existence of a cross-border element is *not* required in order to assess the compatibility of a measure such as that at issue in the main proceedings with the provisions of Chapter III of the Services Directive.

60. Accordingly, I consider that, in a situation such as that in the main proceedings, it is possible to assess the compatibility of a measure with the provisions of Chapter III of the Services Directive, even if it were established that such a measure concerns a purely internal situation, which it is for the national courts to verify.[55]

61. Second, I wish to provide some clarification as to the relationship between Articles 9 to 13 and Article 15 of the Services Directive. In that regard, I note that Article 9 of that directive prevents Member States from resorting to 'authorisation schemes' unless such schemes are non-discriminatory, justified by an overriding reason relating to the public interest and proportionate to that public interest objective. That set of criteria is reproduced in Article 10(2) of the Services Directive, and is also encapsulated in Article 10(4) of that directive, which has been interpreted by the Court[56] as meaning that authorisation schemes must generally enable providers to exercise their activity throughout the national territory unless a limitation to a certain part of that territory is non-discriminatory, justified by an overriding reason relating to the public interest and proportionate. Those three conditions are also explicitly referred to in Article 15(3) of the Services Directive.

[51] See, inter alia, judgment of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraph 23).

[52] See, inter alia, judgment of 22 December 2010, *Omalet* (C-245/09, EU:C:2010:808, paragraph 12 and the case-law cited).

[53] See, for example, in support of the view that there is no such requirement, Opinion of Advocate General Szpunar in Joined Cases *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:505, points 49 to 57).

[54] See judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 110). The same is not the case for the freedom to provide services (see paragraph 102 of that judgment).

[55] See, to that effect, judgment of 1 October 2015, *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:641, paragraph 41). In that judgment, the fact that the referring court had noted, in the order for reference, that the scheme at issue could impede access to the market for all service providers, including those from other Member States, was deemed to be sufficient to establish that the situations which were the subject of the questions referred for a preliminary ruling were not purely internal.

[56] See judgment of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraph 53).

62. Articles 9 to 13 of the Services Directive deal specifically with the conditions to be fulfilled by a national scheme for granting authorisations, whereas Article 15(3) of that directive has as its object the compatibility with that directive of national requirements, including territorial and quantitative restrictions, imposed on service providers, more generally. However, it is clear that there is a degree of overlap between those various provisions. In fact, the Court has decided, in essence, that an 'authorisation scheme' which imposes a 'territorial restriction' on service providers seeking to establish their economic activity and which is incompatible with Article 15(3) of that directive, will also be precluded by Article 10(4) of that directive, [57] and vice versa.

63. In the present case, the parties and interested parties have focused their observations and pleadings on whether a measure such as that at issue in the main proceedings is compatible with Article 15(3) of the Services Directive. In the sections that follow, I will therefore concentrate on whether or not such a measure complies with the requirements of that provision.

64. In that regard, I will start by indicating the reasons why I consider that that measure constitutes a 'requirement' within the meaning of Article 15(2) of that directive which places a restriction on the freedom of establishment (1). I will then examine whether such a restriction is (i) non-discriminatory, (ii) justified by an 'overriding reason relating to the public interest' and (iii) proportionate, in line with the three conditions imposed by Article 15(3) of the Services Directive. I will explain why there are, in my view, reasons to doubt that such a measure satisfies the 'proportionality' requirement (2). I will also say a few words about the fact that the courses in question have the characteristics of a SGEI (3).

1. The existence of a restriction (Article 15(2))

65. In order to assess the compatibility of a measure such as that at issue in the main proceedings, in the light of the criteria contained in Article 15(3) of the Services Directive, it must first be established whether such a measure falls within one of the categories of 'requirements' listed in Article 15(2) of that directive, read in the light of Article 4(7), which provides, inter alia, that 'any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law' shall be considered a 'requirement' for the purposes of the Services Directive.

66. Based on the information provided in the file, it appears to me that AUDICA's main criticism as to the measure at issue in the main proceedings does not merely concern the fact that the contracts for the provision of the services in question must be awarded as public service concessions; rather, it is mostly about the fact that *only one* concession holder is allowed to provide the services at issue *in each of the five* geographical zones previously delineated across the national territory (not including Catalonia and the Basque country).

67. In that regard, I note that Article 15(2)(a) of the Services Directive expressly classifies 'quantitative or territorial restrictions' on the pursuit of an activity as 'requirements' within the meaning of Article 4(7) of that directive that affect the freedom of establishment of service providers. [58]

[57] Ibid., paragraph 55 et seq.

[58] See judgment of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraph 51).

68. As stated in that provision, such restrictions exist, in particular, where a national measure imposes limits as to the number of operators authorised to establish themselves in a particular Member State (or a specific area within a Member State) (*quantitative restrictions*), or where it requires that a minimum geographical distance be respected between providers (*territorial restrictions*).[59] The Court has explained that a 'territorial restriction' is also present in a situation where a national legislation limits, in all respects, a licence to trade to a particular geographical area[60] or prohibits trade in certain geographical zones.[61]

69. In the present case, the referring court indicates (and all the parties and interested parties agree) that, pursuant to the measure at issue in the main proceedings, the Spanish territory (not including Catalonia and the Basque country) is divided into five zones, with only one entity (the successful contractor in the public service concession award procedure) being authorised to provide road-safety awareness and training courses for each zone.[62] That entity has exclusive control over the area for which it holds a public service concession, whilst other providers are effectively prohibited from carrying out the services in question in the same zone.

70. Even if a measure such as that at issue in the main proceedings does not prevent a service provider from participating in the public concession award procedure for the provision of road-safety awareness and training courses on the market, it still limits *how many* providers can exercise that right (one in each of the five previously delineated geographical zones) and *where*.

71. It follows that such a measure amounts, in my view, both to a quantitative and a territorial restriction within the meaning of Article 15(2)(a) of the Services Directive.[63] As such, it restricts freedom of establishment and will only be permissible if it fulfils the conditions provided for in Article 15(3) of that directive, which I will now turn to.

2. The conditions that must be satisfied in order for the restriction to be permissible (Article 15(3))

72. Article 15(3) of the Services Directive lists three conditions that must be satisfied in order for a 'restriction' to be permissible. More specifically, that provision requires that such a restriction: (i) does not discriminate on grounds of nationality (Article 15(3)(a)), (ii) is necessary (that is, is justified by an overriding reason relating to the public interest) (Article 15(3)(b)) and (iii) is proportionate (Article 15(3)(c)).

73. In the present case, the question of whether the first two conditions are met does not seem to me to present much difficulty.

74. Indeed, it is clear to me, in the first place, that a restriction such as that at issue in the main proceedings applies without discrimination on grounds of nationality (Article 15(3)(a)) (first condition).

[59] See Article 15(2)(a) and the explanations provided in the *Handbook on the implementation of the Services Directive* (point 6.3.1, at p. 33) (see the reference in footnote 30 above).

[60] See judgment of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraphs 48 and 49).

[61] See judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 131).

[62] According to CNAE and others, in the context of the main proceedings, the same entity has in fact been the successful tenderer for each of the five zones.

[63] In my view, it is possible that the measure at issue in the main proceedings could also be classified as a 'requirement … which reserve[s] access to the service activity in question to particular providers by virtue of the specific nature of the activity' concerned (see Article 15(2)(d) of the Services Directive), given that, as AUDICA argues, such a measure is effectively aimed at creating five monopolies (one in each zone).

75. Second, I consider that such a restriction is justified by an overriding reason relating to the public interest within the meaning of Article 15(3)(b) of the Services Directive, read in the light of Article 4(8) of that directive (second condition).

76. In that regard, I note that the justification provided by the Spanish authorities before the national court for allowing only one entity to provide the services at issue in each of the five delineated geographical zones is that such a restriction is necessary in order to ensure that road-safety awareness and training courses are available throughout the relevant territory. According to the Spanish authorities, by facilitating geographical access to road-safety awareness and training courses, a measure such as that at issue in the main proceedings contributes to the effective training of drivers who have committed traffic offences. Thus, overall, it reinforces road safety.

77. Pursuant to Article 4(8) of the Services Directive, read in the light of recital 40 of that directive, 'road safety' is one of the overriding reasons relating to the public interest that may justify restrictions on freedom of establishment. In my view, a measure such as that at issue in the main proceedings, whose purpose is to improve road safety, therefore satisfies the second condition provided in Article 15(3)(b) of that directive.

78. More challenging is the question of whether such a measure meets the third condition (that imposed by Article 15(3)(c) of the Services Directive – proportionality). In that regard, I recall that, in order to meet that condition, two requirements must be fulfilled. The measure must, first, be appropriate, that is, according to the wording of Article 15(3)(c) of the Services Directive, be suitable for securing the attainment of the objective pursued. Second, the measure must not go beyond what is necessary to attain the objective. If there is a choice between various measures to achieve the objective in question, the means to be chosen should be the least restrictive to the freedom of establishment guaranteed by the directive. [64]

79. As the Court has consistently held, it is ultimately for the national court, which has sole jurisdiction to assess the facts of the dispute in the main proceedings, to determine whether a measure satisfies those two requirements. [65] However, in order to provide useful answers to the referring court, the Court may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable that court to give judgment. [66]

80. As regards the first requirement, I note that the Court has on previous occasions found measures which amount to a territorial restriction to be *suitable* for securing the attainment of the objective pursued, where its purpose is to adapt to the needs of the population, cover the entire territory or take account of geographically isolated or otherwise disadvantaged regions. [67]

81. In the light of that case-law, I agree with CNAE and others and the Spanish Government that, to the extent that a measure such as that at issue in the main proceedings guarantees that there is at least one operator responsible for carrying out the activity in each of the five zones across the relevant territory, it contributes to ensuring that drivers have access to training centres across

64 See judgment of 1 October 2015, *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:641, paragraph 70 and the case-law cited).

65 Ibid., paragraph 71.

66 Ibid., paragraph 55.

67 See, to that effect, judgments of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 70), and of 26 September 2013, *Ottica New Line* (C-539/11, EU:C:2013:591, paragraphs 36 and 37), concerning territorial restrictions on the establishment of opticians' shops and pharmacies. See, also, judgment of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraph 60), concerning similar restrictions on the pursuit of the trade of chimney sweep.

the relevant territory, including in those zones which are disadvantaged or less attractive. Such a measure is therefore suitable to achieve the objective pursued (which is to improve 'road safety' by facilitating access to training centres for drivers who have lost points on their driving licence).

82. As regards the second requirement (that is, the question of whether a measure such as that at issue in the main proceedings goes *beyond what is necessary* to achieve the objective pursued), I must admit, however, that I have my doubts.

83. Indeed, in the context of the main proceedings, the entire Spanish territory, not including Catalonia and the Basque country, is to be divided into just five zones. There may be only one provider in each of those five zones. Overall, that means that a maximum of *five* providers may provide the services at issue.

84. In my view, that is quite a significant restriction on the number of providers, whereas it is not clear how a division of the relevant territory into five (large) zones *only* is the least restrictive way of achieving an adequate geographical distribution of training centres. Indeed, without additional requirements concerning, inter alia, the minimum or maximum geographical distance between two centres or the number of centres to be operated, depending on population size, it remains perfectly possible, in my view, for each concession holder to provide the services at issue only in the parts of the zone allocated to it that are most profitable, to the exclusion of less attractive parts of the zone.

85. I understand from the file and, in particular, from AUDICA's written observations that the tender documents and specifications (cahier des charges) do in fact contain such additional requirements, regarding, inter alia, the number of centres to be established in each zone based on population size. In my view, it is those requirements, rather than the division of the relevant territory into five zones and the corresponding limitation on the number of providers, which prevent operators from focusing their activity exclusively in areas considered attractive to the benefit of the inhabitants of those areas and to the detriment of the inhabitants of less attractive areas, who face poorer access to those services. [68]

86. On balance, it seems to me that, if the relevant territory were divided into a greater number of (smaller) geographical zones (more than five), not only would that ensure sufficient access to road-safety awareness and training courses across the relevant territory but, *ipso facto*, that would also allow a greater number of public service concession holders to provide the services at issue across that territory. Consequently, I believe that there are less restrictive measures capable of securing the attainment of the general interest objective pursued, within the meaning of Article 15(3)(c) of the Services Directive.

87. In the light of the above considerations, I am of the opinion that a measure such as that at issue in the main proceedings fails to meet the third condition listed in Article 15(3) of the Services Directive, to the extent that it goes beyond what is necessary in order to achieve the objective pursued.

88. In my view, such a measure should therefore be declared incompatible with that provision of the Services Directive. In the light of the considerations that I have outlined in point 62 above, I believe that such a measure is also precluded by Article 10(4) of that directive.

[68] See, by analogy, judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 73).

89. Having reached that conclusion, I should emphasise that, in my view, one does not need to go as far as to say that the services at issue should *not* be provided by means of a public service concession. Indeed, it is possible, I think, to keep in place the obligation for the relevant contracts to be awarded as public service concessions *as a basic principle*, while allowing more concession holders to engage in the activity.

90. Specifically, I am of the opinion that, contrary to what AUDICA argues, the legal framework put in place for the provision of the courses at issue does not have to be similar to that which exists for courses for *obtaining a driving licence* in the first place, which is subject to an authorisation scheme but not a public service concession.

91. In that regard, I am receptive to the arguments put forward by the Spanish Government with a view to explaining why those two activities ought to be treated differently. The Spanish Government argues (in my view, convincingly) that courses provided with a view to *obtaining a driving licence* are different in *two respects* from those which are designed to enable drivers to recover points on their driving licence: first, they are not aimed at individuals who have committed traffic offences and, second, they take place in the run-up to an exam which is administered directly by the relevant public authorities, meaning that those authorities can, in any case, exercise their control as to whether a driving licence should be granted or not. No equivalent exam exists for the recovery of driving licence points that have been lost as a result of committing traffic offences. That is why it is necessary for the public authorities to exercise greater control over the provision of the courses at issue.

92. I should add that, in any case, the way in which two *different* services may be organised within a Member State relates primarily, in my view, to an issue concerning the coherence of the national legislation. It is not conclusive as to whether a measure concerning only one of those two services is compatible with the conditions imposed by Article 15(3) of the Services Directive.

3. The specific standard applicable to SGEIs (Article 15(4))

93. By way of final remark, I would like to explain why I believe that the fact that the provision of the courses at issue may be characterised as a SGEI, within the meaning of Article 14 and Article 106(2) TFEU,[69] does not affect the conclusion which I have just reached regarding the compatibility of a measure such as that at issue in the main proceedings with Article 15(3) of the Services Directive

94. On that point, I recall, first, that, for the purposes of the Services Directive, services may be considered to be SGEIs only if they are provided in application of a 'special task in the public interest entrusted to the provider by the Member State concerned'.[70] The burden of proving the existence of such a 'special task' is on the Member States. Indeed, the Member States have a wide discretion to define the scope and the organisation of their SGEIs, taking particular account of objectives pertaining to their national policy.[71]

[69] Pursuant to that provision, SGEIs 'shall be subject to the rules contained in the Treaties … in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.

[70] See recital 70 of the Services Directive.

[71] Ibid.. In the context of the Services Directive, that discretion has been reaffirmed by the EU legislature in the second subparagraph of Article 1(3) of that directive, which states that that the directive does not affect the freedom of Member States to define, in conformity with EU law, what they consider to be SGEIs.

95. Second, I note that, if the national courts were to find that the provision of the courses at issue constitutes a SGEI, then such a service would come within the scope of Article 15(4) of the Services Directive,[72] with the result that the compatibility with EU law of the measure at issue in the main proceedings should be assessed in the light of the specific rule contained in that provision.

96. That specific rule provides, in essence, that Article 15(1) to (3) of that directive shall apply to legislation concerning SGEIs only in so far as that does not obstruct the performance, in law or in fact, of the particular tasks which are assigned to them.[73]

97. The Court has explained that it follows from the very wording of that provision that SGEIs are not automatically excluded from the scope of Article 15 of the Services Directive.[74] However, it has also held that where the fourth paragraph of that provision applies, the first three paragraphs of the same provision should be understood in the sense that they do not preclude a national measure from imposing a restriction on a SGEI, if that restriction is (i) necessary to enable the carrying out of the particular task under economically viable conditions and (ii) proportionate to the performance of those tasks.[75]

98. I understand the first of those two requirements in the sense that the conditions contained in Article 15(1) to (3) of the Services Directive should not be applied where that would prevent the task categorised as a SGEI from being performed under economically viable conditions.

99. In the present case, if it were established that the provision of the courses at issue is a SGEI, it would be for the national court to carry out that assessment. That being said, I would tend to agree with the Czech Government that the application of Article 15(1) to (3) of the Services Directive *in casu* does *not* obstruct the performance of the particular task assigned in the context of the main proceedings.

100. Indeed, as I have indicated in point 84 above, I am of the opinion that a division of the relevant territory into a greater number of (smaller) zones than the five existing geographical zones (potentially resulting in a correspondingly greater number of concession holders throughout the relevant territory) is what would in fact contribute to facilitating the provision of the services at issue in less attractive areas. This leads me to conclude that the territorial division and quantitative restriction imposed by a measure such as that at issue in the main proceedings is not necessary for the performance of the particular task at hand under economically viable conditions; quite the contrary.

101. In the light of those considerations, I am of the view that the fact that the activity at issue in the main proceedings may be characterised as a SGEI should *not* affect in any way the application of Article 15(1) to (3) of the Services Directive to the case at hand.

72 See point 7 above.

73 See also recital 72 of the Services Directive.

74 See judgment of 7 November 2018, *Commission* v *Hungary* (C-171/17, EU:C:2018:881, paragraph 62).

75 See, to that effect, judgment of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraph 73).

V. Conclusion

102. In conclusion, I propose that the Court answer the question referred for a preliminary ruling by the Tribunal Supremo (Supreme Court, Spain) as follows:

(1) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

must be interpreted as covering, in all respects, the provision of road-safety awareness and training courses for drivers who have lost points on their driving licence as a result of committing traffic offences.

(2) Article 15(1), (2)(a) and (3) of Directive 2006/123

must be interpreted as precluding national legislation pursuant to which: (i) the provision of such courses is framed as a public service concession; (ii) that provision is made subject to the requirement that only one operator may provide such courses in a particular geographical area and; (iii) the overall number of providers does not exceed the number of geographical areas delineated by the competent authority, where that legislation goes beyond what is necessary to achieve the objective of road safety. This is a matter to be determined by the national court.

(3) Article 15(4) of Directive 2006/123

must be interpreted as not precluding such national legislation where the tasks relating to the provision of courses are classified as tasks connected with a service of general economic interest, provided that the restriction imposed is necessary and proportionate to the performance of those tasks under economically viable conditions. It is for the national court to carry out that assessment.