

ANALYSES

Analysis: “CNAE and Others (C-292/21) and the awarding of public service concessions under the Services Directive” by Mariana Martins Pereira

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On January 19, the Court of Justice delivered its judgment in case *CNAE and Others* ([C-292/21](#)), assessing the compatibility of a public service concession for road-safety courses with [Directive 2006/123](#) (‘Services Directive’). The judgment gives EU law-based grounds to challenge Member States’ awarding of public service concessions.

Regarding the facts of the case, road-safety awareness and training courses for drivers who have lost points on their driving licenses were subject in Spain to a public service concession. Apart from Catalonia and the Basque Country, the country was divided into five zones, where only one economic operator was authorised to provide those courses (paras 17-18). A lawsuit filed by an association of driving schools reached the Supreme Court, which requested a preliminary ruling from the Court of Justice.

The Court of Justice firstly ascertained whether the services at stake could be qualified as ‘services in the field of transport’, which, according to Article 2(2)(d) of the Services Directive, do not fall within its scope of application. In so doing, the Court recalled that ‘services intrinsically linked to the physical act of moving persons or goods from one place to another by a means of transport’ do not fall within the scope of the Directive, whereas services whose ‘primary purpose is not to convey persons or goods’ do (para34).

In applying this well-established distinction, the Court had previously reached contrasting outcomes. In *Trijber* ([C-340/14](#)), driving license lessons were found to fall within the scope of the Directive, since their purpose was for the recipient to learn how to drive, not be transported. Under *Grupo Itevelesa and Others* ([C-168/14](#)), roadworthiness tests for vehicles fell outside the scope of the Directive. Despite acknowledging the potential

tension, both the Court and Advocate-General Emiliou considered appropriate to draw a further distinction: whereas roadworthiness tests concern the vehicle itself, driving license and road-safety courses concern the individual ([Opinion](#), paragraph 37; judgment, para 40). The latter is thus covered by the Services Directive (para 41).

Secondly, the Court considered whether the contracts at stake were covered by [Concessions Directive 2014/23](#) (paras 49-52). By establishing rules on the procedures for public procurement concessions that exceed a certain value, that Directive aims at preventing distortions in the functioning of the internal market and facilitating free provision of services. Hence, concessions covered by it are exempted from the requirements of the Services Directive (Article 9(3) thereof). Conversely, where, as in the main proceedings, the Concessions Directive is inapplicable (both *ratione temporis* and due to the tenders' value), free movement is safeguarded through the Services Directive.

As a last point on the Services Directive's applicability, the Court recalled that, unlike Treaty provisions, the former also covers 'purely internal situations' (para 53). While Articles 9 and 15 of the Services Directive essentially codify the Court's case-law on fundamental freedoms, its application to purely internal situations considerably broadens EU law's outreach.

Regarding the compatibility assessment, the measure was easily qualified as a 'quantitative or territorial restriction' under Article 15(2)(a) of the Services Directive (paras 57-58), which applied indistinctively and pursued an overriding reason of public interest related to road safety (Articles 15(3)(a) and (b)).

Doubts nonetheless arose concerning the proportionality principle (Article 15(3)(c)). While the concerned limitation seemed appropriate to ensure that road-safety courses are available in isolated and less attractive areas (para 65), less restrictive options seemed to exist, namely the division of the territory in more zones (para 66).

In this regard, for the Advocate-General it was not the awarding of a public concession *per se* that was contrary to the Directive. In his opinion, if there were more operators the measure would eventually be proportional (para 89). The Court did not necessarily agree, stating that an authorisation scheme could suffice to attain the objective (para 67). Public service concessions were thus considered a more serious restriction, which, in the

circumstances of the case, failed to respect the proportionality principle.

Finally, the application of Article 15(4) of the Directive, which applies to Services of General Economic Interest ('SGEI'), was pondered. The Court did not reach a conclusion, leaving such examination for the national court. In any event, it declared that only territorial restrictions that are necessary for the performance of the particular tasks of the SGEI's providers under economically viable conditions and are proportionate to that exercise can be imposed through Article 15(4) (para 71). As the division of the territory in more zones seemed to improve the provision of the services concerned, the measure imposed by Spain did not appear to meet those requirements (para 73).

This judgment ultimately shows how the awarding of public service concessions, irrespective of the value, is subject to a (strict) proportionality test. Although the outcome arguably depended on the specific nature of road-safety courses, the Court may apply a similar approach to other sectors.

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