Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 11 May 2023[1]

Case C‑278/22

AUTOTECHNICA FLEET SERVICES d.o.o., formerly ANTERRA d.o.o.
v
Hrvatska agencija za nadzor financijskih usluga

(Request for a preliminary ruling from the Upravni sud u Zagrebu (Administrative Court, Zagreb, Croatia))

(Request for a preliminary ruling – Freedom of establishment – Freedom to provide services – Scope of Directive 2006/123/EC – Article 2(2)(b) – Financial services – Financial and operating leasing – Articles 9 and 10 – Requirement to obtain authorisation from a supervisory agency)

I. Introduction

1. The present request for a preliminary ruling from the Upravni sud u Zagrebu (Administrative Court, Zagreb, Croatia) essentially concerns the scope of application of Directive 2006/123/EC,[2] also known as 'the Services Directive'. A company which leases out cars to its customers was ordered to terminate its activities on the ground of the absence of a valid authorisation to offer financial services.

2. The Court has previously been faced with the issue of various forms of leasing, notably in the context of value added tax (VAT) and of consumer law. However, this is the first case in which leasing falls to be considered in the context of Directive 2006/123.

3. In this Opinion I shall propose to the Court that activities such as those at issue in the main proceedings, which consist of offering what is known as 'operating leasing', are not excluded from the scope of Directive 2006/123; they do not constitute financial services within the meaning of Article 2(2)(b) of that directive. Consequently, a Member State may not provide for an authorisation scheme to be administered by an agency responsible for supervising financial markets.

[1] Original language : English.

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

II. Legal framework

A. European Union law

1. Directive 2006/123

4. Pursuant to Article 2(2)(b) of Directive 2006/123, the directive is not to apply to 'financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC [of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ 2006 L 177, p. 1)]'.

5. Section 1 of Chapter III[3] of Directive 2006/123 concerns 'authorisations' and contains Articles 9 to 13.

6. Article 9 of Directive 2006/123, entitled 'Authorisation schemes', provides in paragraph 1 thereof:

'Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.'

7. According to Article 10 ('Conditions for the granting of authorisation') of Directive 2006/123:

'1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

[3] Chapter III of Directive 2006/123 deals with freedom of establishment for service providers.

(g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.

5. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

6. Except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.

7. This Article shall not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations.'

B. Croatian law

8. Article 15(1) of the Zakon o Hrvatskoj agenciji za nadzor financijskih usluga (Law on the Croatian Agency for the Supervision of Financial Services) (*Narodne novine*, No 140/05, No 154/11 and No 12/12) provides that, for the purpose of exercising its public prerogatives, the Hrvatska agencija za nadzor financijskih usluga (Croatian Agency for the Supervision of Financial Services; 'the Agency') is authorised to issue implementing rules under that law and under laws that regulate the capital market, investment funds and other funds, the acquisition of joint stock companies, pension insurance companies, insurance, reinsurance and financial services, as well as under other laws if those laws authorise it to do so.

9. Article 15(2) of the Law on the Croatian Agency for the Supervision of Financial Services provides that, for the purpose of exercising its public prerogatives, the Agency is authorised to supervise the activities of the entities subject to its supervision, which are specified in paragraph 1 of that article, and of legal entities engaging in factoring services, in so far as the latter are not provided by banks within the framework of their registered activities. The Agency is also authorised to impose measures aimed at eliminating identified illegalities and irregularities.

10. Article 3(1) of the Zakon o leasingu (Leasing Law) (*Narodne novine*, No 141/13) provides that a leasing company is a commercial company with its registered office in the Republic of Croatia and entered in the court register on the basis of an authorisation to engage in leasing activities which is issued by the Agency under the terms and conditions set forth in the Leasing Law.

11. Article 4(1) of that law provides that leasing is a legal transaction whereby the lessor acquires a leased asset in such a manner that it purchases it from a supplier and acquires ownership of the leased asset, subsequently allowing the lessee to use the leased asset for a certain period of time, use for which the lessee undertakes to pay a fee.

12. Article 5(1) of that law provides that, depending on the subject matter and characteristics of the lease, the latter may be a finance lease or an operating lease.

13. Article 5(2) of the Leasing Law provides that a finance lease is a legal transaction whereby the lessee, during the period of use of the leased asset, pays a fee to the lessor which takes into account the total value of the leased asset, bears the cost of depreciation of the asset, and by means of a buy-out option may acquire ownership of the asset for a fixed price which, at the time of exercising that option, is less than the actual value of that asset at that time. The risks and benefits of ownership of the leased asset are largely transferred to the lessee.

14. Article 5(3) of the Leasing Law provides that an operating lease is a legal transaction whereby the lessee, during the period of use of the leased asset, pays a specified fee to the lessor, which need not take into account the total value of the leased asset. The lessor bears the cost of depreciation of the leased asset and the lessee does not have a contractual buy-out option; the risks and benefits of ownership of the leased asset largely remain with the lessor, that is to say, they are not transferred to the lessee.

15. Article 6(1) of the Leasing Law provides that leasing activities may be carried out by a leasing company referred to in Article 3 of that law, a leasing company from a Member State referred to in Article 46 of that law, and a branch of a leasing company from a third country referred to in Article 48 of that law.

III. Facts, procedure and questions referred

16. AUTOTECHNICA FLEET SERVICES ('Autotechnica') is a company registered in Croatia that carries out activities of 'leasing of motor vehicles', 'rental and leasing of cars and lorries (with or without a driver)' and 'rental and leasing of bicycles, scooters, etc.'. It is a subsidiary of a parent company established in another EU Member State where that company provides services of the same type as those at issue in the present case.

17. The Agency found, during an extraordinary audit of Autotechnica, that that company had entered into three long-term rental agreements (involving four cars) and, subsequently, at the express request of its customers, had acquired the cars by purchasing them from the supplier, thereby acquiring ownership of them, and made them available to customers to use. Based on these facts, the Agency considered that Autotechnica was, in essence, carrying out a leasing activity without a valid authorisation. Consequently, by decision of 14 February 2019 ('the contested decision'), it prohibited Autotechnica from carrying out leasing activities without a valid authorisation.

18. Autotechnica brought an action before the referring court seeking to have that decision annulled. It claims that there has been an infringement of the rights which, in its view, it derives from EU law, on the ground that the Republic of Croatia could not treat operating leasing as a financial service, with the result that the provision of such services, like the leasing of motor vehicles, should not be subject to supervision by the Agency.

19. The referring court notes that Directive 2013/36/EU[4] refers exclusively to financial leasing and does not cover operating leasing. It would then be appropriate, by reasoning *a contrario*, to apply the provisions of Directive 2006/123 to operating leasing. It is apparent from recital 33 and Article 2 of the latter directive that it covers a wide variety of services, including the leasing of cars, which can be regarded as operating leasing.

20. The referring court adds that the Croatian legislation at issue in the main proceedings is liable to prevent or deter Autotechnica and persons from other Member States wishing to establish themselves in Croatia from carrying out commercial rental or operating leasing activities, with the result that that legislation may not comply with the requirements arising from Article 49 TFEU.

21. It is against this background that, by order of 12 April 2022, received at the Court on 22 April 2022, the Upravni sud u Zagrebu (Administrative Court, Zagreb) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do operating leasing and/or long-term car rental services fall within the scope of [Directive 2006/123] (the Services Directive), as indicated in the *Handbook on implementation of the Services Directive* of 13 March 2008 issued by the Directorate-General for Internal Market and Services? Should an entity that engages in operating leasing (but not financial leasing) and/or long-term car rental be considered a financial institution within the meaning of Article 4(1)(26) of Regulation (EU) No 575/2013 [of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1)]?

(2) If the answer to the [first part of the] first question above is in the affirmative and the answer to the second [part of the first] question is in the negative, is granting the [Agency] the power to supervise the provision of operating leasing and/or long-term car rental services pursuant to Article 6(1) of the Leasing Law, and to impose additional requirements and restrictions on undertakings that engage in such activities … compatible with Article 49 [TFEU], read in conjunction with Articles 9 to 13 of [Directive 2006/123]?

(3) Must Article 49 [TFEU] and Articles 9 to 13 of [Directive 2006/123], in circumstances such as those at issue in the present dispute, in which a parent company from one Member State wishes to provide in another Member State, through a subsidiary, services of the same type as those which it provides in the original Member State, be interpreted as permitting a national law (the Leasing Law) to impose additional requirements and restrictions on the subsidiary and thereby hinder or render less attractive engaging in the activity in question?’

22. Written observations were submitted by the parties to the main proceedings, by the Croatian and Netherlands Governments and by the European Commission. All parties, with the exception of the Netherlands Government, took part in the hearing, which was held on 1 March 2023.

[4] Directive of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

IV. Assessment

A. Question 1

23. By its first question, the referring court enquires, in essence, whether operating leasing constitutes a 'financial service' within the meaning of Article 2(2)(b) of Directive 2006/123 and whether such a service has to be carried out by a 'financial institution' within the meaning of Article 4(1)(26) of Regulation No 575/2013.

1. Classification of leasing contracts under national law

24. It is apparent from the question that the referring court distinguishes between three different types of situation: car rental services, operating leasing and financial leasing. These concepts all have their origin in national civil law. They have not, as such and as yet, been subject to harmonisation by the European Union, which implies that they are not positively defined at EU level. It is therefore appropriate, by way of introductory remarks and for the purposes of the present Opinion, to clarify those concepts briefly.

25. Carrying out a comprehensive comparison between different national civil codes on rental agreements, operating leasing agreements and financial leasing agreements is not within the scope of the present case. However, it can be stated that while rental agreements have been a core subject matter of national civil law (codes) for centuries, this is not the case for leasing (whether operating or financial) agreements. The reason for this is that leasing agreements cater to needs which have only emerged in recent decades, as I shall illustrate below, particularly in the context of agreements involving a car.

26. Car rental services are the easiest category of rental services to understand from a legal and economic perspective. There is only one (legal) relationship: A, the owner of a car, rents out the car for a fee to B, who is to have temporary possession of the car. Typically, cars are rented out on a short-term basis. This can be in a professional context, such as on business trips, or in the context of leisure activities, such as while on holiday. Car rental tends to be carried out independently of the question whether the person renting the car is the owner of one 'in real life'.[5]

27. Leasing agreements follow a different logic: a person would like to have at his or her disposal a car, on a permanent basis (that is to say, day and night) and for a specified period of time. Such agreements do not cater to short-term (business or holiday) needs, but rather to medium- to long-term ones, as well as, more importantly, everyday needs. A person would like to use a car, whenever it suits them, for everyday purposes. The question of who actually owns the car becomes secondary. What counts is that a car is put at someone's disposal who can then effectively use it.

28. Under an operating leasing agreement, the lessee (the user of the car) does not assume any ownership or residual value risk. The lessor (the owner of the car) retains ownership of the car and is responsible for maintenance and repairs. When the agreement comes to an end, the lessee returns the car to the lessor. Under a financial leasing agreement, on the other hand, the lessee assumes possession and the residual value risks. Typically, the lessor purchases the car at the

[5] Although statistics point to the fact that this is probably the case in modern times. Thus, in 2020, according to Eurostat, car ownership in the European Union was at 0.53 cars per inhabitant; see https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220727-1.

behest of the lessee and leases it to him or her for a fixed period of time, usually several years. The lessee makes periodic lease payments and is responsible for maintenance and repairs. At the end of the agreement, the lessee generally has the option to purchase the car for its residual value.

29. By way of illustration, operating leasing generally functions in the following way: A desires a car, typically for everyday use. For this purpose, A goes to B, a specialist, usually a car dealer or, as in the present case, a firm specialised in placing cars at the disposal of customers for a specified period of time. B either has a car already ready among its fleet or, as is more likely, will procure a car in accordance with A's wishes, which will then be leased to A.

30. B is the owner of the car, in the legal sense of the term. A uses the car and pays a fee for its use. Various other conditions are determined by the contract between A and B, such as a maximum mileage and the fees to be paid if that mileage is exceeded. At the end of the period stipulated in the contract, the car is given back to B. Crucially, the payments made by A do not correspond to the amortisation of the value of the car. In other words, B assumes the economic risk in relation to its ability to re-use, re-rent, re-lease or re-sell the vehicle.

31. Financial leasing follows a different pattern. The initial arrangement is similar to that of operating leasing (see point 29 above). Where the two differ is in the amortisation of the vehicle via the payments between A and B. Typically, in financial leasing, at the end of the stipulated period, the vehicle is either 'paid off' and ownership is transferred from B to A, or there is the option for A to acquire the vehicle against the payment of a final sum. The second option is the more prevalent, meaning that even financial leasing is not necessarily geared towards the acquisition of the vehicle. This is logical – if the acquisition of the vehicle were central to the intentions of the parties, they would opt for a regular sale contract with deferred payment.

32. In summary, leasing – whether operating or financial – is intended to place a car at the disposal of a customer so that it can be used. That is the reason why, in national legal systems, leasing, and in particular operating leasing, is typically seen as a rental contract with certain specificities.

33. In other words, even though operating leasing contracts involve, as the case may be, elements of rent, sale and loan, they tend to be treated primarily as rental contracts,[6] since the main thrust of the agreement, in conformity with the parties' intentions, is the renting aspect. In some cases, operating leasing and financial leasing are even treated in the same manner under national civil law.[7]

34. Finally, to conclude this part, it may be assumed, based on the information before the Court, that operating leasing as carried out by Autotechnica is offered in a way such as that described in points 28 to 30 above.

[6] This is, by way of example, the case in Spain; see judgment of 19 January 2000 of the Tribunal Supremo (Supreme Court, Spain) (STS 203/2000 – ECLI:ES:TS:2000:203). It is also the case in Germany; see Pierson, T., 'Grundlagen und Probleme des Finanzierungsleasings', in *Juristische Schulung*, 2021, pp. 8 to 12, at p. 9. In Germany, even financial leasing is treated primarily under the civil law codes pertaining to renting.

[7] This is, for instance, the case in Poland, where leasing results in the acquisition of the good in question.

2. Article 2(2) of Directive 2006/123

35. This brings us to the core of the first question: can operating leasing under conditions such as those at issue in the main proceedings be regarded as a ‘financial service’ within the meaning of Article 2(2)(b) of Directive 2006/123?

36. The answer is a resounding ‘no’.

37. The subject matter of Directive 2006/123 is defined in Article 1 thereof as the establishment of ‘general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services’. Directive 2006/123 has a broad scope, as it applies, in principle, to all services supplied by providers established in a Member State.[8] The exceptions, that is to say, the fields to which Directive 2006/123 does not apply, are enumerated in Article 2(2) of that directive.

38. Following the general logic of rule and exception underpinning the entire internal market, those exceptions are to be interpreted in a narrow manner. Moreover, even though it may appear at first as if the activities listed in points (a) to (l) of Article 2(2) of Directive 2006/123 do not follow any inherent logic and constitute a random ‘hotchpotch’, dictated by policy choices of the EU legislature at the time,[9] I would nevertheless submit that they do follow a legal logic. Activities are excluded for one of three reasons: because the EU legislature decided to follow the logic enshrined in primary law;[10] because, at least in some Member States, they tend to be carried out by public bodies due to their sensitivity;[11] or because they have been harmonised at EU level, thereby making the application of Directive 2006/123 redundant. Examples of the last category are electronic communications services and networks[12] and, I would submit, financial services[13]. This is corroborated by recital 18 of Directive 2006/123, which states that financial services should be excluded from the scope of that directive ‘since these activities are the subject of specific [EU] legislation aimed, as is this Directive, at achieving a genuine internal market for services’.[14]

39. Article 2(2)(b) of Directive 2006/123 mentions, in an illustrative manner,[15] among the financial services to which that directive does not apply, banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and

8 See Article 2(1) of Directive 2006/123.

9 It is no secret that the legislative process leading to the adoption of Directive 2006/123 was arduous.

10 See, for instance, services in the field of transport, including port services, (point (d) of Article 2(2) of Directive 2006/123) or activities connected with the exercise of official authority (point (i) thereof).

11 See, by way of example, gambling activities (point (h) of Article 2(2) of Directive 2006/123) or social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State (point (j) thereof).

12 See point (c) of Article 2(2) of Directive 2006/123.

13 See point (b) of Article 2(2) of Directive 2006/123.

14 The rest of the recital mirrors Article 2(2)(b) of that directive. Consequently, this exclusion should cover all financial services such as banking, credit, insurance, including re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2013/36.

15 There are other acts of EU secondary law in the domain of consumer protection which define what a ‘financial service’ is for the purposes of each act. See Article 2(b) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16) and Article 2(12) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64). According to both provisions, a ‘financial service’ is ‘any service of a banking, credit, insurance, personal pension, investment or payment nature’. However, these definitions are not conducive to solving the legal problem we are faced with in the present case, since they do not go beyond the enumeration set out in Article 2(2)(b) of Directive 2006/123.

investment advice, including the services listed in Annex I to Directive 2013/36.[16] That annex lists 15 activities which are subject to mutual recognition under that directive. One of these activities is financial leasing;[17] operating leasing is not mentioned therein.

40. This last finding already permits the conclusion that operating leasing is not regarded as a financial service by the EU legislature and that, consequently, it falls within the remit of Directive 2006/123. This is also corroborated by the Commission's non-binding but nevertheless illustrative *Handbook on implementation of the Services Directive* in which it is stated that 'services which do not constitute a financial service, such as operating leasing services consisting in the hiring-out of goods, are not covered by this exclusion'.[18]

41. Other arguments also militate against qualifying operating leasing as a financial service.

42. Any commercial transaction entails a financial element in the broad sense, namely the price or the fee paid for a good or service. Thus, by way of example, in order to acquire a bottle of water at the supermarket, one must pay the relevant price, and in order to take a train, one must pay for a ticket – yet most commercial transactions do not constitute financial services. The decisive question is where does the centre of gravity lie? That is, is the purpose of the agreement to acquire or rent a good or service outright, or is it to *finance* the acquisition of a good or service?

43. As regards operating leasing, the answer is clear: the purpose of an agreement is to rent a car for a specified period of time. Financial elements are secondary and cannot, in themselves, lead to operating leasing being classified as a financial service.

44. As a final, but important, remark, I should like to stress that it is, in this connection, immaterial whether, as is argued by the Agency, the lessor acquires the car at the behest of the lessee. This is typical for any type of leasing and has no bearing on whether or not a transaction constitutes a financial service.

45. In conclusion, operating leasing does not constitute a financial service. It therefore follows that it does not have to be a 'financial institution', within the meaning of Article 4(1)(26) of Regulation No 575/2013, which offers such services.[19]

3. Proposed reply to question 1

46. In conclusion, I propose that the answer to the first question should be that operating leasing does not constitute a 'financial service' within the meaning of Article 2(2)(b) of Directive 2006/123; it therefore falls within the scope of that directive.

[16] The text of Directive 2006/123 refers here to Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ 2006 L 177, p. 1), the precursor of Directive 2013/36. As per Article 163 of Directive 2013/36, references to Directive 2006/48 are to be construed as references to Directive 2013/36.

[17] See Annex I to Directive 2013/36, point 3. It should be noted here that the French language version is the odd one out in the sense that mention is made only of 'crédit-bail' without further specification. This, however, does not change the present legal analysis given that the other language versions are clear in that it is specified that this provision deals with 'financial leasing'.

[18] See *Handbook on implementation of the Services Directive*, Office for Official Publications of the European Communities, 2007, point 2.1.2; available at http://bookshop.europa.eu/en/handbook-on-implementation-of-the-services-directive-pbKM7807096/.

[19] Accordingly, the European Banking Authority has also found that an entity which carries out operating leasing exclusively cannot be considered a 'financial institution'; see the reply provided to question ID 2014_1644, available at: https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2014_1644.

B. Questions 2 and 3

47. By its second question, the referring court seeks, in essence, to ascertain whether Articles 9 to 13 of Directive 2006/123 or Article 49 TFEU are to be interpreted as precluding the requirement of a prior authorisation in order to carry out the activity of operating leasing. The third question focuses on a situation where a company from one Member State wishes to provide the services of operating leasing in another Member State through a subsidiary.

48. I shall deal with the questions jointly, given that the legal analysis is the same. Indeed, pursuant to settled case-law of the Court, the provisions of Chapter III of Directive 2006/123, on freedom of establishment of service providers,[20] must be interpreted as meaning that they apply not only to a cross-border situation but also to a situation where all the relevant elements are confined to a single Member State.[21]

49. By its second question, the referring court seeks, in essence, to ascertain whether Articles 9 to 13 of Directive 2006/123 and Article 49 TFEU preclude national provisions such as those of the Leasing Law applicable in the main proceedings, which treat providers of operating leasing and long-term vehicle leasing services as providers of financial services and therefore as financial institutions, and in particular the requirement of prior authorisation by the Agency.

1. Authorisation schemes under Articles 9 and 10 of Directive 2006/123

50. As a preliminary remark, it should be emphasised that, in view of my conclusion that Autotechnica does not supply financial services, the entire logic of entrusting the Agency with the power to grant authorisations to firms providing operating leasing services and to request firms to terminate their activity appears dubious. It is difficult to see why an agency entrusted with supervising financial markets should be involved in activities as benign as the operating leasing of vehicles.

51. As the Commission rightly stresses in its observations, the provisions of the Croatian Leasing Law, in particular Article 3 thereof, institute an authorisation scheme within the meaning of Article 4, point 6, of Directive 2006/123.[22]

52. Consequently, Articles 9 to 13 of Directive 2006/123[23] are applicable. These provisions deal with authorisation schemes, their conditions and related procedural aspects. Article 9 of that directive governs the situations in which, in principle, Member States may resort to authorisation

[20] That is to say, Articles 9 to 15 of Directive 2006/123.

[21] See judgments of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 110), and of 4 July 2019, *Commission* v *Germany* (C-377/17, EU:C:2019:562, paragraph 58).

[22] Pursuant to this provision, 'authorisation scheme' means any procedure under which a provider or recipient of a service 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.

[23] These articles constitute Section 1 ('Authorisations') of Chapter III ('Freedom of establishment for providers') of Directive 2006/123.

schemes governing access to a service activity and the exercise thereof (the question of 'if'), whereas Article 10 of that directive sets out the conditions for the granting of authorisation (the question of 'how'). [24]

53. Pursuant to Article 9(1) of Directive 2006/123, Member States must not make access to a service activity or the exercise thereof subject to an authorisation scheme unless three conditions are satisfied: (a) the authorisation scheme does not discriminate against the provider in question; (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest; and (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

54. It will be for the referring court to assess these questions. Based on the information before the Court and the submissions of the various parties, I am in a position to propose the following guidance.

55. First, in the absence of information on how Autotechnica's competitors [25] are treated by the Agency with regard to the question of authorisation, there appears to be no discrimination against Autotechnica in Croatia. [26] However, it will be for the referring court to verify that hypothesis.

56. Secondly, it appears as though there is, in principle, a ground for justifying an authorisation scheme in the form of consumer protection, as invoked by the Agency and the Croatian Government. Suffice it to state at this point that consumer protection is one of the overriding reasons relating to the public interest which is expressly recognised by Directive 2006/123. [27] Nevertheless, it is not clear to me in what way operating leasing differs from other contracts a consumer might enter into, such as to justify protection, based on Article 9 et seq. of Directive 2006/123, in addition to the general consumer protection already afforded by, for instance, Directive 2011/83. In the case of a financial service, a consumer is clearly vulnerable in the sense that he or she risks incurring excessive debt if there are no sufficient safeguards in place. By contrast, since operating leasing does not constitute a financial service and since there is no risk that the consumer may incur excessive debt, it is difficult to see why a consumer must be protected, based on the provisions of Directive 2006/123.

57. Similarly, it is not possible to invoke the stability or reputation [28] of the financial sector or the need for prudential rules, [29] given that the services in question do not constitute financial services. Operating leasing, even if used excessively, does not constitute a threat to the stability or reputation of the financial sector, for the simple reason that when a consumer is no longer able to pay the monthly fee, the car is returned to the lessor, the lease payments are terminated and almost no financial harm occurs. It will certainly not result in a crash of the financial sector.

[24] Although these provisions are directed at Member States, they impose on them unconditional and sufficiently precise obligations to adapt their legal systems so as to make them compatible with the conditions laid down in these provisions. They are directly applicable and can be invoked by individuals against national authorities. See judgment of 4 July 2019, *Kirschstein* (C-393/17, EU:C:2019:563, paragraph 67 et seq.), in which the Court explores Article 9 of Directive 2006/123. See, moreover, judgment of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 130), with respect to the same question under Article 15 of Directive 2006/123. See also my Opinion in *Hiebler* (C-293/14, EU:C:2015:472, point 53).

[25] From Croatia or from other Member States.

[26] It is worth stressing that the fact that the company of which Autotechnica is a subsidiary does not appear to encounter similar obstacles in other Member States is irrelevant here, given that we are examining the treatment of Autotechnica in Croatia by the Croatian authorities and on the basis of Croatian law.

[27] See Article 4, point 8, of Directive 2006/123.

[28] See judgment of 14 February 2019, *Milivojević* (C-630/17, EU:C:2019:123, paragraph 71).

[29] See judgment of 21 December 2011, *Commission* v *Poland* (C-271/09, EU:C:2011:855, paragraph 57).

58. Thirdly, I do not see how the condition set out in Article 9(1)(c) of Directive 2006/123 is satisfied, that is to say, that the objective of consumer protection cannot be attained by means of a less restrictive measure, such as an a posteriori inspection. It has not been proven why an *ex ante* control is necessary. In the absence of further relevant elements, it appears to me that the condition set out in Article 9(1)(c) of Directive 2006/123 is not satisfied here.

59. Regarding the conditions for the granting of authorisation under Article 10 of Directive 2006/123, the following remarks should be made.

60. First, it will be for the referring court to determine whether the authorisation scheme in question is based on criteria which preclude the Agency from exercising its power of assessment in an arbitrary manner, as is required under Article 10(2) of Directive 2006/123.

61. Secondly, the criteria establishing the authorisation scheme must be proportionate to the public interest objective of consumer protection. Here, the test is comparable to that under Article 9(1)(c) of Directive 2006/123. [30] It is not possible to establish why less restrictive measures are not called for.

62. Thirdly, I should like to draw attention to Article 10(3) of Directive 2006/123, according to which the conditions for granting an authorisation are not to duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the service provider is already subject in another Member State. That said, given that Autotechnica does not appear to be subject to authorisation schemes in other Member States, it may well be that the national court may not have to apply this provision to the case at issue.

2. Proposed reply to questions 2 and 3

63. In conclusion, I propose that the Court should answer the second and third question to the effect that Article 9(3) and Article 10(2)(c) of Directive 2006/123 preclude the application of a prior authorisation scheme for carrying out the activity of operating leasing.

3. Article 49 TFEU

64. In view of the reply proposed, an analysis with respect to Article 49 TFEU is not necessary. [31] In any event, it would not lead to a different result than under Directive 2006/123.

[30] Indeed, as logical as the structure of Articles 9 and 10 of Directive 2006/123 may appear, it is often difficult in practice to delineate the two provisions. As the present case demonstrates, the justification of an authorisation scheme as such, in particular the justification that preventive control is necessary and that *ex post* control would not have been sufficient, can only be achieved by referring to the purpose of the authorisation scheme. See also, in that sense, Cornils, M., in Schlachter, M. and Ohler, C. (eds.), *Europäische Dienstleistungsrichtlinie, Handkommentar*, Nomos, Baden-Baden, 2008, Article 9, point 4.

[31] See judgments of 30 January 2018, *X and Visser* (C-360/15 and C-31/16, EU:C:2018:44, paragraph 137), and of 4 July 2019, *Commission* v *Germany* (C-377/17, EU:C:2019:562, paragraph 97). See also Opinion of Advocate General Emiliou in *Administración General del Estado and Others* (C-292/21, EU:C:2022:694, point 24).

V. Conclusion

65. In the light of the foregoing, I propose that the Court should answer the questions referred by the Upravni sud u Zagrebu (Administrative Court, Zagreb, Croatia) as follows:

(1) Article 2(2)(b) of 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 meaning that operating leasing does not constitute a financial service, and it falls within the scope of that directive.

(2) Article 9(3) and Article 10(2)(c) of Directive 2006/123

must be interpreted as precluding the application of a prior authorisation scheme for carrying out the activity of operating leasing.